

CAPITAL CASE: EXECUTION DATE MARCH 23, 2000

No. 99-8681

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

ROBERT GLEN COE,
Petitioner.

v.

STATE OF TENNESSEE
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

PETITIONER'S REPLY BRIEF

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COMES NOW the petitioner, Robert Glen Coe, through his undersigned counsel of record and submits this Petitioner's Reply Brief pursuant to Supreme Court Rule 15(6):

A. *The State In Its Brief In Opposition Did Not Contest Any Factual Averments From the Record Raised In The Petition.*

In its Brief in Opposition, the State did not contest any of the averments of facts asserted by Petitioner contained in the record. Some of the critical facts pertinent to this Court's determination are:

1. Dr. Merikangas testified that Mr. Coe, although he was aware of the fact of his pending execution, lacked the capacity to understand the meaning of death.

2. Dr. Kenner, a psychiatrist on the faculty at Vanderbilt University Medical School, testified that Mr. Coe suffers from Dissociative Identity Disorder, and under stress he decompensates to the point that he would be incompetent to be executed. Dr. Kenner testified within a reasonable degree of medical certainty that with the stress of a pending execution, Robert Coe would decompensate and be incompetent to be executed on March 23, 2000, his set execution day¹.

Thus, factually, this case presents an ideal opportunity for this Court to clarify the law as to the appropriate standard under the Eighth Amendment for competency to be executed.

B. *The State Ignored Coe's Averment That The Common Law Required More For Competency To Be Executed Than Mere "Awareness."*

¹On page 2 of the Brief in Opposition, the State erroneously stated that Dr. Kenner was a forensic psychologist. Dr. Kenner is a licensed psychiatrist employed on the clinical faculty at Vanderbilt University Medical School, who testified as an expert in the field of psychiatry. See Petition for Certiorari, p. 4; see also Opinion, p. 8, Appendix, Tab 4 to Petition for Certiorari.

In the petition, Coe asserted that at common law there was a uniform standard for competency to be executed which included four prongs:

1. Sufficient present ability to consult with an attorney;
2. A reasonable degree of rational understanding;
3. A rational and
4. Factual understanding of proceedings against the prisoner.

Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

Robert Coe also asserted that the States have formulated various tests to determine competency. Fourteen States require a defendant to be able to assist counsel before he is competent to be executed. Some States, as at common law, require rational understanding as well as factual understanding of the proceedings in order to be competent for execution. See *Atwell v. State*, 354 So.2d 30, 35 (Ala. Crim. App. 1977); see also N.C. Gen. State § 15-A-1001 (1989) (prisoner must be "unable to understand the nature and object of proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist his defense in a rational and reasonable manner.")

Dr. Merikangas testified that although Mr. Coe is aware of his pending execution, he does not understand the meaning of execution (VII, 190). The trial court and Tennessee Supreme Court made no findings that Dr. Merikangas was incorrect in his assessment. Rather, the Supreme Court asserted that Mr. Coe's awareness of the fact of impending execution was sufficient mental acumen to execute Mr. Coe, even if he did not understand what execution is.

Thus the Tennessee standard is drastically lower than the common law standard and the standard imposed by several states.

Dr. Merikangas opined that the way to distinguish between awareness and understanding is to ask a person to explain the concept back to you -- when Mr. Coe

explains what he means by execution, it is clear he does not understand the concept. (VIII, 210). By analogy, if a three year old child was told his grandmother died, and was then asked "where's grandma?", the child would respond, she died. However, it is doubtful that a three year old child could explain what death is, or "understand" death, even though the child had some sort of awareness that Grandma was dead. Likewise, Mr. Coe's limited awareness of the meaning of execution does not rise to the level of rational understanding which is required by the Eighth Amendment.

This Court should grant certiorari to establish uniformity as to the standard of competency for execution, which counsel submits should be the same standard applied for determining competency to stand trial, and competency to plead guilty. The common law standard which requires a prisoner to have both a rational and factual understanding of proceedings against him, as well as being able to assist counsel, should be the uniform standard in the nation.

C. *The State's Argument That The Tennessee Court Decided Present Competency, And Not Competency At the Time of Execution, Demonstrates Mr. Coe Is Entitled To Federal Relief .*

The State in the Brief In Opposition conceded that the Tennessee courts only found Mr. Coe to be presently competent at the time of his State court hearing, and did not even address the medical proof that he would be incompetent on his execution day.

On December 15, 1999, the Tennessee Supreme Court set Mr. Coe's execution for March 23, 2000. (See Appendix 1 to Petition for Certiorari). On December 29, 1999, Mr. Coe filed a petition in State court asserting under the Eighth and Fourteenth Amendments and under *Ford v. Wainright*, he was incompetent to be executed. (See Appendix, Tab 2). Mr. Coe then placed psychiatric proof before the court that within a reasonable degree of medical certainty, Mr. Coe would be incompetent to be executed on March 23, 2000, the day of his set execution. (Petition for Certiorari, p. 7). Dr.

Kenner's observation of Mr. Coe on December 22, January 10, 11, and 12th, led Dr. Kenner to discover Robert Coe suffers from Dissociative Identity Disorder which causes him to phase in and out of competency. The trial court did not discredit Dr. Kenner's testimony. Rather, it held that since Coe was competent on January 12 (notwithstanding that on January 11 he was incompetent), Coe was competent to be executed March 23. In so holding, the court completely ignored Dr. Kenner's prognosis that on March 23, the relevant date for any *Ford* inquiry, Mr. Coe would be incompetent.

Mr. Coe has a right not to be executed if at the time of his execution he is mentally incompetent. See *Ford v. Wainwright*. Mr. Coe timely raised a *Ford* claim in State court and presented psychiatric proof that he would be incompetent within a reasonable degree of medical certainty at the time of his execution. Thus, Mr. Coe properly presented a *Ford* claim to the State court; and, the State court was in error in holding that the proper time frame for determining competency was the time of the hearing and not the time of the set execution. Obviously, in many cases, a prisoner's competency will not fluctuate significantly between a set execution date and a hearing two months prior. But in Mr. Coe's case, there is undisputed proof in the record that Mr. Coe's competency at the time of the hearing and at the time of the set execution would be different due to medically explainable mental disease exacerbated by stressors. The Tennessee courts refused to answer the only question that was relevant under *Ford*, namely whether he would be incompetent at the time of his execution.

Also, there is no meaningful way for Mr. Coe to again present his mental condition at the time of execution to the State courts. While the Tennessee Supreme Court purports to allow additional *Ford* proceedings after an initial competency determination, it places severe limitations on such proceedings. Specifically, the Tennessee Supreme Court states

If a prisoner is found to be competent, subsequent *Ford* claims will

be allowed unless the prisoner, by way of a 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.

Coe v. State opinion p. 49 (Appendix 4 to Petition for Writ of Certiorari). This is simply inconsistent with *Ford*.

Mr. Coe is an indigent person or death row with no meaningful way to retain a mental health professional to come to the prison and conduct a mental examination. Since the Tennessee Supreme Court indicated more than a conclusory affidavit would be needed, apparently, Mr. Coe would have to be able to retain mental health professionals to conduct a thorough evaluation with testing to satisfy this requirement. However, there is no need for a new hearing. Mr. Coe presented a proper *Ford* claim, with medical proof of his incompetence to be executed on the set March 23rd execution date. The State courts simply refused to rule on the only critical issue; his competency to be executed.

Respectfully submitted,

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