IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.
APR 0 3 2000
BY _____ CLERK

ROBERT GLEN COE)
)
Petitioner)
) No. 3:00-0219
v.) Judge Trauger
)
RICKY BELL, Warden)
)
Respondent)

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE/
CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. §2253(c), Fed.R.App. P. 22, Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063 (6th Cir.1997), and In Re Certificates of Appealability, 106 F.3d 1306 (6th Cir. 1997), Petitioner Robert Glen Coe, and respectfully moves this Court for a certificate of probable cause and/or appealability to allow him to appeal this Court's dismissal of his petition for writ of habeas corpus.

I.
STANDARDS GOVERNING ISSUANCE OF THE CERTIFICATE

The Supreme Court has held that "certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394 (1983), quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir.1971). As the Sixth Circuit has held, the standard for granting a certificate of appealability (COA) under the AEDPA is identical to the pre-AEDPA standards for a certificate of probable cause to appeal, with the exception that a COA requires that the standard be met for each issue on which an appeal is sought. Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1073 (6th Cir.1997), overruled on other grounds Lindh v. Murphy, 521 U.S. ____, 117 S.Ct. 2059 (1997)("The AEDPA . . . makes no change to the general showing required to obtain a certificate, and essentially makes only a change in nomenclature from a 'certificate of probable cause' to a 'certificate of appealability'"). See also 28 U.S.C. § 2253.

In Barefoot, the Supreme Court explained the standard for granting a certificate:

> In requiring a 'question of some substance,' or a 'substantial showing of the denial of [a] federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, *he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further.'*

Barefoot, 463 U.S. at 893 n.4, 103 S.Ct. at 3394 n.4 (emphasis supplied). A certificate is to be granted so long as the petitioner's claim "is not legally frivolous." Id., 463 U.S. at 894, 103 S.Ct. at 3395.

Only when a court is "confident that petitioner's claim is *squarely foreclosed* by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case," may a court dismiss the claim "as frivolous" and deny the certificate. Id.(emphasis supplied). Finally, "We resolve any doubt about entitlement to a COA in favor of granting it." Boehmer v. Johnson, 151 F.3d 991 (5th Cir. 1998).

II.
THIS COURT SHOULD GRANT THE CERTIFICATE

The issues presented by Robert Glen Coe are indeed debatable among jurists of reason, and therefore this Court should issue the requested certificate in order that he may appeal this Court's ruling to the Sixth Circuit. In support of his application, he respectfully incorporates into this application all previously filed pleadings, motions, and memoranda, and requests that this Court grant the certificate as to all issues presented by Robert Coe. He incorporates his petition., motion for evidentiary hearing, memorandum in support of the petition, reply to the Respondent's answer.

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and reply to the Respondent's response to the motion for evidentiary hearing. He also respectfully notes the following as well, in support of his request for the certificate:

A.
APPLICATION OF THE AEDPA

As an initial matter, this Court has denied Robert Coe relief on his *Ford* claim, asserting that his claims are not governed by the pre-AEDPA law, and are governed by the "unreasonable application" provision of new §2254(d). Memorandum, pp. 4–5 & n.6. Petitioner has argued that his claims are not governed by the AEDPA, because application of the AEDPA would impose impermissible retroactive effects. Specifically, he has asserted that, under In Re Hanserd, 123 F.3d 922 (6th Cir. 1997), the provisions of the AEDPA cannot apply if they impose impermissible retroactive effects. Petitioner's Mar. 27, 2000 Reply, pp. 1-9. This Court has stated that the retroactivity analysis of Hanserd only applies to the "second or successive" provisions but not to the substantive provisions. Memorandum, p. 4 n. 6. This court's conclusion is subject to debate.

