IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: GREGORY THOMPSON	**) COFFEE COUNTY**
	) ORIGINAL APPEAL NO.
	) M1987-00067-SC-DPE-DD
	) Filed: December 2, 2005

RESPONSE OF THE STATE OF TENNESSEE TO THOMPSON'S MOTION FOR PROTECTIVE ORDER AND ORDER REQUIRING RECIPROCAL DISCOVERY

After more than 20 years of active litigation concerning his mental health, Thompson now asserts a "right to privacy" in his medical and mental health records and requests a protective order from this Court seeking to prevent the State Attorney General — who has defended against Thompson's claims of incompetency in the commission of the offense, to stand trial, to pursue federal habeas proceedings, and now to be executed — from gaining access to records maintained by Thompson's custodian, the Tennessee Department of Correction (TDOC) and/or Riverbend Maximum Security Institution (RMSI). Thompson's allegations concerning the State's access to his medical records are ill-conceived, however, because they are based on a flawed legal premise — that Gregory Thompson, a death-sentenced inmate in state custody, has an absolute "right to privacy" in his medical records as against the State. He does not. While Thompson has some interest in preventing unwarranted *public disclosure* of his medical condition absent a waiver of confidentiality or (as in this case) through initiation of legal proceedings placing his mental condition at issue, he may not prevent access to medical information by his custodian or, where there is a legitimate need

for the information, his custodian's counsel.[1] *See, e.g., Crawford v. Manion*, 1997 WL 148066 (S.D.N.Y. 1997) (release of inmate medical records to Assistant Attorney General of New York did not violate any right to privacy where inmate waived privacy right by bringing lawsuit in which medical history was a pertinent issue).[2] As Thompson's own motion and attachments show, the State Attorney General obtained his institutional files in this case, including medical records, solely for use in connection with competency proceedings initiated by Thompson himself, not for general public disclosure.[3]

Moreover, substantial information about Thompson's medical and mental health condition is already a matter of public record through his own pleadings in state and federal courts, including

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[1]Even in a non-prison setting, a "right to privacy" in one's medical information is neither fundamental nor absolute. *Whalen v. Roe*, 429 U.S. 589, 603-04, 97 S.Ct. 869 (1977) (upholding system of registering users of certain prescription drugs with state). *See also Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994) (inmate's alleged constitutional right to privacy was not violated due to disclosure to corrections officer of inmate's Human Immuno-deficiency Virus (HIV) infection; Constitution did not encompass general right to nondisclosure of private information); *J.P. v. DeSant*, 653 F.2d 1080, 1090 (6th Cir. 1981) ("[T]he Constitution does not encompass a general right to nondisclosure of private information.").

[2]*See also Price v. Johnson*, 334 U.S. 226, 285, 68 S.Ct. 1049, 1060 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."); *Smith v. Fairman*, 678 F.2d 52, 54 (7th Cir. 1982) (diminution of one's personal privacy necessary follows as a result of incarceration).

[3]Thompson's reliance on the protective order entered by the Davidson County Chancery Court is misplaced. That order, which created a "Chinese Wall" between attorneys representing the Tennessee Department of Correction as to Thompson's medical care and attorneys in the Criminal Justice Division of the Attorney General's Office (who were then representing the Warden and the State in connection with Thompson's federal habeas and error coram nobis proceedings), was valid only in connection with Thompson's conservatorship, which was being contested by Thompson's federal habeas counsel. Thompson's conservatorship was terminated in 2003 at the request of his own counsel, thus dissolving any related injunctive orders entered by the Chancery Court. *Thompson*, 134 S.W.3d at 179. Moreover, Thompson's contention that counsel for the State acted improperly in obtaining a subpoena for his institutional records is incorrect. The subpoena in question was issued on March 1, 2004, to obtain certified copies of Thompson's institutional records for use in connection with proceedings in the Coffee County Circuit Court, *State v. Gregory Thompson*, No. 20,014, following remand by this Court on February 25, 2004. (Copy attached)

this one. Thus, any privacy interest in medical information that an inmate may possess as a general matter is greatly reduced in Thompson's case. *See, e.g., McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 77-78 (8th Cir. 1976) (where substantial information regarding federal prisoner's mental competency was a matter of public record by virtue of competency proceedings, publication of portions of record not read in open court did not support invasion-of-privacy claim). Thompson can hardly be heard to complain at this juncture about the State's efforts to investigate his mental health history, given his long-standing allegations of incompetence.[4]

To make his case of incompetence for execution, Gregory Thompson's counsel has had full access to Thompson's medical records, his institutional records, and to Thompson himself. Thompson's counsel also has the benefit of multiple mental health experts, who have never been

