

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

ROBERT GLEN COE,)	
)	
Petitioner,)	
)	Case No. 3:00-0239
v.)	Judge Trauger
)	
RICKY BELL, Warden,)	
)	
Respondent.)	

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

I.

Preliminary Statement

This action concerns a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2241 and/or 2254 by Robert Glen Coe, petitioner, complaining of the legality of his execution under a judgment of the Criminal Court of Shelby County finding him competent to be executed.

B. Transcripts and Briefs

The original transcripts and appellate briefs of petitioner's competency to be executed proceeding are available and lodged in the Office of the Clerk of the Supreme Court of Tennessee at Nashville. Copies of the originals have been filed with the Court and have been designated as follows:

ADDENDUM 1: Technical Record, transcripts and exhibits of

petitioner's competency proceedings, *Robert Glen Coe v. State* (2 volumes technical record, 13 volumes transcripts, 3 volumes exhibits, 4 videotapes).

ADDENDUM 2: Direct appeal briefs and opinions:

Document 2A: Brief of Appellant, Robert Glen Coe, filed in the Tennessee Supreme Court February 22, 2000.

Document 2B: Brief of the State filed in the Tennessee Supreme Court February 28, 2000.

Document 2C: Reply brief of Appellant filed in Tennessee Supreme Court March 2, 2000.

Document 2D: Opinion of the Tennessee Supreme Court affirming the judgment of the Shelby County Criminal Court filed March 6, 2000.

II.

Statement of the Case

The petitioner was convicted of the 1979 kidnaping, rape and murder of Cary Ann Medlin. He was sentenced to death, and in addition, received two consecutive life sentences. The convictions and sentences were affirmed by the Tennessee Supreme Court in *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983). He subsequently filed three post-conviction petitions, and each was denied. *Coe v. State*, 1997 WL 88917; *Coe v. State*, 1991 WL 2873; *Coe v. State*, 1986 WL 14453.

The petitioner also filed a habeas corpus petition in the United States District Court, Middle District of Tennessee. Although the district court granted petitioner relief, the United States Court of Appeals for the Sixth Circuit reversed and reinstated his convictions and sentences. *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). On October 4, 1999, the United States Supreme Court denied a petition for a writ of certiorari, *Coe v. Bell*, ___ U.S. ___, 120 S.Ct. 110 (1999), and on November 29, 1999, denied rehearing. *Coe v. Bell*, ___ U.S. ___, 120 S.Ct. 567 (1999).

Also on November 29, 1999, the Attorney General and Reporter of the State of Tennessee filed a motion in the Tennessee Supreme Court to set an execution date. In response, the petitioner alleged that the State's motion should be denied because he continued to pursue remedies in state and federal courts. Although the petitioner failed to allege that he was incompetent to

executed as required by this Court in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), the Tennessee Supreme Court ordered the petitioner to address his competency to be executed or "risk waiver of that issue." Accordingly, the petitioner filed a motion to reconsider wherein he alleged that he was incompetent to be executed under Tennessee and federal law.

On December 15, 1999, the Tennessee Supreme Court set the petitioner's execution date for March 23, 2000. In addition, it ordered the case remanded to Division III of the Criminal Court of Shelby County for an "expeditious determination of [petitioner's] present competency, including the initial determination of whether the [petitioner] has met the required threshold showing."

On December 23, 1999, the petitioner submitted to the Shelby County Criminal Court an affidavit from Dr. William Kenner, M.D., a forensic psychologist. Dr. Kenner opined that the petitioner was not competent to be executed because he suffers from "delusional beliefs about the reason for his execution." Although the State argued that the petitioner failed to make a threshold showing of incompetence, the court ordered a hearing to be held, and in accordance with *Van Tran*, appointed two experts, Dr. Kenner and Dr. James Merikangas, to evaluate the petitioner on behalf of the defense. The court also appointed Dr. Daryl Matthews and Dr. Daniel Martell to evaluate the petitioner on behalf of the State.

From January 24, 2000 to January 28, 2000, a hearing was

held in Shelby County Criminal Court to determine whether the petitioner was competent to be executed. On February 2, 2000, the court found that Robert Glen Coe failed to establish that he was incompetent to be executed under *State v. Van Tran*. Under the dictates the Tennessee Supreme Court established in *Van Tran*, the Shelby County Court's order was automatically appealed to the Tennessee Supreme Court. *Van Tran*, 6 S.W.3d at 273. On March 6, 2000, the Tennessee Supreme Court affirmed the finding of the trial court that Robert Glen Coe is competent to be executed.

