FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.
MAR 2 7 2000
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE	)	
	)	
Petitioner	)	No. 3-00-0229
	)	Judge Trauger
v.	)	
	)	
RICKY BELL, Warden	)	
	)	
Respondent	)	

PETITIONER'S REPLY TO RESPONDENT'S ANSWER
TO PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Robert Glen Coe respectfully files this reply to the Respondent's answer to the petition for writ of habeas corpus.

I.
INAPPLICABILITY OF ANTITERRORISM ACT

Respondent incorrectly asserts that the Antiterrorism Act applies to this case. As the Sixth Circuit panel held in its March 21, 2000 order, Robert Coe's petition does not constitute an abuse of the writ and therefore must be heard on the merits. In reaching this conclusion, the panel has cited *In Re Hanserd*, 123 F.3d 922 (6th Cir. 1997) to conclude that Robert Coe is entitled to review of his petition on the merits:

> We hold that the district court has jurisdiction to consider the habeas petition challenging the state court's determination that Coe's execution would not violate *Ford*. Under the unique circumstances of this case, where any prior attempt to raise the *Ford* issue would almost certainly have been dismissed as premature, it would not be an abuse of the writ to permit the district court to consider it. *See In Re Hanserd*, *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998); *see also Nguyen v. Gibson*, 162 F.3d 600, 601 (1998)(Briscoe, J., dissenting)

Coe v. Bell, 6th Cir. Nos. 00-5323/5327/5328/5329 (Mar. 21, 2000)(Order), pp. 5-6

In Hanserd, the Sixth Circuit held that an impermissible retroactive effect occurs upon the application of the AEDPA if the petitioner would win under the pre-AEDPA law, but would lose under the AEDPA. See Hanserd, 123 F.3d at 930-933. The Sixth Circuit has indicated in its March 20 Order that the provisions of the AEDPA governing second or successive petitions would have impermissible retroactive effects. Even the dissenting judge in the Court of Appeals recognized that the AEDPA cannot apply under *Hanserd* ("application of the AEDPA would result in the denial of relief when relief would be available pre-AEDPA. See *Coe v. Bell* (Mar. 27, 2000 Order), p. 1 (applying pre-AEDPA analysis to determine whether retroactive effect would occur").

Just as the Hanserd retroactivity analysis applies to the "second or successive" petition provisions of the AEDPA, that same retroactivity analysis applies to the merits of the claims. Now that the claims are before this Court on the merits, the operative question is whether relief would be available under the pre AEDPA law, even if not available under the AEDPA. For analytical purposes, therefore, this Court must therefore apply the pre-AEDPA substantive habeas law applicable to Robert Coe's claims. If he wins under the pre-AEDPA law, he must be granted relief because denial of relief would therefore impose retroactive effects. If he loses under the pre-AEDPA law, then there is no retroactive effect. Hanserd, 123 F.3d at 931-932. Therefore, this Court must apply the pre-AEDPA law to his petition, for purposes of conducting the retroactivity analysis. The AEDPA therefore does not apply.[1]

Consequently, this Court must consider this petition without any application of the provisions

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[1] Indeed, under *Lonchyar* retroactivity analysis, the operative event here is the filing of his petition in 1992, which would have included a *Ford* claim if he had been aware that he would be precluded from filing such a claim following the passage of the AEDPA years later. Had Robert Coe presented his *Ford* claim in the petition, it clearly would be governed by the pre AEDPA law. See Lindh v. Murphy, 521 U.S. 320 (1997).

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of the AEDPA urged by the Respondent.[3]

II.
INAPPLICABILITY OF PRESUMPTION OF CORRECTNESS

Respondent also mistakes the application of any "presumption of correctness" applicable to state court findings of fact. First of all, as Robert Coe has previously noted, a finding of mental competency is not a finding of fact -- it is a mixed question of law and fact. Levasseur v. Pulvis, 986 F.2d 1506, 1514 (6th Cir. 1993); Washington v. Johnson, 90 F.3d 945, 951 n.4 (5th Cir. 1996). Cited v. Singletary, 981 F.2d 481, 484 & nn. 3, 6 (11th Cir. 1993), Dixon v. Jacobs, 427 F.2d 589, 595 n. 17 (D.C.Cir. 1970). See Memorandum In Support Of Habeas Petition, p. 14. The federal courts are required to review *de novo* such mixed questions. Miller v. Fenton, 474 U.S. 104 (1985).