Indeed, Hanserd makes clear that any impermissible retroactive effect of the AEDPA, if not specifically authorized by Congress, cannot apply to bar relief. It does not seem plausible to conclude that Hanserd allows the application of pre-AEDPA to allow consideration of a claim, only to have the claim denied under the new law. The whole point of retroactivity analysis is that Robert Coe has been unfairly trapped by a change in the law. If he knew that the AEDPA would cut off his right to relief on a *Ford* claim, he certainly would have raised the claim in his first petition, which clearly would have been governed by the pre-AEDPA law. Lindh v. Murphy, 521 U.S. 320 (1997). It is for this reason that the AEDPA does not apply, because the retroactive effect which has occurred is the new effect of Robert Coe's filing of claims in his first petition – not only the cutting off of his

right to file the claim, but the prospect of being denied relief under the new standards of the AEDPA.

This Court's decision holding that Hanserd and the *Lundgren* retroactivity analysis do not apply to the merits of the claim conflict with the rationale of Hanserd, is inconsistent with Lindh and is subject to dispute. Also, Robert Coe has contended that AEDPA does not apply, because the petition is more properly considered a petition under 28 U.S.C. §2241. Accordingly, this Court should grant the certificate on this issue.

B.
ENTITLEMENT TO RELIEF UNDER *FORD*

This Court has applied the AEDPA to deny relief to Robert Coe on his claims of incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). Memorandum, pp. 20. In reaching this conclusion, however, this Court has conflated the state courts' determination of "present competency" in January with a conclusion that the state courts determined the question of Robert "Coe's competency to be executed. . . ." Memorandum, p. 20. The state courts never determined the *Ford* question.

Robert Coe has repeatedly emphasized that the state courts' determination of "present competency" at some point in the past is not — and was not — a determination on the merits of his *Ford* claim. That is a totally different issue, and therefore §2254(d) does not apply:

> Of special significance is the fact that the state courts never fully adjudicated Robert Coe's claims of incompetency to be executed, having instead decided a different issue — his competency at a past point in time, and even then, it is not quite clear what point in time that is (or was). [footnote omitted] As such, even if the AEDPA were to apply, new §2254(d) does not apply, because there has been no adjudication of the *Ford* claim on the merits, and the prerequisite to application of §2254(d) is a "claim that was adjudicated on the merits." Id.

Petitioner's Reply To Respondent's Answer, pp. 7-8. Indeed, as Robert Coe emphasized in his

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Motion For Evidentiary Hearing:

> Despite the fact that Robert Coe raised the issue of his incompetency and presented evidence that he was not competent to be executed, the state trial court never addressed this crucial issue when denying Robert Coe relief. On appeal, Robert Coe again made clear that he was entitled to relief because: "Given all the proof at the hearing, under Ford [and] Van Tran, Robert Coe is not competent to be executed on March 23, 2000." Brief Of Appellant, p. 49. He further emphasized in his reply brief that the evidence overwhelmingly established that he was not competent to be executed on March 23, 2000. His point could not have been clearer:
>
> > The issue before the trial court was whether Robert Coe will be competent to be executed on March 23, 2000. The evidence presented overwhelmingly preponderated towards a finding of incompetency to be executed.
>
> Appellant's Reply Brief, p. 1.
>
> As did the trial court below, the Tennessee Supreme Court overlooked his constitutional assertions about his competency on March 23, 2000, failing to resolve them by instead asserting that before them was merely an issue of "present competency." Ken Coe v. State, slip op. at p. 47 n.15.
>
> But that wholly misses the mark. Robert Coe's *Ford* claim is a claim that he is "not competent to be executed." He was not being executed in December 1999, nor in January 2000, nor in February 2000, when the trial court ruled. The trial court and the Tennessee Supreme Court thus looked only at "present competency" (which is now past competency) and not the issue presented by Robert Coe, and which must be answered by *Ford*, viz. whether Robert Coe is "competent to be executed."
>
> In fact, nowhere does *Ford* use the term "present competency." It talks about "competence to be executed." Ford, 477 U.S. at 418, 106 S.Ct. at 2606. Yet neither the trial court nor the Tennessee Supreme Court answered that question – they answered a totally different question, and never made any findings or determination of the issue of "competency to be executed." In fact, the Tennessee Supreme Court specifically eschewed the issue - despite Robert Coe's specific request that they find him incompetent under *Ford* because of his mental state on March 23, 2000, as testified to by his expert witnesses.
>
> Robert Coe's claim of incompetency to be executed was thus never fully addressed by the state courts. Though there was hearing on the issue, and though Robert Coe presented evidence in support of his *Ford* claim, and though Robert Coe argued that he was not competent to be executed because of the extent of his mental illness, the Tennessee courts never decided the claim. Instead of resolving Robert Coe's *Ford* claim, they chose to resolve a claim of "present incompetency."