III.

Statement of the Evidence

To the extent that the evidence at the original trial is relevant, it is accurately summarized by the Tennessee Supreme Court in *State v. Coe*, 655 S.W.2d 903, 905 (Tenn. 1983). A summary of the evidence adduced at the competency hearing is contained in the opinion of the Tennessee Supreme Court on direct appeal. Addendum 2D.

IV.

A. Standard of Review

Because petitioner commenced this action after April 24, 1996, the standard of review employed for exhausted claims is that contained in 28 U.S.C. §2254(d). *Nevers v. Killenger*, 169 F.3d 352, 357 (6th Cir. 1999); *Herbert v. Billy*, 160 F.3d 1131, 1134-35 (6th Cir. 1998) (citing *Harpster v. Ohio*, 128 F.3d 322,326 (6th

Cir. 1998); *but see*, *Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 1355, 143 L.Ed.2d 516 (1999) (certiorari granted regarding Fourth Circuit's application of §2254(d) standard of review).

B. Presumption of correctness of state court record

Respondent submits that the state courts (both trial and appellate) have made relevant findings of fact on the issues presented in this habeas petition. The factual determinations of the state courts are presumed to be correct and petitioner must rebut that presumption with clear and convincing evidence. 28 U.S.C. §2254(e)(1). Unless petitioner can plead and prove facts meeting this burden, the federal court must presume the state courts' determination of the facts as true, and review the reasonableness of the state courts' application of federal law. *Dukes v. Hunt*, 952 F.Supp. 276, 280 (E.D.N.C. 1996). Where the state court has not articulated express findings, federal courts must nevertheless give appropriate deference to implicit findings of the state courts which can be inferred from the record. *Fowler v. Jago*, 683 F.2d 983, 987-89 (6th Cir. 1982). The presumption of correctness that attaches to both explicit and implicit factual findings applies to findings of both the trial and appellate courts. *Loveday v. Davis*, 697 F.2d 135, 139 (6th Cir. 1983). The presumption of correctness also applies to credibility findings made by the state courts. *Smith v. Jago*, 888 F.2d 399, 407 (6th

Cir. 1989).

Respondent submits that a review of the state court record filed with the Court demonstrates that petitioner was afforded a full and fair hearing before the various state tribunals; that their factual determinations were reasonable in light of the evidence presented to them; and, that petitioner has failed to plead, much less prove, any facts which would establish by clear and convincing evidence that the state court findings of fact are not entitled to the §2254(e)(1) presumption of correctness.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THIS HABEAS PETITION AND TO ENTER A STAY ABSENT AN ORDER FROM THE COURT OF APPEALS AUTHORIZING THE PETITION'S CONSIDERATION.

Coe has presented his *Ford* claim in a petition under 28 U.S.C. § 2241 and, in the alternative, under 28 U.S.C. § 2254. However, § 2241 is not an available vehicle for litigation of a *Ford* claim in federal court. A *Ford* claim may only be litigated in federal court under 28 U.S.C. § 2254. If brought under 28 U.S.C. § 2254, Coe's *Ford* claim constitutes a "second or successive habeas corpus application under section 2254," requiring permission from the Court of Appeals. Coe has not sought permission from that Court to file a second or successive petition; nor can he satisfy the requirements for obtaining permission. Therefore, there is no proceeding sufficient to invoke the jurisdiction of this Court.

Consequently, this court lacks jurisdiction to enter a stay.

A. Coe's Ford claim cannot be brought in a petition under 28 U.S.C. § 2241.

Coe is indisputably "a person in custody pursuant to the judgment of a state court" within the meaning of 28 U.S.C. § 2254. Whatever independent jurisdiction 28 U.S.C. § 2241 may confer upon federal courts in other contexts (see, e.g., *United States v. Jalili*, 925 F.2d 889, 893 (6th Cir. 1991) (holding that federal prisoner's attack on Bureau of Prison's designation of facility in which prisoner was to serve his sentence properly cognizable in a § 2241(a) habeas petition)), the Supreme Court made it clear in *Felker v. Turpin*, 518 U.S. 651, 662 (1996), that the authority "to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a state court.'" Nothing in the language of *Felker* or the construction of Title 28 of the United States Code suggests that this limitation of § 2241 by § 2254 in habeas cases filed by state prisoners is confined to the United States Supreme Court and not applicable to the lower federal courts. In fact, *Ford* itself involved a § 2254 claim. See *Ford v. Wainwright*, 477 U.S. 399 (1986); *In re Davis*, 123 F.3d 952, 955 (5th Cir. 1997). Thus, § 2241 is not an available vehicle for litigation of a *Ford* claim in federal court.

