

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

ROBERT GLEN COE,  
Petitioner-Appellant.

v.

RICKY BELL, Warden,  
Respondent-Appellee.

Case No. 00-5419

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING  
AND SUGGESTION FOR REHEARING EN BANC  
AND IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

INTRODUCTION

Coe contends that rehearing and rehearing en banc should be granted. Because the panel opinion does not contain any error of fact or law, and the case does not present the need to secure uniformity of the Court's decisions or involve a question of exceptional importance, the petition should be denied. More specifically, the petition should be denied for the following reasons:

ARGUMENT

I. THE PANEL CORRECTLY REJECTED COE'S CLAIM THAT *FORD*  
REQUIRED A DETERMINATION OF COMPETENCY AT THE TIME OF HIS  
EXECUTION.

Coe has mischaracterized the holding of *Ford*. Nowhere does *Ford* require a determination of what his mental status will be at or near the moment of execution.

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Rather, the holding of *Ford* is that the Eighth Amendment simply prohibits the State from imposing the death penalty upon a prisoner who is insane. *Ford v. Wainwright*, 477 U.S. 514, 529-410 (1986).

In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-645 (1998), the Supreme Court required only that, in addressing a *Ford* claim, a state must make the competency determination when the execution is "imminent." There is no requirement in either *Ford* or *Stewart* that the determination be predictive of the prisoner's mental status at the time of execution or that it be made at the last moment before execution.

Indeed, as the panel correctly stated, Coe's position, when carried to its logical conclusion, would require a practical impossibility. "By definition, [a *Ford* claim] can never be conclusively and finally determined." Panel op. at 14, quoting *Ford*, 477 U.S. at 429 (O'Connor, J. concurring in part and dissenting in part).

All that *Ford* and *Stewart* require is a determination at a time when execution is imminent. The Tennessee state courts satisfied that requirement. When the trial court made its finding of competency on February 2, 2000, Coe's execution was only 50 days away. The Tennessee Supreme Court affirmed the finding on March 6, only 17 days before the scheduled execution. Clearly, the state court determination was made when execution was imminent.

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Tennessee recognizes that a prisoner's mental status can change between the time of the initial determination and execution. Tennessee provides an adequate remedy:

If a prisoner is found to be competent, subsequent *Ford* claims will be disallowed unless the prisoner, by way of motion for stay, provides this Court with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed.

*Van Tran v. State*, 6 S.W.3d 257, 272 (Tenn. 1999).

The procedures followed by Tennessee satisfy the requirements of *Ford* and due process. The panel correctly rejected Coe's contention that Tennessee's regime for determination of a prisoner's competency is constitutionally flawed.

#### IX. TENNESSEE LAW WILL ALLOW COE TO BRING A SUBSEQUENT *FORD* CLAIM.

Coe contends that the panel has been misled into believing that Tennessee affords an adequate procedure for assessing a change in mental status. Citing an April 3, 2006, order of the Tennessee Supreme Court denying his motion for an order requiring a mental evaluation, Coe maintains that the Tennessee Supreme Court will not in fact allow presentation of such a claim and has, in effect, "slammed the [ ] door in Robert Coe's face." On the contrary, the door remains open should Coe satisfy the

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prescribed requirements for a new hearing.

In the order to which Coe refers, the Court states that "under *Van Tran*, subsequent *Ford* claims are disallowed unless they are based upon a substantial change in the prisoner's mental health since the previous determination of competency was made." The court noted, however, that "[c]ounsel for Coe have not supported the motion with any factual allegation under oath that would indicate that there has been a substantial change in Coe's mental health since the previous determination of competency was made." This procedure was, of course, expressly specified in *Van Tran*, 6 S.W.3d at 272.

There is no reason to believe that, if the procedure required by *Van Tran* is followed and if Coe makes the requisite showing of a substantial change in his mental health, he could not obtain relief from the Tennessee Supreme Court. Therefore, Coe's assertion that the panel's decision rested upon a faulty premise is plainly wrong.

#### III. THE PANEL PROPERLY REVIEWED COE'S *FORD* CLAIM REGARDING HIS COMPETENCY FOR EXECUTION UNDER THE AEDPA.

Contrary to Coe's assertion, the Tennessee courts did resolve the issue of his competency for execution on the merits (see *Coe v. State*, slip op. at 47-48), and the panel correctly applied 28 U.S.C. § 2254(d) in reviewing the state court findings. Coe's argument in this regard is premised entirely upon his mischaracterization of the holding of *Ford* (see argument 1. *supra*). *Ford* simply cannot be read to require the Tennessee

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courts to protect a prisoner's future mental status. Rather, as set forth above, and as the panel correctly determined, *Ford* and *Stewart* require that the competency determination be made when the prisoner's execution is imminent, and Tennessee has fully complied with that requirement in Coe's case.

The instant habeas action was filed in district court on March 16, 2000, nearly four years after President Clinton signed the AEDPA into law. Consequently, the standard of review set forth in 28 U.S.C. § 2254(d) clearly applies to this action. See *Altepeter v. Ohio*, 128 F.3d 922, 926 (6th Cir. 1999).

Equally without merit is Coe's contention that the panel failed to apply the correct legal standard in resolving the issue of whether he is competent to be executed. He continues to maintain that *Ford* requires application of the common law standard for competency. This is simply incorrect.

As the panel noted, a majority of the Justices did not reach the issue of what constitutes insanity in the context of competency for execution or what state procedures would adequately address a prisoner's *Ford* claim. Consequently, the panel correctly looked to the concurring opinion of Justice Powell, who concurred in the judgment on the narrowest grounds, to determine the Court's holding on these issues. See *Marko v. United States*, 430 U.S. 188, 193 (1977). Accordingly, a prisoner is insane for competency for execution purposes only if the prisoner is unaware of the punishment he is about to suffer and why he is to suffer it. *Ford*, 477 U.S. at 422 (Powell, J.,

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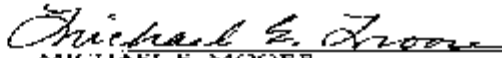
concurring). This is exactly the standard followed by the Tennessee courts in adjudicating Coe's *Ford* claims. See *Van Tran, n.S.W.3d* at 286; *see also* *Low v. State*, slip op. at 41; *Perry v. Lynaugh*, 493 U.S. 302, 323 (1989) (applying same standard).

Likewise, Coe's claim that the Tennessee courts' adjudication of his competency was both "contrary to" and involved an "unreasonable application" of *Ford* is without merit. Once again, Coe's contention rests on a faulty premise—that *Ford* required the state courts to predict what Coe's mental status will be at the moment of his execution. But, as pointed out in Argument 1, *supra*, *Ford* contains no such requirement. The Tennessee courts have adjudicated Coe's *Ford* claims when his execution is imminent, and Tennessee's procedure for addressing a change in mental status enables the prisoner to bring subsequent *Ford* claims upon a proper showing. Accordingly, there has been no unreasonable application of *Ford*, and the decision of the Tennessee courts was not "contrary to" *Ford*. As the panel correctly held, Tennessee's procedures established in *Van Tran* "are generally adequate to protect a prisoner's right to a fair hearing of his *Ford* competency claim as required by due process" and were properly applied to Coe's claim. Panel op. at 9.

CONCLUSION

For the reasons stated, the petition for rehearing and suggestion for rehearing en banc should be denied. For the same reasons, the motion for stay of execution should be denied.

Respectfully submitted,



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