Motion For Evidentiary Hearing, pp. 19-20.

Because the Tennessee courts never resolved the *Ford* issue, and because this court thus

erroneously concluded that Robert Coe should be denied relief merely because the state courts made a determination of past competency, this Court should grant the certificate on this issue. Also, because this Court and the Tennessee courts failed to apply the proper common law standard, and because this Court failed to grant an evidentiary hearing on the claim, or otherwise properly apply new §2254(d) or (e), even were they applicable, the certificate should issue.

C.
THE TRIAL COURT'S FORCED DISCLOSURE OF PRIVILEGED MATERIALS VIOLATED DUE PROCESS

This Court has denied relief on this claim, but has never addressed the fact that this claim is meritorious under Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) and Aka v. Oklahoma, 470 U.S. 68 (1985). Likewise, the bait-and-switch performed by the state trial judge constitutes a classic violation of due process, which requires that a defendant be given notice of the consequences of his actions. See e.g., Bouie v. City of Columbia, 378 U.S. 347 (1964); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

D.
THE TRIAL COURT FAILED TO CONSIDER ALL RELEVANT EVIDENCE ON THE ISSUE OF COMPETENCE

As Robert Coe has emphasized, he was entitled to the full consideration of all relevant evidence as demanded by *Ford*, but the trial court failed to consider relevant expert and lay evidence. See Motion For Evidentiary Hearing, pp. 1-90, & Exhibits 1-9. This Court's conclusion that Robert Coe was not denied that right is at odds with *Ford* itself, and therefore the claim is debatable among reasonable jurists and this Court should grant the certificate on this issue. Ford, 477 U.S. at 414, 106 S.Ct. at 2604; Lockett v. Ohio, 438 U.S. 586 (1978)

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E.

ROBERT COE IS ENTITLED TO DISCOVERY AND AN EVIDENTIARY HEARING

For all the reasons stated in Robert Coe's 90 page motion for evidentiary hearing, and his motion for discovery and memorandum in support, Robert Coe is entitled to discover, and a full and fair federal evidentiary hearing. Because this Court has denied such discovery and a hearing despite Robert Coe's entitlement to such process in this court, this Court should grant the certificate on this issue to allow an appeal.

F.

OTHER ISSUES FOR WHICH A CERTIFICATE SHOULD ISSUE

This Court should likewise grant the certificate as to the remaining issues contained in the case, which include, but are not limited to, the following:

The Trial Court Applied An Improper Standard Of Proof (Petition, ¶66): This court has denied relief on this claim, but has failed to acknowledge that the proper standard of proof is derived from Godinez v. Moran, 509 U.S. 389 (1993), which indicates that the standard applied by the state courts was unconstitutionally low, under the Eighth and Fourteenth Amendments. In light of Godinez, therefore, this court should grant the certificate.

The Trial Judge Was Biased In Violation Of Due Process (Petition ¶70): This court's ruling not only misapprehends the fact that Robert Coe tried to raise the claim in state courts, but it also conflicts directly with the principles articulated in In Re Murchison, 349 U.S. 133 (1955); Turney v. Ohio, 273 U.S. 510 (1927), and Offutt v. United States, 348 U.S. 11 (1955). This court's assertion that death threats do not result in an unfair proceeding also flies in the face of Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 1464 (1975), which acknowledges that bias must be assessed in light of "a realistic appraisal of psychological tendencies and human weakness." A judge whose life is

threatened if he rules in favor of a petitioner is not unbiased — regardless of how that judge might act in a courtroom. The bias results from being placed in the untenable position of risking one's own life in order to uphold the rights of another. In such a situation, the bias against Robert Coe is evident. The Court should grant a certificate on this issue as well, especially where Robert Coe was denied discovery and a hearing on his claims of bias.