B. Coe's Ford claim, if brought under 28 U.S.C. § 2254, constitutes a "second or successive habeas corpus

application under section 2254," requiring permission from this Court.

28 U.S.C. § 2244(b) now provides, in pertinent part:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

The pleading filed in this Court is undeniably a second attempt by Coe to obtain habeas relief. Coe did not present a *Ford*

claim in his first federal habeas petition, which was adjudicated on the merits. Therefore, § 2244(b)(2) plainly applies. And every court of appeals addressing this procedural scenario, *i.e.*, where a *Ford* claim is raised for the first time *after* an initial habeas petition has been filed and disposed of on the merits, has so held.¹ See *In re: Medina*, 109 F.3d 1556 (11th Cir. 1997), *cert. denied*, *sub nom. Medina v. Singletary*, 520 U.S. 1151 (1997); *In re: Davis*, 121 F.3d 952 (5th Cir. 1997); and *Nguyen v. Gibson*, 162 F.3d 600 (10th Cir. 1998). In all three cases, the courts found that the petitioners' *Ford* claims were barred by 28 U.S.C. § 2244(b).

In *Medina*, the Eleventh Circuit, applying the clear language of the statute, found that the *Ford* claim did not fall within the exceptions of § 2244(b). *Medina*, 109 F.3d at 1564-65. The court further considered the question of whether such a bar would impermissibly deny a petitioner federal review of a *Ford* claim² and held that it would not, given the writ of certiorari and the possibility of seeking habeas relief through an original writ with the Supreme Court. *Medina*, 109 F.3d at 1564.

¹The only Supreme Court case to address the applicability of 28 U.S.C. § 2244(b) to *Ford* claims -- *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) -- is not controlling because it is factually distinguishable. In that case, the petitioner raised a *Ford* claim in his first federal habeas petition considered on the merits. The district court dismissed the *Ford* claim as premature. The Supreme Court held that the petitioner's subsequent reassertion of his *Ford* claim would not be treated as a second or successive habeas application because in fact "[t]here was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe." *Id.* at 1621. But the Court specifically noted that it was *not* deciding the issue presented by this case -- whether a federal habeas court should treat a *Ford* claim, asserted for the first time after a previous denial of federal habeas relief, as a second or successive application. *Id.* at 1622 n.*; see also *In re Davis*, *supra*, 121 F.3d at 955; *Nguyen v. Gibson*, *supra*, 162 F.3d at 601 (both distinguishing *Stewart* in circumstances similar to this case).

²The court began its analysis with the observation that "[i]t is not any more apparent to us that *Ford* guarantees a federal court determination of the issue it addresses than that any other decision does." *Medina*, 109 F.3d at 1564.

The Fifth Circuit likewise applied the plain meaning of §2244(b) to deny relief in *Davis*. Although *Davis* conceded that he could not satisfy § 2244(b)(2)(B), he argued that his case did fall under § 2244(b)(A), arguing that *Ford* should be considered "a 'new rule of constitutional law' because it is applicable for the 'first time' only when both the execution date is imminent and the petitioner is incompetent. [Davis stated] also that *Ford* was 'previously unavailable' to him because a *Ford* claim is premature until both an execution date is set and the applicant is incompetent." *Davis*, 121 F.2d at 955. The Fifth Circuit rejected that position, stating that a 1986 decision is not a new rule of constitutional law, and that while the *factual* basis of the claim may not have been previously available, the *legal* basis had been available since 1986. *Id.*

In *Nguyen*, the Tenth Circuit, as did the Eleventh Circuit, noted that federal review, if required, was available through certiorari or an original petition in the Supreme Court. *Nguyen*, 162 F.3d at 602.

Thus, the only courts of appeals to address the applicability of § 2244(b)(2) to the present scenario have ruled adversely to petitioner. As petitioner did not include a *Ford* claim in his first habeas petition, and since that petition has been disposed of on the merits, he is now barred by the prohibition of 28 U.S.C. § 2244(b)(2) from bringing a *Ford* claim in this Court unless he is

permitted to do so by the Sixth Circuit.

