

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

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
MAR 27 2000

ROBERT GLEN COE

Petitioner

v.

RICKY BELL, Warden

Respondent

No. 00-0030
Judge Trauger

BY: _____
DEPUTY CLERK

**PETITIONER'S REPLY TO RESPONDENT'S RESPONSE
TO MOTION FOR EVIDENTIARY HEARING**

Petitioner Robert Glen Coe has filed a motion for evidentiary hearing, requesting that this Court grant him a full and fair hearing on his claims of incompetency to be executed, because the state court proceedings in this matter were not full and they were unfair. Consequently, this Court must conduct a hearing of its own, and after such a hearing, resolve the issues presented by the petition for writ of habeas corpus, free from the any constraints imposed by the unfair state court process.

I.

**A FEDERAL DISTRICT COURT HAS A DUTY TO ENSURE THE FULL AND FAIR
ADJUDICATION OF FEDERAL CONSTITUTIONAL RIGHTS**

Respondent has come to this federal court asking this Court to deny a hearing and to rely upon the fact finding process conducted by the state courts. In requesting that the federal court rely upon the state court proceedings, Respondent asks this court to countenance an unfair process that no federal court would ever allow in the adversarial adjudication of constitutional rights, let alone in a case involving a man's life. The way the state court conducted the hearing was non-judicial than adversarial: decisionmaking by a judge who was not impartial, *ex parte* judicial

consideration of materials never introduced as evidence, compelled disclosure of privileged defense materials (resulting in the violation of the right to counsel in the proceedings), exclusion of relevant evidence, and reconsideration of evidence which was unreliable and otherwise tainted. The state courts' failure to conduct a full and fair adjudicative process renders any conclusions drawn from that process suspect and unworthy of respect in the federal courts.

II.

**ROBERT COE IS ENTITLED TO A FULL AND FAIR
FEDERAL EVIDENTIARY HEARING**

As Robert Coe has explained previously, unless the state courts have conducted a full and fair hearing on his *Ford* claims, he must be accorded such a full and fair hearing in federal court under *Yarwood v. Nain*, 372 U.S. 293 (1963). See Motion For Evidentiary Hearing, pp. 4-16. And indeed, this conclusion necessarily attaches, for if a state court has not fully and fairly adjudicated a claim by considering all relevant evidence through a fair process, it cannot be said that there has been a just adjudication of the federal issue by the state court.

Robert Coe has outlined in detail the numerous ways in which the state courts failed to fully and fairly adjudicate his federal *Ford* claims: the trial judge was not impartial (Motion For Evidentiary Hearing, p. 86);¹ the trial court never answered the operative competency question or determined the extent of Robert Coe's mental illness, despite its vital importance to any determination of incompetency (id., pp. 16-23);² the court precluded the consideration of extensive

¹ Robert Coe has contemporaneously filed a motion for discovery requesting discovery to prove his allegations of judicial bias. Such bias renders the state court consideration of the claims wholly invalid.

² Contrary to Respondent's assertions, these issues were fully raised by Robert Coe in the Tennessee courts. The evidence in support of these assertions was presented during the state court

relevant evidence which Robert Coe sought to introduce to prove his claims (*Id.* at 49-75); the court applied a wrong standard of proof (*Id.* at 21-32); it ordered the disclosure of confidential and privileged defense materials in a way that rendered counsel unable to properly prepare and present petitioner's proof in the state proceedings (*Id.* at 32-37) and considered materials never introduced as evidence (*Id.* at 43-49); and the court otherwise relied upon evidence which was unreliable or tainted (*Id.* at 75-86). All of these circumstances in state court cumulatively denied Robert Coe a full and fair adjudication of his *Ford* claims.

In particular, the need for a federal evidentiary hearing is evident in light of unresolved questions about the trial court's partiality, questions which the state courts refused to resolve. An unbiased adjudicator is the cornerstone of due process (*Brady v. Grimley*, 520 U.S. ____ 117 S.Ct. 1793 (1997)), and there remain serious unanswered questions about the trial court's bias in this matter. As Robert Coe has outlined in his habeas petition ("70), motion for discovery, and motion for evidentiary hearing, there remain serious questions about the fundamental fairness of the state court proceedings given questions about the trial judge's bias against Robert Coe. During the hearing, the trial court gagged Robert Coe even though no one – even the prosecution – requested such action. After the hearing, the judge then talked to the media on several occasions concerning this pending case, which is highly questionable as a matter of ethics. *See* Tenn. S. Ct. R. 10, Code of Judicial Conduct, Canon 3(B)(9). In a television interview, the judge publicly stated his personal

.....
hearing (including from Dr. Kenner and Dr. Merikangas), and raised on appeal. Robert Coe made clear that "Given all the proof at the hearing, under Ford [and] Van Tran, Robert Coe is not competent to be executed on March 23, 2000. Opening Brief of Appellant, p. 49. Similarly, he made clear that the conclusion of incompetency reached by Dr. Kenner and Dr. Merikangas was essentially un rebutted and therefore mandated relief, because of Robert Coe's dissociation and psychotic thinking. *See* Reply Brief, pp. 1-7.