Even so, as Robert Coe has noted elsewhere, under both pre-AEDPA law and the AEDPA, there is no presumption of correctness accorded to findings made by a state court if there is "reason to doubt the adequacy or accuracy of the fact-finding proceeding." Nadine v. Barnes, 71 F.3d 464, 469 (10th Cir. 1995). As the Tenth Circuit has even stated in an AEDPA case:

> Although federal courts entertaining habeas petitions must give a presumption of correctness to state courts' factual findings . . . this 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.

Miller v. Champion, 161 F.3d 1249, 1254 (10th Cir. 1998). See also United States ex rel. Blankenship v. Circuit Court of Cook County, 59 F.Supp.2d 736, 741 (N.D.Ill. 1999)(presumption applies only "if in state court the petitioner has a 'full and fair hearing . . . resulting in reliable

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[3] While none of the substantive provisions of the AEDPA are therefore applicable to the petition, Robert Coe will at times in his pleadings also address the provisions of the AEDPA, because even under those standards, he is still entitled to relief. If he is entitled to his requested relief under either the AEDPA or pre AEDPA law, he must be accorded relief.

findings.'"). See Legal Memorandum In Support Of Petition, p. 20 & n.9.

As Robert Coe has explicated in his motion for evidentiary hearing, evidentiary hearing reply, and petition, he has been denied a full and fair hearing in the state courts, because of an adjudication by a judge who was not impartial, and through procedures which precluded the full presentation of evidence on the issue of competency, and procedures which undermined the reliability of the fact finding process. Therefore, he is entitled to a full and fair federal evidentiary hearing and any alleged presumption of correctness does not apply.

As a result, under pre AEDPA law, Robert Coe satisfies the numerous exceptions to the presumption of correctness attaching under former 28 U.S.C. §2254(d), which eliminates any presumption of correctness where: (1) the merits of the factual dispute were not resolved in the State court hearing; (2) the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) the material facts were not adequately developed at the State court hearing; (4) the state court lacked jurisdiction of the subject matter or person of the applicant, (5) the applicant was denied the right to counsel; (6) the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; (7) the applicant was otherwise denied due process of law in the state court hearing; or (8) the finding is not fairly supported by the record.

Indeed, the merits of his "incompetency to be executed" claim were never fully addressed, because the state courts decided the issue of present competency two months ago, and never addressed his showing from Drs. Kenner and Menikangas that he suffers from dissociative identity disorder and chronic paranoid schizophrenia, respectively, which renders him incompetent at the point of facing the ultimate threat to his life. See §2254 (d)(1). This inadequacy in the state court process also renders the presumption of correctness inapplicable under the AEDPA as well

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Similarly, the state court's bias, conducting an inquisitorial proceeding, forced disclosure of privileged materials and failure to allow funding and a continuance for necessary testimony rendered the state court proceedings not full and fair. See § 2254(d)(2) (d)(3), (d)(6), (d)(6). Likewise, given these inadequacies and unfairness in the state court proceedings, there cannot be any presumption of correctness under the AEDPA either. Mata v. Champion, 161 F.3d 1249, 1254 (10th Cir. 1998).

In addition, with all of the evidence contained in the state court record, as well as the additional evidence proffered by Robert Coe in his motion for evidentiary hearing (quite apart from the fact that the state courts never resolved the operative questions about his "competency to be executed" nor the scope of his mental illness) Robert Coe has established by clear evidence that he suffers from dissociative identity disorder and is therefore incompetent to be executed.

