

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

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

RESPONSE TO PETITIONER'S MOTION
FOR EVIDENTIARY HEARING

For the reasons set forth below, the petitioner's motion for an evidentiary hearing should be denied.

I. Standards Governing Evidentiary Hearings in a Federal Habeas Case.

In order to be granted an evidentiary hearing on the merits of his claims, a petitioner must overcome the statutory limitations set out in 28 U.S.C. §2254(e). Evidentiary hearings may also be permitted in the discretion of the district court where such a hearing is required to appropriately address a collateral matter that has been plead, i.e., cause and prejudice for procedural default where it is not apparent from the record; to establish a fundamental miscarriage of justice; or, to show that petitioner did not receive a full and fair hearing in state court, if not apparent from the state court record. Because petitioner has not alleged cause and prejudice or a fundamental miscarriage of justice in

either his motion for an evidentiary hearing, or his habeas petition, they will not be addressed in this response.

A. Generally.

Because his petition was filed on March 16, 2000, it is governed by the provisions of the Anti-terrorism and Effective Death Penalty Act [AEDPA] of 1996. *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1998). Under the AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1). For any claims where the petitioner *failed* to develop the factual basis in State court, this Court:

shall not hold an evidentiary hearing on the claim unless the applicant shows that –
(A) the claim relies on–
 (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2254(e)(2).

In this case, petitioner was granted an evidentiary hearing in the State trial court that lasted for five days and included testimony from 14 witnesses. Following the hearing, the trial

court entered a written order containing detailed findings of fact and holding that petitioner was competent to be executed under the standard set forth in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) and *Van Tran v. State*, 6 S.W.3d 266 (Tenn. 1999). Petitioner subsequently filed an appeal to the Tennessee Supreme Court in accordance with the procedure adopted in *Van Tran*. Following briefing and oral argument, the Tennessee Supreme Court issued a lengthy opinion, again containing detailed factual findings, and upheld the decision of the trial court. *Coe v. State*, __ S.W.3d __, 2000 WL 246425 (Tenn., Mar. 6, 2000). In light of the extensive and protracted proceedings in state court on the issue of competence to be executed, the 28 U.S.C. §2254(e)(1) presumption of correctness applies, unless petitioner can rebut it by clear and convincing evidence.

B. Rebutting the §2254(e)(1) Presumption.

Post-AEDPA, it appears that various Circuit Courts of Appeal have been asked to consider the method for determining whether an evidentiary hearing should be granted when it is determined that the prohibitions of §2254(e)(2) do not apply.¹ However, this does not guarantee the petitioner a hearing; rather it remains within the discretion of the District Court based upon a review of the

¹See, e.g., *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998); *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998); *McDonald v. Johnson*, 139 F.3d 1056 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256 (7th Cir.), cert. denied, __ U.S. __, 118 S.Ct. 462, 139 L.Ed.2d 395 (1997); *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997); *Love v. Morton*, 112 F.3d 131 (3rd Cir. 1997).

record.² In two of these cases, the courts have looked to the factors set forth in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), which require a petitioner to establish that facts were in dispute and that he did not receive a full and fair evidentiary hearing in the state courts. *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998). These cases, as do the others which have considered the question, arise from situations where the petitioners sought to obtain an evidentiary hearing in the state courts but were, for various reasons, denied that opportunity. Counsel for the respondent has not located a post-AEDPA case involving an extensive state court hearing as in this case.

Although the above cases suggest the consideration of the *Townsend* factors is appropriate, nothing in those cases relieves the petitioner of the burden established under §2254(e)(1), and the Fifth Circuit specifically noted that "consistent with the AEDPA's goals of streamlining the habeas process. . .[a petitioner] must still persuade the district court" that a hearing is appropriate. *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998). It is as to this burden of persuasion that the provisions of §2254(e)(1) come in to play.

Respondent submits that the appropriate consideration for the

²Denial of evidentiary hearing was upheld in *Miller*, *Cardwell*, *McDonald*, and *Burris*, *supra*.

