IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GREGORY THOMPSON	)	
	)	
	)	**No. M1987-00067-SC-DPE-DD**
v.	)	Coffee County Circuit Court
	)	No. 20,014
	)	**DEATH PENALTY CASE**
STATE OF TENNESSEE	)	**Filed March 19, 2004**

BRIEF OF APPELLANT GREGORY THOMPSON

On appeal from the Coffee County Circuit Court's order denying a hearing on the issue of competency to be executed.

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JURISDICTIONAL STATEMENT

On February 25, 2004, this Court set Mr. Thompson's execution date for August 19, 2004, and remanded the case to the court of original conviction for proceedings to determine Mr. Thompson's competency to be executed. This is an appeal from the March 8, 2004, order of the Circuit Court of Coffee County denying an evidentiary hearing on the issue of competency to be executed. A notice of appeal from the Circuit Court's order was filed on March 9, 2004. This Court automatically reviews decisions of the trial court in competency proceedings arising out of this Court's order setting an execution date. *Van Tran v. State*, 6 S.W.3d 257, 272 (1999).

STATEMENT OF THE ISSUES

I. The trial court erred when it denied a hearing on Mr. Thompson's competency and found Mr. Thompson competent to be executed.

II. The trial court's order is not entitled to deference because it fails to reflect a reliable and fair resolution of the disputed factual and legal issues.

III. The trial court erred when it did not rule on and grant co-counsel's motion to withdraw.

STATEMENT OF THE CASE

On January 21, 2004, Attorney General Paul Summers asked this Court to set an execution date for Gregory Thompson.

On February 2, 2004, Mr. Thompson responded to the state's request by opposing the setting of an execution date, providing notice of his present incompetence to be executed, and requesting a certificate of commutation.

On February 25, 2004, this Court determined that "Thompson [] raised the issue

of his present competency to be executed in accord with the procedures adopted ... in *Van Tran v. State*" and remanded this case to the Circuit Court of Coffee County for a competency determination "including the initial determination of whether he has met the required threshold showing." *State v. Thompson*, No.M1987-00067-SC-DPE-DD, order (Tenn. 2004). This Court appointed Michael J. Passino lead counsel for Mr. Thompson and the 14th Judicial District Public Defender's Office as co-counsel. This Court also scheduled Mr. Thompson's execution for August 19, 2004.

On March 1, 2004, a 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 issuance of a reprieve was filed in the Circuit Court of Coffee County (hereinafter referred to as "Petition"). (R.1).

Also on March 1, 2004, District Public Defender, B. Campbell Smoot, moved both this Court and the lower court to withdraw as counsel due to a conflict of interest. (R.264).

On March 4, 2004, the State of Tennessee filed its response. (R.268).

On March 8, 2004, the Coffee County Circuit Court entered an "order denying hearing on issue of competency to be executed" (hereinafter referred to as "Order"). (R.308).

On March 9, 2004, a notice of appeal was filed on behalf of Mr. Thompson. (R.312).

FACTS OF THE CASE

The following facts regarding Mr. Thompson's present mental state were submitted to the lower court:

I. Prison Records Conclusively Establishing Mr. Thompson's Long History Of Serious Mental Illness Marked By Persistent Delusional Thoughts.

Since his incarceration on death row, prison doctors have treated Mr. Thompson for his severe mental illness.[1] They have prescribed him anti-psychotic, mood stabilizing and anti-depressant medication. Mr. Thompson's prison file consists of over four thousand pages documenting his illness.[2] Despite the fact that Mr. Thompson has been actively treated by mental health personnel and medicated throughout these eighteen years, at least one aspect of his mental illness has never abated; his disorganized and delusional thought process.[3]

Prison records document that at times Mr. Thompson believes he is God and in control of the world.[4] He has believed the victim in this case is alive and working at the Lois DeBerry Special Needs Facility.[5] He believes, despite his death sentence, that he will be released from prison either because Big Bird or God is on his side[6] or because

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[1]*See* Petition, Exhibit 2 (R.51), partial prison records of Gregory Thompson containing an original Bates number and electronic Bates numbers 1 - 96 located at the bottom center of each page.

