

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

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.
JAN 24 2000

ROBERT GLEN COE,)
)
 Petitioner,)
)
 v.)
)
 RICKY BELL, Warden,)
)
 Respondent.)

BY _____
DEPUTY CLERK

Case No. 3:92-0180
Senior Judge Nixon

MOTION TO ALTER/AMEND ORDER AND MEMORANDUM
ENTERED 14 JANUARY 2000

I. BACKGROUND

On 14 January 2000, this Court entered an order and memorandum denying petitioner's Statement and Motions to Amend and to Consider Unresolved Claims included therein, finding that its jurisdiction over petitioner's habeas corpus petition is limited to executing the appellate mandate. Because of this finding, the Court also dismissed petitioner's Motion to Disqualify (both Attorney General Paul G. Summers and his Office) as being moot.

Notwithstanding the fact that this Court found its jurisdiction was limited to executing the appellate mandate, it went on to find that petitioner "may file a Ford claim, challenging both his competency to be executed and the adequacy of state procedures used to determine his competency to be executed, in a separate habeas corpus petition with this Court pursuant to 28

U.S.C. Section 2241, and in the alternative pursuant to 28 U.S.C. §2254." Memorandum (Doc. 458) at 1. Respondent submits that the portions of this Court's order and memorandum pertaining to bringing a Ford claim in this Court, under either 28 U.S.C. 2241 or Section 2254, comprise an advisory opinion and should be stricken.

II. ARGUMENT

Article III federal courts cannot render advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113 (1969); *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947). "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975). Federal courts have neither the power to render advisory opinions nor decide questions that cannot affect the rights of litigants in the case before them. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 1413 (1971). Concrete legal issues, presented in actual cases, not abstractions, are required. *Golden*, 394 U.S. at 108. The judgment must resolve real, substantial controversies "admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser*, 422 U.S. 401.

Although petitioner sought to amend his habeas corpus petition

to include a *Ford* claim, this Court's finding that it had no jurisdiction to permit such an amendment conclusively resolved that issue. Whether or not petitioner might be able to bring a *Ford* claim in a separate habeas corpus action and, if so, in what venue, were not matters this Court needed to address, nor should address in resolving the issue of whether or not to allow petitioner to raise a *Ford* claim by amendment.

The Tennessee Supreme Court has held that "execution is imminent only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence and [the Tennessee Supreme Court] has set an execution date upon motion of the State Attorney General." *Van Tran v. State*, 6 S.W.3d 257, 267 (Tenn. 1999) (emphasis in original). In *Van Tran*, the Tennessee Supreme Court also set out the state procedures for raising and litigating a *Ford* claim. *Van Tran*, 6 S.W.3d at 273-74.

Petitioner's imminent execution date was set by the Tennessee Supreme Court for 23 March 2000, in an order entered 15 December 1999 (copy attached). That same order held that petitioner had raised the issue of his competency to be executed and referred the matter to the Shelby County Criminal Court for further proceedings consistent with the opinion in *Van Tran*. These state competency

proceedings have not been completed.³ Until the state competency proceedings are completed, it remains purely speculative whether or not petitioner will even have a *Ford* claim to litigate in federal court.

III. CONCLUSION

Based upon the foregoing and pursuant to Fed. R. Civ. P. 59(e), respondent requests that this Court alter/amend its order and memorandum entered 14 January 2000, as follows:

1. Order -- delete the last sentence.
2. Memorandum:
 - A. Page 2. Delete the last sentence of the introductory remarks which immediately precede Section I. Background.
 - B. Section III. Discussion:
 - a. All of subsection D., "Petitioner's Ford Claims," pages 20-42.
 - b. The last sentence in subsection E., "Motion to Disqualify General Summers and Office of the Attorney General," page 42.
 - c. Section IV. Conclusion: the last sentence of the first paragraph.

³The competency hearing is set to begin at 1:30 p.m., Monday, 24 January 2000, in the Shelby County Criminal Court. The criminal court's decision may then be appealed directly to the Tennessee Supreme Court. See *Van Tran*, 6 S.W.3d at 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via first-class U.S. Mail, postage prepaid, to Henry A. Martin and Paul Bottei, Federal Public Defender's Office, 810 Broadway, Suite 200, Nashville, Tennessee 37203 and James Holt Walker, Esquire, 601 Woodland Street, Nashville, Tennessee 37206 on this the 24th day of January, 2000.



GLENN R. PRUDEN
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