Dr. Kenner testified to a reasonable degree of medical certainty that Robert Coe is incompetent to be executed given his dissociation and inability to grasp reality at execution. Vol. IX, pp. 344-345; See also Vol. VIII pp. 297-307 (discussing his extensive evaluation, Robert Coe's functioning mental state, and dissociation). Dr. Merikangas also testified that Robert Coe was brain-damaged, delusional, and dissociative, which renders him incompetent. See Vol. VI, pp. 88-123, 163 (Robert Coe blatantly incompetent at point of execution). The state's counter proof is wholly unpersuasive. Dr. Matthews took the extraordinary position that dissociative identity disorder does not exist and that Robert Coe has no signs of psychiatric illness. He reached these conclusions relying upon the conclusions of Dr. Martell, whose conclusions of malingering are simply untenable to be relied upon tests which have no validity under the circumstances. The conclusions of both Dr. Matthews and Dr. Martell defy credibility, and even Dr. Matthews admitted that, upon facing execution, Robert Coe faced the prospect of decompensating into incompetency.

Further, even Dr. James Walker concluded that Robert Coe was not malingering, which thus undermines the prosecution's entire theory. Similarly, Dr. Pruett acknowledged that Robert Coe may suffer from dissociative identity disorder. So, too, Dr. Paula Lundberg Love has reached the same conclusion.

Thus, the evidence of Robert's incompetency to be executed is as follows. Dr. Kenner and Dr. Merikangas have testified to a reasonable degree of certainty that he is not competent to be executed. Dr. Pruett and Dr. Lundberg Love confirm that he may suffer dissociative identity disorder, which would render him incompetent. Dr. Walker confirms that Robert Coe is not malingering. Even Dr. Matthews admits that Robert may decompensate, but his conclusions about Robert's supposed lack of serious mental illness deny the existence of DID and rely upon the questionable testing done by Dr. Martell, while denying in effect the lifelong history of mental illness suffered by Robert Coe. 5 mental health professionals confirm that Robert is not competent. 1 questionable expert hired by the state admits that decompensation is possible, and another is simply not credible. There is sufficient proof that Robert Coe is not competent, and any presumption or assertion to the contrary therefore does not withstand scrutiny.

III
THIS COURT HAS JURISDICTION

Contrary to the Respondent's assertions in his answer, this Court does have jurisdiction to entertain Robert Coe's petition. This has been the holding of the Sixth Circuit in this case.

IV.
ROBERT COE HAS SHOWN HIS ENTITLEMENT TO RELIEF AND/OR FURTHER FEDERAL PROCESS ON HIS CLAIM THAT HE IS NOT COMPETENT TO BE EXECUTED

As noted supra, the AEDPA does not apply, to the extent that Robert Coe would receive

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relief under the pre-AEDPA law. Therefore, Respondent's assertions that Robert Coe is not entitled to relief under the AEDPA misses the point. Rather, as Robert Coe has established, he was denied a full and fair hearing on the merits of his claims in the state courts, and as a result, he is entitled to a federal evidentiary hearing on his claims before this Court addresses his claim on the merits, applying the proper burden and standard of proof required by *Ford*. Consequently, under either version of the habeas law, Robert Coe is entitled to further proceedings, and is not barred from federal relief.

Even under the AEDPA, Robert Coe is still entitled to relief. 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 just point in time and even then, it is not quite clear what point in time that is (or was).[7] As such, even if the AEDPA were to

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[7] The dissenting judge in the Court of Appeals has stated that he does not believe Robert Coe can win on the merits of his claim, given his interpretation of events at the state court hearing. This misses the mark, as it asks the wrong question, the same wrong question asked by the state courts.

Robert Coe's mental illness (dissociative identity disorder) is not static; it fluctuates, and he decompensates when his life is in imminent danger. See Vol. VIII, pp. 299-345 (Dr. Kenner); Petition, pp. 5-10 (noting Robert's fluctuating mental state, which deteriorates when his life is threatened). This has been the result of the horrible abuse and trauma suffered by Robert as a child. See e.g., Vol. VIII, p. 309, 326. Dr. Kenner has made clear through his testimony that Robert has decompensated to the point of incompetency on two occasions when he has seen Robert. See Petition, ¶¶ 12-23 (noting Robert Coe's decompensation as evident during January 11, 2000 interview); ¶¶ 9-10 (Robert Coe incompetent on December 22, 1999 as well). On other occasions, Robert has not appeared incompetent.