[2]*Id*. ,Exhibit 1 (R.48), Affidavit of Dana C. Hansen Chavis, ¶5.

[3]*Id.*, Exhibit 2 (R.51).

[4]*Id.* (R.101), original Bates number 0000133, electronic Bates number 51; (R.118) original Bates number 0001667, electronic Bates number 68; (R.119) original Bates number 0001672, electronic Bates number 69.

[5]*Id.*(R.131-132)., no original Bates number, electronic Bates number 81-82.

[6]*Id.*(R.127), no original Bates number, electronic Bates number 77.

he is a wealthy songwriter[7] or simply because that is what is going to happen.[8]

The mental health treatment plan for 2003 indicates a "history of mood disorder – depression and suicidal gestures, denies current suicidal ideation." Mr. Thompson's diagnosis reflects "bipolar disorder, most recent [episode] depressed with psychotic features."[9]

Medication orders dated December 2003 show Mr. Thompson's prescriptions continue as Prolixin Decanoate (25 mg) every two weeks, Lithium (1500 mg) per day, Cogentin (2 mg), and Paxil (40 mg).[10]

II. Uncontroverted Record Facts Of The Conservatorship Proceedings Conclusively Prove The Severity Of Mr. Thompson's Mental Illness.

Just three years ago, State Attorney General Paul Summers requested that a court appoint a conservator to Gregory Thompson in order to forcibly medicate him because he "is incapable of making rational decisions."[11] Attorney General Summers asserted that Mr. Thompson "is in need of protection and assistance by reason of the illness rendering him presently disabled..."[12] Supporting the State Attorney General's request was a competency evaluation by Dr. Casey C. Arney, a treating mental health professional at the Special Needs Facility of the Tennessee Department of Corrections.

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[7] *Id.* (R.117), original Bates number 0002825, electronic Bates number 67.

[8] *Id.* (R.140), original Bates number 0000044, electronic Bates number 90.

[9] *Id.* (R.141-142), original Bates #000046, 72, electronic Bates #91, 92

[10] *Id.* (R.144), electronic Bates #94 (no original Bates number)

[11] *Id.*, Exhibit 3 (R.148), Petition by Attorney General and Reporter Paul G. Summers For Appointment of Conservator at p.1.

[12] *Id.* (R.148)

Dr. Arney reported:

> ...Mr. Thompson is a 38 year old gentleman with a long history of Bipolar Disorder and psychotic symptoms. He has severe symptoms of mania with racing tangential thoughts, pressured speech, in delusional grandiosity. He becomes severely agitated and hostile at times. He has assaulted staff in the recent past which appears to be related to his mental illness. It has been recommended by the treatment review committee to be treated with involuntarily medication [sic] and have a conservator assigned to him.
>
> It is my opinion that Mr. Thompson lacks the insight into his illness to make decisions regarding mental health and medical treatment at this time. I believe that a conservator is necessary to make appropriate decisions regarding his care and without such conservatorship, harm is likely to come to Mr. Thompson or others as a result of his mental illness. Mr. Thompson's illness is chronic and fluctuating in nature, therefore extended periods of marked improvement are not expected. [R.151]

Attorney General Summers urged the state court find Mr. Thompson "incapable of managing his person ... based upon his present mental condition"[13] and "in view of the seriousness of the Respondent's [Mr. Thompson's] condition the Court immediately appoint a Guardian ad Litem and expedite these proceedings."[14]

By Order of May 10, 2001, the court agreed with Attorney General Summers' assessment that Mr. Thompson was "disabled" under the law and "incapable of managing his own affairs."[15]

Following several hearings on a second petition to terminate the conservatorship, on October 15, 2003, the Probate Court for Davidson County, Tennessee entered an Order terminating the conservatorship of Mr. Thompson.[16] That

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[13] *Id.* at p. 2 (R.149).