The Judge Improperly Considered Materials Ex Parte Which Were Not Confronted (Petition, ¶64): This court has countenanced the trial court's consideration of evidence which was never confronted and which was considered in violation of fundamental notions of fairness. Essentially, this Court's decision is at odds with numerous Supreme Court cases. See e.g., Lilly v. Virginia, 527 U.S. 116 (1999); Ohio v. Roberts, 448 U.S. 56 (1980); Chambers v. Mississippi, 410 U.S. 284 (1973); Gardner v. Florida, 430 U.S. 349 (1977); Ford, 477 U.S. at 413–414 (petitioner entitled to confront evidence considered by adjudicator of *Ford* claim). As a result, this Court's denial of relief warrants further consideration, and this Court should grant the certificate on these issues as well.

Robert Coe was denied due process through the lack of an adversarial proceeding (Petition, ¶62). The state court's conducting of a non-adversarial process is inconsistent with due process as explained in Ford, which requires "adversary presentation of relevant information." Ford, 477 U.S. at 417, 106 S.Ct. at 2605. See Nix v. Whiteside, 467 U.S. 431, 454 (1984). The certificate should issue on this claim as well.

The State Courts Applied An Incorrect Burden Of Proof (Petition, ¶65): Especially where Robert Coe's mental state fluctuates, it is impermissible to require him to bear the burden of proving his incompetence. Rather, with Robert Coe having established a *prima facie* showing of his incompetence, the burden properly shifts to the state to prove that he is actually competent. See e.g.,

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Addington v. Texas, 441 U.S. 418 (1979); Mathews v. Eldridge, 424 U.S. 319 (1976). Accordingly, because this court's ruling on this issue fails to take into account the requirements of due process, this court's conclusion is debatable among jurists, and the certificate should issue.

The Trial Judge Relied Upon Inherently Unreliable Tests (Petition, ¶71): As the United States Supreme Court has recognized in Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993), the factfinding process is skewed when the factfinder's decision is polluted by purportedly "scientific" information which has no basis in science. With the state's experts having relied upon such imprecise evidence, the certificate should issue.

Prosecutorial Misconduct (Petition, ¶72): Robert Coe respectfully notes that due process precludes actions which are fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The unfairness of any such process must be gauged by the interests involved, and the risk of an erroneous decision in light of those interests. See e.g., Mathews v. Eldridge, supra. Here, the prosecution's misconduct in making unsupported, unconfronted allegations before the court resulted in a violation of due process, given that the petitioner's interest here – his life – ought not be subjected to such arbitrary factfinding process and in the type of misconduct undertaken by the prosecution here. The certificate should issue.

The Attorney General's Office Should Have Been Disqualified (Petition, ¶73): As Robert Coe made clear in his motion in the state courts asking that the Attorney General's Office be recused both from the trial court proceedings and the appeal, the Attorney General is appointed by the Tennessee Supreme Court. Tennessee is the only state in the Nation which allows such a process. Due process precludes an adjudicator from having any bias in favor of one party or another. The fact that the Supreme Court has chosen the Attorney General demonstrates unconstitutional bias. It is hard to

see how a court can be completely unbiased when it hears from essentially (though not actually) one of its employees -- someone whom they have hired. This troublesome situation is even more problematic here where the Tennessee Supreme Court failed to recuse the entire Attorney General's Office (given a conflict with Attorney General Paul Summers), when Tennessee Supreme Court Rule 10, DR 5-105(D) ethically requires the disqualification of an entire office when one attorney is disqualified. It is arbitrary and a violation of due process for the Tennessee Supreme Court not to follow its own rules, as has occurred here. The certificate should issue on these matters as well.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid to Glenn R. Pruden, Assistant Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243, on this __ day of April, 2000.

_____

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