Whether Robert was or was not competent at points during the state court proceedings is ultimately not relevant, because the ultimate question of his competency to be executed is not whether he was competent at any given point in the past (in the past he has been both incompetent and competent) but whether he is competent to be executed. As Drs. Kenner and Mericangas have made eminently clear, there is proof to a reasonable degree of certainty that he is not competent at the point of execution, given the breadth of his psychiatric symptoms and inability to understand reality. See Vol. IX, pp. 344-345 (Dr. Kenner); Vol. VI, p. 109-123; 162-163 (Dr. Mericangas).

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.

Further, even under new §2254(d)(1), the state courts were required to apply the law of *Ford*, which provides that a person is insane and incompetent to be executed, and under the Eighth Amendment, the proper standard is the standard which existed at common law. As Robert Coe has noted in his Motion For Evidentiary Hearing, pp. 23-30, competency is governed by a uniform standard throughout proceedings (as at common law), and the standard for determining competency requires a finding of (1) factual understanding of the punishment, (2) rational understanding of the punishment; (3) ability to consult with counsel; and (4) to do so with a reasonable degree of rational understanding. See Dusky v. Missouri, 420 U.S. 162 (1975); Dusky v. United States, 362 U.S. 402 (1960); Godinez v. Moran, 509 U.S. 389 (1993).

The state courts of Tennessee never applied such a standard; rather, they applied a "standard" of proof requiring mere factual knowledge of the proceedings. The state courts' application of this unconstitutional standard would therefore preclude any application of §(d)(1). Further, as explained *infra*, there is no *Teague* bar to application of the proper standard to the claims, because application of the proper *Ford* standard does not require application of any new rule of law (it is dictated by *Ford* which incorporates the common law) and necessarily falls within *Teague*'s first exception. See pp. 9-10, *infra*.

Moreover, it is clear that a reviewing court applying Ford is under an obligation to determine what the proper standard is, and Ford itself establishes that standard: under the Eighth Amendment, that standard is the standard which existed at common law. See Ford, 477 U.S. at 406, 106 S.Ct. at

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2600. The Tennessee Supreme Court, however, inaccurately and unreasonably failed to determine what that standard was at common law, and therefore applied an incorrect standard, relying instead on mere *dicta* from Justice Powell, contrary to the dictates of *Ford*. The Tennessee Supreme Court's decision therefore, while not even qualifying as an adjudication on the merits of the *Ford* claim, likewise relies upon an incorrect understanding of *Ford* and is contrary to *Ford* and therefore habeas relief is required.

In addition, as Robert Coe has noted elsewhere, even under new §2254(d)(2), he is entitled to relief, because the state courts did not make a reasonable determination of the facts on his *Ford* claims, given judicial bias, denial of experts, preclusion of proof, consideration of hearsay evidence, and other procedural improprieties in the state court process. See Reply To Motion For Evidentiary Hearing.

In sum, therefore, Robert Coe is entitled to further proceedings on his *Ford* claims in this Court, including an evidentiary hearing, and nothing which occurred in the state courts precludes such a result.

V

REPLY TO REMAINING ISSUES PRESENTED IN THE PETITION

As with the competency claim itself, the AEDPA does not apply to these claims either, given the potential impermissible retroactive effect of applying the AEDPA to Robert Coe's claims. In any event, he wins under either version of the habeas law:

The Trial Court Applied An Improper Standard Of Proof (Petition, ¶66). As Robert Coe has noted *supra*, the state courts' standard of proof does not comport with *Ford*, which incorporates the standard of competency at common law, a standard which requires more than mere "factual"

knowledge. See also Motion For Evidentiary Hearing, pp. 23-30. Contrary to Respondent's assertions, there is no bar to relief created by Teague v. Lane, 489 U.S. 288 (1989). First, Robert Coe is not asking for application of any new rule of law, because Robert Coe is merely asking for application of the standard enunciated in Ford, which was delineated as the common law standard, even if not expressly discussed in Ford itself.