3

view that Robert Coe should be put to death and that, in his view, Robert Coe should have no more appeals. *See* Memphis Channel 3 News, Mar. 6, 2000.¹

What all this seems to indicate is that the trial judge was indeed biased, and was biased precisely because his life was threatened if he were to rule in Robert Coe's favor – just as Robert Coe himself was threatened during the state court process. The judge's incentive was to give in to the threats and rule against Robert Coe. And, indeed, the trial judge has unequivocally indicated that he was threatened with injury or death. *See* "Judge in Coe Hearing; Says He Was Threatened," Jackson Sun, Feb. 9, 2000, p. 1, attached as an Exhibit to February 20, 2000 Motion To Remand Case To Trial Court To Develop Record Pertaining To Threats Made Against Trial Court Judge. "There can be little fairness in the adjudication of a petitioner's constitutional rights when the cost to the adjudicator of vindicating the Constitution may be life or limb. It is particularly troubling that the trial judge failed to disclose the threats and his opinions to petitioner before or during the hearing, and instead discussed them in two extraordinary post-hearing interviews with the media.

In federal court, the remedy to which Robert Coe is entitled is a hearing in which the state courts' procedural improprieties are not replicated. Unlike the process which occurred in state court, Robert Coe is entitled to a decisionmaker acting with impartiality, and a decision about the extent of his mental illness and a determination of his actual competency to be executed, not just his alleged competency at some point in the past. Robert Coe is also entitled to a court that will consider all of

¹ A transcript of that newscast indicates the following: Q: "Do you think that Robert Glen Coe should be put to death?" A: "Someone who - who - is - is convicted, as he was, and who is capable of understanding, as I believe he is - uh - Yes, he should be." When asked whether Robert Coe should be entitled to any further appeals, the judge stated that: "He has gotten to a point, in my view, where it needs to end." Such statements hardly seem consistent with an impartial adjudicator.

his relevant evidence, and which will in not consider any materials unless they are actually introduced as evidence. He is further entitled to an adjudication of his claims through a process which does not encourage the fabrication of testimony and a process in which highly unreliable evidence is not considered.

As to this court's duty to conduct a hearing and consider all relevant evidence, including evidence not considered by the state courts themselves, Robert Coe notes that this court is required to consider all of the additional evidence which he now seeks to introduce (Motion, pp. 49-75), because Robert Coe did not "fail to develop" such evidence in the state courts. As the federal courts have unanimously recognized, a petitioner is entitled to consideration of evidence not previously considered by the state courts, if it was not the petitioner's fault for failing to present that evidence in the state courts. See e.g., Weyers v. Thompson, 197 F.3d 359, 362-263 & n. 3 (9th Cir. 1999); Raja v. DuCharme, 187 F.3d 1075, 1078-1079 (9th Cir. 1999); Miller v. Champion, 161 F.2d 1249 (10th Cir. 1998)(remanding for evidentiary hearing); Lynn v. Morton, 112 F.3d 131, 136 (7th Cir. 1997).

Here, Robert Coe is entitled to federal consideration of the facts which the state courts failed to consider, because "the record amply demonstrates that [Robert Coe] did not 'fail to develop' the factual basis of his claim" in state court. Weyers v. Thompson, 197 F.3d at 363 n.3. Rather, the record demonstrates that despite Robert Coe's good faith, the state courts failed to consider evidence which must now be considered by this court at a hearing:

(1) Dr. Roy Dool, M.D., did not testify at the state hearing, but this occurred only because state courts denied necessary Dr. Dool's continuance because he was an out-of-state witness, and Robert Coe was denied a requested continuance to secure his testimony (Motion, pp. 53-54);

5

(2) Testimony from a malingerer expert, but this resulted from the trial court's failure to provide funding to Robert Coe, and failure to allow a necessary continuance to permit his testimony (Motion, pp. 51-53);

(3) Drs. Kenner and Merikangas could not present rebuttal testimony, but only because their schedules precluded them from testifying on rebuttal without a necessary continuance, which the trial court denied (Motion, pp. 56-60);

(4) Dr. Lundberg-Love (trauma and pharmacology expert) did not testify, but only because the trial court denied funding for her (Motion, pp. 61-67);

(5) Dr. Kessler (a psychologist) also did not testify, but he too was not funded by the court (Motion, p. 61);

(6) Additional lay testimony was also not presented (including evidence of Robert's childhood seizures) but only because of time constraints and the state court investigator's inability to locate all relevant witnesses within the artificially truncated time frame set by the state courts (Motion, pp. 69-73).