C. The "Law of the Case Doctrine" does not preclude this petition from being a second or successive habeas petition.

In a memorandum filed 14 February 2000, Judge Nixon opined that the filing of a *Ford* claim would not constitute a second or successive petition. That portion of his order is not law of the case, nor is it binding on this Court for three reasons. First, the order is not final, the time for appeal not having expired since Judge Nixon's order denying Respondent's Motion to Alter or Amend was entered 25 February 2000. See F.R.A.P.4(a)(4)(A)(iv).

Second, the language regarding successive petitions is *dicta*: "[A]lthough respondent is correct that the court's opinion does not resolve a live controversy, it does . . . properly consider in *dicta* an issue placed before the court by the parties." (Order of 25 February) When a court's prior holding is *dicta*, it is not law of the case, and the issue may be properly reconsidered. *Tenn. Products & Chemical Corp. v. United Mine Workers*, 481 F.2d 742, 747 (6th Cir. 1973).

Third, application of the law of the case doctrine is discretionary where a case is transferred to a coordinate judge. *Bowling v. Pfizer*, 132 F.3d 1147, 1150 (6th Cir. 1998). Since, for the reasons set out in this memorandum, Judge Nixon's determination was erroneous, this Court should exercise its discretion and decline to apply the law of the case doctrine.

D. Coe has not sought permission from the Court of Appeals to file a second or successive petition; nor can he satisfy the requirements for obtaining permission.

_____Coe has not sought permission from the Court of Appeals to file a second or successive petition. Therefore, this Court's consideration of his habeas petition and the granting of a stay pending determination of the merits of his *Ford* claim would be illegal. Furthermore, Coe cannot satisfy the requirements for obtaining permission from the Court of Appeals. As noted above, § 2244(b)(2) now provides:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed --

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

A *Ford* claim advanced by Coe meets neither of the exceptions set out in the statute.

First, *Ford* was decided in 1986. Accordingly, it is not "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Such a claim would not meet exception (A). See *In re Medina, supra*, 109 F.3d at 1564; *In re Davis, supra*, 121 F.3d at 955-956; *Nguyen v. Gibson, supra*, 162 F.3d at 601.

Exception (B) also cannot provide him with relief. As petitioner has repeatedly pointed out, there has been evidence of his alleged mental impairments for years preceding the commission of the murder which led to this death sentence. In his habeas petition as amended in 1994 and 1996, he challenged trial counsel's failure to adequately present an insanity defense. This Court determined that his claim was without merit based upon a review of the trial record and the psychological testimony and reports offered during the evidentiary hearing. Accordingly, it cannot be said that the factual predicate for a *Ford* claim is newly arisen, since the factual predicate -- Coe's alleged mental illness -- has been of record for many years. And even if petitioner has a valid *Ford* claim, it obviously does not establish his innocence of the murder of Cary Ann Medlin. See *In re Medina, supra*, 109 F.3d at 1564-1565; *Nguyen v. Gibson, supra*, 162 F.3d at 601.

V.

Specific Claims

Respondent will refer to petitioner's claims by the same paragraph and sub-paragraph designations found in his petition for writ of habeas corpus for ease of reference.

A. Petitioner is competent to be executed. Claims 3-61.

Although petitioner failed to raise a claim that the trial court erred in concluding he was competent to be executed under the standard enunciated in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), the Tennessee Supreme Court addressed this issue on the merits. Therefore, petitioner has exhausted this claim. The Tennessee Supreme Court's resolution of this claim on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op at 46-49.

B. Petitioner was not denied due process. Claims 62-74.

Claim 62 (a)-(c): The hearing was conducted as an adversarial proceeding. Petitioner presented these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court and its decision

was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 62-64. To the extent that petitioner bases these claims on the Eighth Amendment to the United States Constitution, petitioner has failed to present them to the State courts and, accordingly, has procedurally defaulted them. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991); *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728 (1999).

Claims 63 (a)-(j): The trial court properly ordered that the reports of mental health professionals be disclosed to assist in its determination of petitioner's competency. Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 33-36. Further, to grant petitioner relief on this claim would be to create a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). In addition, this claim is not cognizable in a federal habeas corpus petition as it relates entirely to the application of state law. To the extent that petitioner bases these claims on the Eighth Amendment to the

United States Constitution, petitioner has failed to present them to the State courts and, accordingly, has procedurally defaulted them.