Second, in any event, the state has no legitimate interest in executing the insane, and therefore Robert Coe must be provided the standard required by the Constitution. As such, even were an alleged new rule involved, Robert Coe is entitled to its application under the direct authority of Penry v. Lynaugh, 492 U.S. 302, 329-330, 109 S.Ct. 2934, 2952 (1989). In Penry, the Supreme Court acknowledged that application of the law of *Ford* falls within the first *Teague* exception.

> [A] new rule will be retroactive if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' . . . Although *Teague* read this exception as focusing solely on new rules assuring constitutional protection to an actor's primary conduct, Justice Harlan did speak in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed. This Court subsequently held that the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendant because of their status, *Ford v. Wainwright*, 477 U.S. at 410, 106 S.Ct. at 2602 (insanity) . . . Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.

Penry, 492 U.S. at 329-330, 109 S.Ct. at 2952-2953. Thus, Robert Coe is entitled to the proper application of the Eighth Amendment standard of insanity, which requires application of the four-prong Dusky test. This Court is constrained to articulate that standard – which requires the four-prong standard articulated by Robert Coe elsewhere (Motion For Evidentiary Hearing, pp. 28-30) – and apply it here, and grant Robert Coe relief. With the state courts having failed to apply the

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proper standard, the federal courts must do so and accord Robert Coe relief.

The Trial Judge Was Biased in Violation Of Due Process (Petition ¶10): Robert Coe has made a showing that his claims were adjudicated by a biased judge, in violation of due process. See also Motion for Evidentiary Hearing, pp. 35 n.1 & 86; Motion For Discovery; State Court Motion To Remand for Discovery Concerning Threats Made To The Judge. As such, he has stated a due process violation and is entitled to a hearing on his claims, at which time he will establish his entitlement to both a full and fair hearing on his *Ake* claim and an independent violation of due process.

His claims have merit. As the Supreme Court has explained, an unbiased tribunal is essential to any notion of justice:

> *A fair trial in a fair tribunal is a basic requirement of due process.* Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . This Court has said, however, that *every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.* Such a stringent rule may sometimes bar trial judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955)(emphasis supplied), quoting Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927). Offutt v. United States, 348 U. S. 11, 75 S.Ct. 11 (1954).

As made clear in Murchison, a showing of actual bias is sufficient to show a violation of due process, but not the exclusive showing required to make out a due process violation. Rather, it is "any procedure which would offer a possible temptation" to a judge "not to hold the balance nice, clear, and true between the State and the accused" which violates due process of law. Tumey, 273

U.S. at 532, 47 S.Ct. at 444 (emphasis supplied). "[W]e require not only an absence of actual bias, but an absence of even the appearance of judicial bias." Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988), quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 n. 19, 71 S.Ct. 624, 649 n. 19 (1951)(Frankfurter, J., concurring)(discussing due process right to tribunal which satisfies the appearance of justice).

"The 'requirement of neutrality in adjudicative proceedings' serves dual interests of equal importance, as 'it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" Anderson v. Sheppard, 856 F.2d at 746, quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1618 (1980). Without judicial impartiality, there can be no "faith in the integrity of this country's tribunals that is so unquestionably vital to this government's existence." Anderson, 856 F.2d at 746. And in a capital case, the impeccable integrity of the trial court must be unquestioned, for without complete assurance of judicial impartiality, there can be no faith that a death sentence has been meted out in a reasonable and fair manner, the very foundation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). This is especially true here, where in Tennessee there has not been an execution in forty years.

Here, Robert Coe's constitutional claims were addressed by a judge whose life had been threatened. Nothing could be clearer than the fact that Robert Coe was thereby denied his right to due process in the state court proceedings. A judge who is threatened with death if he rules in a petitioner's favor simply cannot be trusted to an unbiased adjudication; rather, such a decision-maker is placed in the position of having no rule against the petitioner in order to protect himself. Due process does not countenance such a perverse result. Robert Coe is entitled to full discovery, an

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evidentiary hearing, and relief on his claims that the trial judge was biased. He is therefore entitled to a full and fair evidentiary hearing on his *Ford* claims in this Court.