Townsend factors is as to the "rebuttal" evidence which petitioner must assert in order to overcome the presumption of correctness mandated in §2254(e)(1). Since Congress clearly established the burden of rebuttal to be "clear and convincing" evidence, then this Court must review petitioner's allegations regarding the alleged failings of the State court proceedings against that high hurdle. Only if petitioner can establish by such clear and convincing evidence that the evidentiary hearing in State court deprived him of a full and fair opportunity to present evidence can this Court exercise its discretionary power to conduct further evidentiary proceedings.

II. SPECIFIC ALLEGATIONS OF ERROR ASSERTED IN SUPPORT OF CLAIM.

Petitioner asserts seven areas of alleged error in the state court proceedings as his "rebuttal" evidence. A review of the record from the state trial court, and the opinions of the trial court and supreme court demonstrate that these allegations lack sufficient substance to satisfy even the somewhat more lenient standard of the pre-AEDPA requirements, much less the clear and convincing standard set forth in §2254(e)(1).

1. Alleged failure of Tennessee courts to resolve "critical issues" including petitioner's competence to be executed, and whether he suffers dissociative identity disorder or schizophrenia which renders him incompetent.

This allegation is not included as a claim for relief in the petition for writ of habeas corpus. Respondent submits, therefore,

that it cannot serve as a basis for an evidentiary hearing in this Court since this Court has no jurisdiction to consider an issue that is not before it. Further, as to the specific complaint attacking the failure to find the existence of the specific disorders, that issue was not raised in the State Supreme Court and therefore is procedurally defaulted, and this Court is barred from reviewing it in the absence of cause and prejudice. See, *O'Sullivan v. Boerckle*, __ U.S. __, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999).

Even if this claim is considered solely for the purpose of assessing petitioner's compliance with §2254(e)(1), it is without merit. All of the mental health experts who examined petitioner found that he satisfied the two prong test for competency under *Ford* and *Van Tran*. The Tennessee Supreme Court recognized that:

The evidence in this record fully supports the trial court's finding that the appellant is competent. Dr. Merikangas admitted that the appellant was aware of his impending execution and of the reason for the execution, but he attempted to draw a distinction between "understanding" and "awareness," a distinction which, as we have just concluded, does not exist. While Dr. Kenner opined that the appellant will become incompetent as his execution approaches, Dr. Kenner admitted that the appellant had been competent during his last interview. Dr. Matthews, Dr. Martell, and Dr. Walker all testified that the appellant had the mental capacity to understand the fact of his impending execution and the reason for it, and Dr. Meltzer's report was consistent with their testimony. Moreover, the appellant's conduct both before

and during the hearing is further support for the trial court's finding of competency. The appellant has already chosen a method of execution. He has indicated that he would like to be allowed to donate his organs. He has indicated that, if offered, he will refuse to accept any sedatives prior to his execution because he "think[s] there might be a God, and I've got enough to deal with him, without being drunk on Valium." Comments made by the appellant during the competency hearing, and set out in the trial court's order which is attached hereto as a appendix, indicated that the appellant understands his current legal proceedings. While he maintains that he is innocent, the record clearly reflects that the appellant knows that he was sentenced to death for murdering a young girl. The appellant's comments asserting his innocence and contending that the purpose of his execution is to prevent the truth from coming out actually demonstrate that he understands the fact of his impending execution and the reason for it.

Coe v. State, __ S.W.3d __, slip op. at 47-48. Furthermore, although petitioner claims that the state courts failed to determine whether he will *become* incompetent at the moment of his execution, no court or mental health professional can be required or expected to predict future psychological lapses. Moreover, the Tennessee Supreme Court noted that should a "substantial change" occur in petitioner's condition as the execution date approaches, state procedures allow for further inquiry into a prisoner's mental health. *Coe*, __ S.W.3d __, slip op. at 47 n. 15.

Similarly, no legal authority exists that requires a court to make a specific diagnosis of the prisoner's medical condition.

Indeed, as the Supreme Court indicated, "the existence of a mental disorder does not automatically translate into a finding of incompetency to be executed." Coe, __ S.W.3d __, slip op. at 47. The respondent notes that even petitioner's experts disagreed as to the diagnosis of his mental condition, although both agreed that he understood the fact of his impending execution and the reason for it.