[14] *Id.*at p. 3 (R.150).

[15] *Id.,* Exhibit 4 (R.155), Case No. 01-1041-II, Order appointing conservator.

[16] *Id.,* Exhibit 6 (R.168), Case No.01P-1394, Order terminating conservatorship.

Court found "[t]he evidence is not controverted that he is mentally ill. Clearly, Gregory Thompson is mentally ill. The definition and extent and diagnoses may vary. But he's clearly mentally ill."[17] Specifically, the Court found Mr. Thompson "could go into a manic phase at any point."[18] In dissolving the conservatorship, the Court did not overturn the prior ruling that Mr. Thompson was "disabled," but determined there were least restrictive alternatives available to adequately protect Mr. Thompson.[19]

The Probate Court's findings were not appealed by the State.

III. Expert opinion

The lower court was presented with recent reports of three experts all who opined to a reasonable degree of medical certainty that Gregory Thompson is presently incompetent to be executed.

John S. Rabun, M.D.

After examining Gregory Thompson on March 17, 2003, and January 19, 2004, John S. Rabun, M.D., issued a report dated January 28, 2004, in which he opines that Gregory Thompson presently lacks the mental capacity to understand the fact of the impending execution and the reason for it.[20] Dr. Rabun's report lists eight factors which demonstrate that Mr. Thompson lacks the capacity to be executed:

i. During both interviews, Mr. Thompson discussed his delusional belief that

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[17] *Id.,* Exhibit 7 (R.180), 9/9/03 Hearing Transcript at p.172.

[18] *Id.*, Exhibit 6 at pp.172-173 (R.175-176).

[19] *Id.*, Exhibit 6 at p.172 (R.175). This inquiry was mandated by TENN. CODE ANN. § 34-1-127.

[20] *Id.*, Exhibit 8, Report of John S. Rabun, M.D. at p.14 (R.195).

he buried “one million dollars, two gold bars, one Grammy Award, and two stock certificates from Quaker State and Apple Computers” near a church in Georgia. According to Mr. Thompson, the investigator for the Federal Defender Services and his attorneys should be trying to retrieve these items to use as a “mitigator.” He discussed with the examiner that by “mitigator” he meant that these items “prove” that he can “take care of myself, and I don’t need any help.” He related that the money he has buried will “prove” to the court that he can take care of himself because “I won’t need to steal like a criminal.” He contended that if his attorneys present this “mitigator” to the court, he will be a “free man.” Mr. Thompson’s grandiose delusions about his buried money in Georgia and how it can be used as a “mitigator” suggests that he lacks the capacity to appreciate why he is being punished.

ii. During both interviews, Mr. Thompson reported his delusional belief that he is actually a “lieutenant” in the navy. He discussed his delusional beliefs about the navy in the first interview, but did not fully connect those beliefs with his execution until the second interview. He related in the second interview that being a “lieutenant” in the navy means that he should have another trial because he did not have the correct “jury” in his first trial. Mr. Thompson told the examiner that his attorneys should seek his military records, which prove that he was actually a lieutenant. He indicated that his attorneys can then present this information to the court, and he will have to have another trial. He said that because he is a “lieutenant,” his jury must be made up of “professionals,” and not “ditch dwellers, no housewives, no store clerks.” He informed the examiner several times that he was not provided with the correct jury, so the original trial is invalid. Mr. Thompson’s delusional statements about his naval career and how it is connected to his trial suggests that he lacks the capacity to appreciate why a jury of his peers sentenced him to death.