Robert Coe was denied due process through the forced disclosure of privileged materials (Petition, ¶63): The forced disclosure of privileged materials also violates due process and the right to counsel, as demanded by the Sixth Amendment. Under Ake v. Oklahoma, 470 U.S. 68 (1985), due process demands that experts hired by a defendant be independent -- and not beholden to the court or to one's adversary. Ake makes clear that this is required. And the Ninth Circuit has itself made clear that due process demands such independence of any expert. Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). The state courts' failure to acknowledge the due process violation resulting from the trial court's forced disclosure of the expert evidence failed to accord Robert Coe the due process to which he is entitled under Ake. 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).

The Judge Improperly Considered Materials Ex Parte Which Were Not Confronted (Petition, ¶64): As Robert Coe has explained in his Motion For Evidentiary Hearing, in *Ford* proceedings, a trial court may not, consistent with due process and the right to confrontation guaranteed by the Sixth Amendment, consider materials never introduced as evidence nor confronted by Robert Coe. There is long standing Supreme Court precedent supporting this proposition, which entitles Robert Coe to relief. 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 significant evidence considered by adjudicator of *Ford* claim).

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The Trial Court Denied Due Process Through The Exclusion Of Relevant Evidence (Petition ¶65): The trial court's exclusion of relevant evidence flies in the face of Ford itself, which makes clear that process is violated if the petitioner is precluded from having all relevant evidence considered by the factfinder. Ford, 477 U.S. at 414, 106 S.Ct. at 2604; Lockett v. Ohio, 438 U.S. 586 (1978). The trial court's failure to provide for expert assistance and to consider all relevant evidence therefore cannot be squared with Ford, and Robert Coe is entitled to relief. Robert Coe has asked this Court to conduct an evidentiary hearing on his *Ford* claims, precisely because the state courts did not fully consider all of the available evidence which he has sought to introduce. Having asked for an evidentiary hearing, he need not also request that this court expand the record under Habeas Rule 7, as the Respondent contends. However the court wishes to consider the evidence, it still must consider all of the relevant evidence, including that evidence which was not considered by the state courts, because Robert Coe did not fail to develop the facts in the state court proceedings.

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 2603. See Nix v. Whiteside, 467 U.S. 431, 451 (1984).

The State Courts Applied An Incorrect Burden Of Proof (Petition, ¶66): This claim as well is not barred by *Teague*. As Robert Coe is simply requesting that this Court apply long-standing due process principles for assessing the proper burden of proof. These due process principles derive from many old Supreme Court cases, including Addington v. Texas, 441 U.S. 418 (1979), Mathews v. Eldridge, 424 U.S. 319 (1976). No new rule of law is being requested.

The State Courts Violated Due Process By Failing To Sequester Witnesses (Petition, ¶68):

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To determine the contours of due process, one must assess what is universally required throughout the Nation as necessary to ensure the integrity of the factfinding process. One quickly sees that all jurisdictions — Tennessee included — require the sequestration of witnesses to preclude the fabrication of testimony. Yet here, with Robert Coe's life on the line, the Tennessee courts decided that sequestering witnesses would not be required. Especially where Tennessee requires such sequestration under the circumstances here, the state trial court's actions are wholly arbitrary and do not comport with the type of process which Robert Coe was due. This fundamental violation of the factfinding process cannot be countenanced as a matter of due process, especially where the result of that unfair process is the deprivation of Robert Coe's fundamental right to life.

The Trial Judge Relied Upon Materially 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. In this case, the trial court considered evidence from Dr. Martell (which was relied upon by Dr. Matthews as well) which has no scientific validity under the circumstances as applied to Robert Coe. Indeed, even Dr. James Walker concluded that Dr. Martell's conclusions about malingering derived from his "testing" were simply untenable under the circumstances. Yet the trial court considered that evidence when rendering its decision that Robert Coe was "presently competent." When a man's life is at stake, a state court's consideration of such misleading or "junk" science cannot be countenanced. Indeed, if the federal courts would not admit Dr. Martell's evidence under Daubert, the state court's consideration of such wholly misleading (if not outright false) evidence cannot be countenanced here. This court should conduct a full and fair hearing without considering such misleading evidence, which tainted the state court

proceedings.

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, unconfirmed 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 to the type of misconduct undertaken by the prosecution here.

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.

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