Petitioner has failed to establish by any standard, much less clear and convincing, either that an error has occurred in this regard or that such error was of a magnitude sufficient to deny him a full and fair hearing.

2. Alleged application of incorrect standard and denial of jury trial.

Regarding the application of the standard to determine competency to be executed, the Tennessee Supreme Court applied the standard enunciated by Justice Powell in *Ford v. Wainwright* and cited as controlling in *Penry v. Lynaugh*, 492 U.S. 302, 333, 109 S.Ct, 2934, 2954 (1989): whether a prisoner understands the fact of his execution and the reason for it. Although the petitioner contends that the standard is unclear because Tennessee courts used the words "understand," "aware" and "realize" interchangeably, the Tennessee Supreme Court pointed out that Justice Powell also used various terms in describing the level of knowledge required to determine competency to be executed. Coe, __ S.W.3d __, slip op. at 46. The Court further indicated that the words are synonymous

in terms of the issue, and added that the evidence "fully supports the trial court's finding that the appellant is competent." *Id.* at 47.

The portion of the issue regarding the denial of a jury trial is not part of the habeas petition and therefore, respondent asserts that it cannot be considered as a part of the evidentiary hearing. As above, however, if this Court chooses to consider it *solely* as it impacts upon petitioner's satisfaction of the burden under §2254(e)(1), this claim is without merit. As noted by the Tennessee Supreme Court in *Van Tran*, "none of the various opinions in *Ford* indicate that a prisoner has a due process right to a jury trial on the issue of competency to be executed." *Coe*, ___ S.W.3d ___, slip op. at 42. Petitioner cites to no contrary authority in his motion and, in fact, but for the summary statement of the issue on page two of his motion, the lack of a jury is not mentioned.

3. Allegation that petitioner was denied an "adversarial process" because the court disclosed and considered all relevant evidence of petitioner's competency to be executed. (Petitioner's Issues (3) and (4)).

The Tennessee Supreme Court noted that the petitioner "consistently misconstrued" the meaning and import of an "adversarial" proceeding. The Court explained that an "adversarial" proceeding requires that the State and the prisoner be permitted an opportunity to "present proof and argument relevant to the issue of competency as well as an opportunity to challenge

the proof presented by the other side." *Coe*, __ S.W.3d __, slip op. at 63. It added that the term "adversarial" in *Ford* was a response to Florida's prohibition on allowing an inmate to present any proof regarding his competency. *Id.* Finally, the Court found that "[t]here is no question that the competency proceeding in this case was conducted in an adversarial manner," and cited to the petitioner's opportunity to "review, challenge and rebut all the information considered by the trial court. . . ." *Id.*

Moreover, although the petitioner asserts a due process right to hide information directly relevant to his competency, including the reports of mental health professionals that examined him immediately before the hearing, the Tennessee Supreme Court rejected his claim. The Court cited both the importance of the free flow of information regarding a prisoner's competency and the lack of any authority that would preclude consideration of this obviously important evidence.

4. Allegation that petitioner was precluded from presenting additional evidence that would have established that he is not competent to be executed.

Initially, respondent notes that the experts that petitioner employed all agreed that he meets the standard enunciated in *Ford*. Accordingly, any claim that additional experts would have demonstrated that he is incompetent is highly suspect. Moreover, petitioner's allegation that Dr. Richard Rogers and Dr. Roy Deal were "precluded" from testifying is patently false; neither doctor

was available at the time of the hearing. Petitioner has also failed to demonstrate that either doctor could have been of any benefit to the petitioner. The Tennessee Supreme Court further noted that the trial court "did not deny the [petitioner] an opportunity to present rebuttal proof [by his own experts]" and added that he was able to present rebuttal proof by another expert, Dr. James Walker.

6. None of the remaining claims render the adversarial hearing unfair.

(a) Allowing all experts to remain in the courtroom during testimony. The Tennessee Supreme Court held that "allowing the mental health experts to remain in the courtroom during the presentation of the proof is entirely consistent with the purpose of competency proceedings which is to accurately ascertain the prisoner's mental state." Coe, __ S.W.3d __, slip op. at 50. Contrary to petitioner's allegation, all experts were permitted to remain in the courtroom. Accordingly, the hearing was clearly "full and fair."