In sum, the evidence not considered by the state courts was not before the state courts in a manner not fairly attributable to Robert Coe – he had neither the money nor the time to present all of this relevant evidence under the circumstances. Consequently, he has not "failed to develop" this evidence in the state courts, and this Court is constrained to hold an evidentiary hearing to consider that evidence in resolving his constitutional claims. Wallace v. Stewart, 184 F.3d 1112, 1115 n. 4 (9th Cir. 1999)(evidentiary hearing required where petitioner sought expert funding in state court but was denied such funding and experts therefore did not testify); Correll v. Stewart, 157 F.3d 1404 (9th Cir. 1998)(federal evidentiary hearing required where state courts denied petitioner funding for

6

experts and investigator).

III.

BECAUSE ROBERT COE IS ENTITLED TO A FULL AND FAIR FEDERAL HEARING,
ANY ALLEGED PRESUMPTION OF CORRECTNESS DOES NOT APPLY,
NOR DOES NEW 2254(d) APPLY TO HIS UNFAIRLY ADJUDICATED *FOWD* CLAIMS

And with Robert Coe being entitled to an evidentiary hearing at which all of the relevant evidence is to be considered, Respondent's argument about any alleged presumption of correctness due to state findings also evaporates. As Robert Coe has previously noted, any such "presumption does not apply . . . if the habeas petitioner did not receive a full, fair, and adequate hearing in the state court proceeding on the matter sought to be raised in the habeas petition." *Military Affairs*, 161 F.3d 1249, 1254 (10th Cir. 1998); See Motion for Evidentiary Hearing, p. 7. The federal habeas statutes "do[] not require that [federal habeas] courts 'blindly apply the presumption of correctness' if 'the trial court never conducted an adequate hearing.'" *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 3d 1078, 1095 (N.D. Ill. 1999) or "some reason to doubt the adequacy or the accuracy of the fact-finding proceeding" exists." *Barnett v. Hargett*, 174 F.3d 1128, 1136 (10th Cir. 1999) (citations omitted). See *Medina v. Barnes*, 71 F.3d 363, 369 (10th Cir. 1995). See also *Lieberman & Herzig*, *Federal Habeas Corpus Practice & Procedure* (3d ed. 1998), p. 1316 (presumption of correctness applies only to those cases where there has been "a fairly adjudicated state court factfinding").

This makes eminent sense. If the state court has not heard all the evidence and has conducted an unfair process, there is no reason to believe that the state courts have properly determined the facts. Certainly Congress did not intend that a state court could conduct unfair proceedings and then, despite the unfairness of the proceedings, require the petitioner to prove that the results of such

7

unfair proceedings are incorrect. Rather, once the state court process is skewed, the federal courts must conduct a hearing to reliably determine the facts, free from the errors made by the state courts themselves.⁴ Robert Coe is entitled to such process in this Court.

In addition, it is highly significant that the state courts never made any determination about actual "competency to be executed" or the exact nature of Robert Coe's mental illness. They never determined whether, as Dr. Kemper testified, Robert Coe suffers from dissociate identity disorder. The state courts also never made a determination whether he has delusional or psychotic thinking. As a result, the state court record is devoid of the necessary factual predicates for determining the ultimate question of Robert Coe's competency to be executed. There is no presumption attaching to such matters, for such matters were never actually resolved by the state courts.