[4]Thompson has made his mental condition an issue since he was arrested for the murder of Brenda Lane in 1985. Prior to trial, at defense counsel's request, Thompson was committed for a thirty-day mental evaluation at Middle Tennessee Mental Health Institute, after which he was found to be competent to stand trial, sane at the time of the offense, and not committable. *State v. Thompson*, 768 S.W.2d 239, 248 (Tenn. 1989). He presented the testimony of a clinical psychologist at the sentencing phase of his murder trial. *Id.* at 244. In post-conviction proceedings, Thompson challenged the performance of trial counsel for failing to investigate fully certain head injuries and "mental problems" that he alleged could have formed a basis for an insanity defense or mitigation of his sentence. *Thompson v. State*, 958 S.W.2d 156, 164 (Tenn. 1997). Thompson's entire institutional medical history and records up to that point — spanning nearly ten years — was introduced by Thompson himself as an exhibit to the post-conviction hearing. *Thompson v. State*, No. 01C01-9506-CC-00180, Evid. Hearing Vol. I, Exh. 1. Those same records were filed in the federal habeas corpus proceeding, supplemented by additional records and allegations of current and past mental illness. *Gregory Thompson v. Ricky Bell*, No. 4:98-cv-6 (U.S.D.Ct. E.D.) (Edgar). In 2001, Thompson initiated error coram nobis proceedings, asserting that a January 2001 affidavit of a mental health professional at the Special Needs Facility of TDOC should be considered as newly discovered evidence "relating to [his] mental capacity at the time of the offense, trial and/or post-conviction proceedings." Thompson attached and relied upon more "confidential" medical records in support of that pleading. In March 2004, Thompson filed nearly a hundred pages of medical records as an exhibit to his "Petition Providing Notice of Incompetency to be Executed, Requesting a Hearing on Competency to Be Executed, and Requesting an Order Finding Gregory Thompson Incompetent to Be Executed and Isuance of a Reprieve." Those same records were filed in this Court one month earlier as attachments to Thompson's "Notice of Incompetency to Be Executed." In the current proceeding, Thompson has made even more of his records public by filing them as attachments to his motions in September 2005 and November 2005.

denied reasonable access to Thompson for evaluation purposes by any prison or other state official, as well as the assistance of attorneys and investigators employed by the federal government, though not specifically appointed in these state proceedings. Thompson has requested and received numerous documents from TDOC and/or RMSI and (though not required by any of the Court's previous orders or decisions) from the State Attorney General's Office. Mental health evaluations by Thompson's experts either have been performed on July 28, 2005, November 7, 2005, and November 16, 2005, or scheduled for December 12, 2005.

In fact, the only materials referenced in Thompson's current motion that he does not already have are recordings of his telephone conversations, which the State maintains are confidential "investigative records" and/or "reports of the internal affairs division" under Tenn. Code Ann. § 10-7-504(a)(8) and, thus, not open to inspection by members of the public.[5] Such information may be disclosed to the public "only in compliance with a subpoena or an *order of a court of record*." Tenn. Code Ann. § 10-7-504(a)(8) (emphasis added). The State Attorney General, acting in his official capacity as legal counsel for the State, TDOC and/or the Warden of RMSI, is not deemed a "member of the public" for purposes of the Tennessee Public Records Act. *State v. Fears*, 659 S.W.2d 370, 376 (Tenn. Crim. App. 1983).

Moreover, formal discovery at this stage of the proceedings is not warranted under any order or decision of this Court. Thompson's reliance on *Van Tran* is misplaced because the portion to

[5]Although the State has declined to release the actual recordings of the calls, Thompson has been provided copies of his telephone logs showing numbers dialed from his account. Presumably, counsel has access to both the caller (Thompson himself) and the recipient(s) of any of the telephone calls noted in those logs. And both participants in the calls are fully aware — through a recorded message — that their conversations are subject to monitoring and recording. *See, e.g., Smith v. Bradley*, 53 F.3d 332 (6th Cir. 1995) (no reasonable expectation of privacy in inmate telephone conversations, particularly where participants are told they are being monitored).

which he refers deals with proceedings in the trial court following remand by this Court for evidentiary proceedings. *Van Tran v. State*, 6 S.W.3d 257, 271 n.15 (Tenn. 1999). Furthermore, discovery disputes are more appropriately resolved by the trial court only if and when this Court determines that Thompson has made a threshold showing sufficient to undermine the previous competency determination of this Court. Because Thompson's submissions fail to make that showing (*See* Response of the State of Tennessee to Thompson's Supplemental Filing in Support of *Ford/Van Tran* Claims, filed contemporaneously herewith), his request for discovery is premature and should be denied.

For these reasons, the Court should deny Thompson's motion for protective order and reciprocal discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been forwarded by First-Class U.S. mail, postage prepaid, to Michael Passino, 323 Union Street, 3rd Floor, Nashville, TN 37201, on the _____ day of December, 2005.

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JENNIFER L. SMITH
Associate Deputy Attorney General