iii. The examiner asked Mr. Thompson what his attorneys should be doing in his case at the present time. Mr. Thompson replied, “They should he getting in touch with a navy recruiter, and he should get in touch with the Secretary of the Navy, and all this evidence should be thrown his way, because he has the right to judge.” Mr. Thompson then turned and asked the attorney who was present in the second interview, “isn’t there an advocate general?” The examiner countered by asking Mr. Thompson what he meant by “evidence.” Mr. Thompson again reported that his “evidence” was “the money, and the two check stubs that I wanted checked out, and this should give him (the Secretary of the Navy) the knowledge of why he should help.” Mr. Thompson explained that by “help,” he meant, “help me” with “mitigation at my trial.” Mr. Thompson’s delusional discussions about how the navy should be involved in his case, and how obvious delusional evidence could aid him, suggested that he perceives that he can receive another trial for the instant matter. In fact,

his discussions suggested that he holds magical, near child-like reasoning about possible avenues of appeal in the present case.

iv. Although Mr. Thompson can state that he was sentenced to death, he holds the delusional perception that he will not be executed. When the examiner asked Mr. Thompson if the State of Tennessee can execute him, he replied, "I don't think they can, all the mitigation, the songs, the money, we know who did the crime, me, but they can't execute me because of the Secretary of the Navy, only he handles all the officers, and there is a million dollars in my clothes in Thomaston, Georgia, on East Walker Street near a Baptist church." Mr. Thompson's statement to the examiner suggests that although he knows his sentence is death, he does not appreciate that the State of Tennessee can legally execute him. Instead, he believes for delusional reasons that he will not be executed. He therefore lacks the capacity to understand that his legal execution is approaching. Further, Mr. Thompson's delusional statement suggests that he lacks the capacity to prepare himself for his death with a rational frame of mind.

v. In the first interview, while discussing how executions are carried out in Tennessee, Mr. Thompson told the examiner that he wanted "the electric chair" because, "I am used to being shocked, every time I touch my TV, I get shocked, or when I went to a chiropractor in 1982, he twisted my neck, and it felt like a shock." Mr. Thompson's statement suggests that, due to his mental disease, he lacks the capacity to appreciate the finality of the execution process. Instead, he compares lethal electrocution to common static electricity or a chiropractic procedure.

vi. Mr. Thompson told the examiner that he believed it was realistic to assume that he will be "discharged" and can return to live in "Hawaii." His statement about his "discharge" from prison is not merely wishful thinking, or an attempt to avoid thinking about the inevitable. Instead, his conclusion that he will be "discharged" from prison flows from his grandiose delusion that he has a million dollars and is a lieutenant in the navy, and this information can be used as a "mitigator." Therefore, Mr. Thompson's statement that he will be "discharged" from prison suggests that his mental disease has caused him to be unaware of the punishment he is scheduled to suffer.

vii. Mr. Thompson was questioned about what would happen to his soul after his execution. Mr. Thompson replied that he believes he is a "Klingon." He then told the examiner, "I drink blood wine, and howl at the moon," adding that his soul will go to "Valhalla." Subsequently, in a loose and tangential manner, Mr. Thompson suddenly said, "the Muslims are hairy people, I will have to fight them too." Mr. Thompson then told the examiner that he "made up the Klingons so that young people would have

a strong black person on TV." Importantly, Mr. Thompson's statement about being a "Klingon" and going to "Valhalla" are a product of his mental disease and suggests that he lacks the capacity to rationally prepare himself for his own death.

viii. Mr. Thompson reported that he should receive a "mistrial." His statement is not merely wishful thinking or that of a rational individual arguing a legal point. Rather, when examined further, Mr. Thompson reveals that because his military record with the "Secretary of the Navy" proves he is a "lieutenant," this will allow for a "mistrial." He explained to the examiner in a delusional, convoluted manner that even though the murder happened within the State of Tennessee, he is "Federal property" due to his "officer" status. He informed the examiner that "the State can't hold Federal property." The examiner inquired as to why the State of Tennessee has been able to hold him for 19 years if he is correct, but Mr. Thompson replied, "Because I haven't been doing anything to release myself." He then asserted that he would not be executed because of his connection with the navy. Mr. Thompson's discussion about why the State of Tennessee cannot execute him suggests that due to his mental disease, he lacks the capacity to rationally perceive the connection between his crime and the punishment imposed by the State.[21]

On balance, Dr. Rabun opines with reasonable medical certainty that Gregory Thompson lacks the mental capacity to understand the fact of the impending execution and the reason for it.