And for the same reasons that any alleged presumption of correctness does not apply when the state courts have not conducted a full and fair adjudication of the petitioner's federal constitutional claims, even assuming the AEDPA were to apply, a state court judgment cannot be insulated from attack under new 28 U.S.C. §2254(d) if the state court process was not full and fair. Rather, the prerequisite to application of new §2254(d) is an "adjudication" of a claim on the merits. This clearly requires a "full and fair adjudication" of the claim as well. Compare *Moore v. Johnson*, 101 F.3d 1069, 1073 (5th Cir. 1996) vacated on other grounds 117 S.Ct. 2054 (1997)(§2254(d) applicable but only because "there is no question that [the claims] received a full and fair

⁴ Indeed, it would be an odd result for a state court to deny a petitioner the right to present evidence, only to have the federal courts be required to grant an evidentiary hearing, after which the federal court would still be bound by the facts found by the state court upon a less than full record. Certainly, Congress intended that any presumption of correctness only applies if the state court proceedings were themselves full and fair, and a federal hearing is not required.

adjudication on the merits by the state trial court.") Certainly, Congress did not intend that a state court could fail to consider all of the relevant evidence, and act with unfair procedures, to then reach a conclusion which would then carry any weight in a federal court considering a federal constitutional claim.

Rather, new §2254(d)(2) prevents federal relief only where the state court determination of facts was "reasonable" in both a procedural and substantive sense. This standard is "substantially the same" as the pre AEDPA inquiry about whether the state courts conducted a full and fair hearing on the petitioner's federal constitutional claims. Liebman & Hertz, p. 753. The federal court must ask whether the state court "engaged in a procedurally 'reasonable determination' of the facts" during state court proceedings. *Id.* If there was no such fair process, §2254(d)(2) would apply and relief would be required.

That is the situation here, where the state courts conducted a procedurally unfair process for determining the critical question on which Robert Coe's life depends, and where the court never ultimately decided his "competency to be executed" or assessed the existence of schizophrenia or dissociative identity disorder which underlies his claims.

[A] state court's failure to address relevant evidence or factual issues, or its abbreviated analysis of a substantive issue, are factors to consider in determining the reasonableness of its factual determinations.

Evans v. Rogers, 77 F.Supp.2d 1014, 1020 (S.D.Iowa 1999).

A similar interpretation of §2254(d)(2) is that a determination made without a full and fair review of the claim and consideration of all relevant evidence under fair procedures simply does not constitute a qualifying "adjudication" which is required before §2254(d) even applies to a claim. This, too makes sense. If a state court has conducted an unfair hearing, it certainly was not Congress'

9

intent that following such an unfair hearing, the federal courts would then have to conduct a full and fair hearing under *Fay*, only to then make that federal hearing nugatory, because the federal court would still be bound to accord state fact findings a presumption of correctness while giving the legal conclusions made through that unfair process some meaningful consideration. Under this interpretation of §2254(d), Robert Coe is also entitled to a hearing, and the federal courts are in no way bound by any conclusions from the unfair state court process.

Rather, what has been clear for nearly the last forty years is that a federal habeas petitioner is entitled to a full and fair hearing on his constitutional claims. If he does not receive that type of consideration in the state courts, he is required to receive that consideration by the federal courts. And until the federal court conducts a procedurally fair process, the prior results of the state court process conducted without fair process are entitled to no deference, either on the facts or on the law. Otherwise, the federal courts would merely find themselves conducting fair hearings to properly determine the facts, only to be bound by the results of the unfair state court proceedings. There is little logic to any such regime, and especially so, when a man's life is at stake.

Consequently, because Robert Coe was denied a full and fair hearing in the state courts (for all the reasons stated in his motion for evidentiary hearing) this Court is constrained to hold a federal evidentiary hearing, after which the court should rule in Robert Coe's favor on the merits of his claims of incompetency to be executed under *Fay*.

IV.

THIS COURT MUST CONDUCT AN EVIDENTIARY HEARING

What is clear from the state court record is that Robert Coe was subjected to procedures which no federal court would ever countenance. What is also clear is that the state courts have never

determined the exact nature of Robert Clark's lifelong mental illness, nor have they determined the impact of that mental illness on his competency to be executed – in fact, the state courts never even addressed his substantive claims that he actually suffers from dissociative identity disorder and psychotic thinking, which renders him incompetent for execution. Instead, the state courts made a determination of past competency, relying on the biased conclusions of experts hired by the state (Dr. Martell and Dr. Marchewka) whose conclusions are highly suspect and whose bias as prosecution experts is evident. With a man's life at stake, the Constitution and the laws of the United States demand more than the unfair process conducted by the state courts in this matter. An evidentiary hearing is required in the federal courts.

CONCLUSION

The motion for an evidentiary hearing should be granted.

Respectfully Submitted,

James H. Walker
601 Woodland Street
Nashville, Tennessee 37206
(615) 258-0202

Henry A. Martin
Paul Botter
Kellie Henry
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 746-5017

By: James H. Walker