(b) The State did not videotape the mental health evaluations. The petitioner has failed to indicate any authority requiring or permitting counsel to be present during a psychological evaluation. In addition, the petitioner was not precluded from cross-examining the State experts, and did so. Accordingly, this did not deny him a "full and fair" hearing.

(c) The psychological tests. The psychological tests

administered by Dr. Daniel Martell were determined to be reliable and were relied upon by petitioner's own experts. Any claim that the tests were not tested on death row inmates affects only their weight, not their admissibility.

(d) The trial court relied upon evidence from the state which purportedly "contravened criminal statutes designed to prohibit the illegal practice of psychology." This allegation is based upon petitioner's claim that Dr. Daniel Martell's conduct of a forensic evaluation violated Tenn. Code Ann. §63-11-211, which addresses reciprocity and calls for a psychologist who is licensed in another state to obtain written permission from the Board of Psychological Examiners to "practice as a psychologist" in Tennessee.

Initially, as with the above claims, respondent notes that this is not asserted as a basis for relief in the petition and therefore should not be considered by this Court. Further, as it is based entirely upon a state criminal statute (violation is a misdemeanor), it is not a Constitutional claim and therefore is not cognizable in a federal habeas proceeding.

To the extent that it is looked at under the §2254(e)(1) analysis, it is without merit. As the Tennessee Supreme Court noted in its opinion, when the definition of "practice of psychologist" is reviewed, it requires a purpose of "preventing or eliminating symptomatic, maladaptive, or undesired behavior and of enhancing interpersonal relationships, work and life adjustment,

personal effectiveness, behavioral health, and mental health." Tenn. Code Ann. §63-11-203(a). The court noted that its role was to "determine and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Coe*, __ S.W.3d __, slip op. at 55. The court held that "[s]ince Dr. Martell's appearance as an expert witness did not involve either of these two functions for which written authorization must be obtained, §63-11-211(b)(5) did not apply. . . . Since Dr. Martell was not an illegal witness, the appellant's claim that his constitutional rights were violated is totally without merit." *Coe*, __ S.W.3d __, slip op. at 56.

(e) Allegation of prosecutorial misconduct. The basis for this claim arises out of a statement made during pre-trial hearings. As the Tennessee Supreme Court noted, "[t]he comments about which the appellant now complains were made in response to the appellant's request for discovery of any statements that the appellant had made to correctional officers." *Coe* at *20. Although the court correctly found that the remarks did not constitute prosecutorial misconduct, it went on to note that in light of the testimony offered at the hearing which supported those statements, the comments "did not prejudice the [petitioner] much less render the hearing fundamentally unfair. In addition, the record contains no indication that these statements deprived the appellant of due process by causing the trial court to be biased

against him." Coe, __ S.W.3d __, slip op. at 40.

7. Allegation that the State was represented by attorneys who were ethically barred from seeking petitioner's execution.

This claim arises out of petitioner's attempt to have the Office of the State Attorney General & Reporter disqualified because Attorney General Paul Summers previously acted in a judicial capacity in this matter.

Initially, respondent notes that ethical issues surrounding the practice of law by attorneys licensed in the State of Tennessee are governed by the rules and procedures of the Tennessee Supreme Court. That court has already ruled adversely to petitioner on this issue. Coe at *20. As that court noted in the opinion denying relief under the competency claim, the "disqualification issue clearly was resolved by this Court's order of December 9, 1999. . . . Accordingly, the appellant's assertion that the trial court erred by denying the same motion is entirely without merit. Since this is a matter of the Tennessee Supreme Court's interpretation and application of its own rules, it fails to state a cognizable claim for habeas relief, nor does it in any way rebut the presumption that petitioner's hearing was completely full and fair.

Conclusion

Based upon the foregoing, the petitioner is not entitled to an evidentiary hearing

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 hand delivery to:

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on this the 17th day of March, 2000.

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