Claims 64 (a)-(f): The trial court properly considered the reports of mental health professionals that examined petitioner but did not testify to assist in its determination of petitioner's competency. Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 33-36. To the extent that petitioner bases these claims on the Eighth Amendment to the United States Constitution, petitioner has failed to present them to the State courts and, accordingly, has procedurally defaulted them.

Claims 65 (a)-(bc): The trial court properly denied continuances to obtain additional expert testimony, and the schedule for addressing competency to be executed claims enunciated in *Van Tran v. State* and followed by the trial court comport with due process. Petitioner has exhausted claims 65 (a)-(x) through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither

contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 40-42, 60-62. Regarding Claims 65 (y)-(bc), petitioner relies on evidence not included in the state court record. As petitioner has not moved to expand the record in this case, and this court has not ordered the record expanded, this court may not consider the allegations included in Claims 65 (y)-(bc). Rule 7, Rules Governing Section 2254 Cases in the United States District Courts.

Claims 66 (a)-(o): The standard for determining competency enunciated by the Tennessee Supreme Court in *Van Tran v. State* and employed by the trial court in this case: that a prisoner is "not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it," comports with the Eighth and Fourteenth Amendments. Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v.*

State, op. at 43-49. Further, to grant petitioner relief on this claim would be to create a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

Claims 67 (a)-(f): Requiring the petitioner to bear the burden of proving he is incompetent to be executed did not violate the Eighth and Fourteenth Amendments. Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 43. Further, to grant petitioner relief on this claim would be to create a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

Claims 68 (a)-(f): The trial court's permitting of all experts to remain present in the courtroom during the testimony of other witnesses did not violate due process.³ Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of

³Petitioner's continued claim that his experts were "precluded" from remaining in the courtroom is absolutely false.

clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 49-51. Further, to grant petitioner relief on this claim would be to create a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

Claims 69 (a)-(g): No right to have counsel present during a forensic evaluation exists. Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 30-31. Further, to grant petitioner relief on this claim would be to create a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). Regarding petitioner's Claim 69(d) (failure to provide *Jencks* material), petitioner has failed to present this to the State courts and, accordingly, he has procedurally defaulted it.

Claims 70 (a)-(g): No evidence exists to indicate that the trial judge was biased. Petitioner has exhausted these claims

through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 51-53. Claims 70(c) and (d) contain allegations not included in the State Court record. As petitioner has not moved to expand the record in this case, and this court has not ordered the record expanded, this court may not consider the allegations included in these Claims. Rule 7, Rules Governing Section 2254 Cases in the United States District Courts.

Claims 71 (a)-(c): The psychological tests administered to the petitioner are scientifically reliable and testimony regarding them did not violate due process. Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 56-60.

Claims 72 (a)-(e): No prosecutorial misconduct occurred. Petitioner has exhausted these claims through presentation to the

Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 39-40.

Claim 73: No reason existed to disqualify the Tennessee Office of the Attorney General or the Tennessee Supreme Court, and the videotape of the proceeding was properly not considered by the Tennessee Supreme Court. Petitioner has exhausted these claims through presentation to the Tennessee Supreme Court. The Tennessee Supreme Court's resolution of these claims on the merits was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court, and its decision was based on a reasonable determination of the facts in light of the evidence presented at petitioner's competency hearing. See *Coe v. State*, op. at 38, 61 at n. 19, Order denying Appellant's Motion to Recuse.

Claim 74: Cumulative error. Petitioner failed to present this claim to the State courts and, accordingly, he has procedurally defaulted the claim.

Claims 75-79. Petitioner is not entitled to an evidentiary hearing. These claims are separately addressed in the State's response to Petitioner's Motion for an Evidentiary Hearing.

VII.

Conclusion

Based upon the foregoing, the petition for writ of habeas corpus should be denied and no stay of execution should issue.

Respectfully Submitted,

MICHAEL E. MOORE
Solicitor General

GLENN R. PRUDEN
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3487
B.P.R. No. 15333

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via hand delivery to:

James H. Walker
601 Woodland Street
Nashville, TN 37206

Henry A. Martin and Paul Bottei
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203

on this the 17th day of March, 2000.

GLENN R. PRUDEN
Assistant Attorney General