Faye E. Sultan, Ph.D.

On January 28, 2004, Faye E. Sultan, Ph.D., examined Gregory Thompson. Dr. Sultan has monitored Mr. Thompson's psychological functioning since 1998. In a report dated February 27, 2004, Dr. Sultan reports that in a non-medicated state, Mr. Thompson is floridly psychotic and not competent to be executed.[22] During such times, "Mr. Thompson was completely unaware ... of the Death Sentence ... the crime for which he received that sentence... [and] clearly did not understand that the State was

[21] *Id.* at pp. 12-14 (R.193-195).

[22] *Id.*, Exhibit 12, report of Faye E. Sultan, Ph.D. p.2 (R.232).

seeking to execute him or that his death would be the consequence of such an execution."[23]

Dr. Sultan reports "Mr. Thompson is currently participating in a regular regimen of medications prescribed by the mental health staff at Riverbend" but "[e]ven with such medication, Mr. Thompson continues to exhibit the major symptoms of Schizophrenia."[24] Dr. Sultan finds that "[a]lthough Mr. Thompson can say that he knows he has been sentenced to death, he holds the delusional belief that it is impossible for him to be executed."[25] In Dr. Sultan's opinion "Mr. Thompson currently lacks the capacity to understand the fact of his scheduled execution or the reason for it... further ... Mr. Thompson lacks the capacity to assist in his defense or to prepare himself for his death."[26]

George W. Woods, Jr., M.D.

On February 17, 2004, George W. Woods, Jr., M.D., examined Mr. Thompson. In a report dated February 27, 2004, Dr. Woods concludes "Mr. Thompson suffers from a Schizophreniform Spectrum Disorder, Schizophrenia, undifferentiated type. His Schizophrenia is severe and ongoing."[27] Dr. Woods further reports, "[i]t is also my professional opinion, which I hold to a reasonable degree of medical certainty, that Mr.

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[23] *Id.* (R.232).

[24] *Id.* (R.232).

[25] *Id.* at p.3 (R.233).

[26] *Id.* at p.3. (R.233).

[27] *Id.,* Exhibit 10 (R.208), Report of George W. Woods, Jr., M.D., p.2.

Gregory Thompson is currently incompetent to be executed."[28]

Specifically, Dr. Woods reports that "Mr. Thompson believes that he cannot die ... that he will not be executed ... and he will receive a military tribunal which will exonerate him."[29] Further, Mr. Thompson indicated that electrocution was his execution method of choice "because he has been electrocuted many times in the past, and it is more comfortable to him than needles."[30] Mr. Thompson denies that electrocution would eliminate his life.[31] "When Mr. Thompson was asked what would occur to him after death, he noted that he was going to be in Hawaii..."[32] Dr. Woods finds that, although not mentally retarded, Mr. Thompson "is so impaired by his mental illness, he clearly fits Atkins vs. Virginia's description of those deficits that preclude execution of the mentally retarded."[33]

IV. Legal team opinion

The lower court was presented with two lay opinions that Gregory Thompson is presently incompetent to be executed.

On January 22, 2004, undersigned counsel spoke with Mr. Thompson by telephone.[34] Mr. Thompson was informed the State had filed a motion to set his

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[28]*Id.* (R.208).

[29]*Id.* at p.3 (209).

[30]*Id.* (R.209).

[31]*Id.* (R.209).

[32]*Id.* (R.209).

[33]*Id.* at p.7 (R.213).

[34]An expressed doubt by a lawyer in close contact with her client concerning the competency of her client is unquestionably a factor to be considered by a court making

execution date. He giggled and said, “Don’t worry. God told me yesterday I’m not going to die.” When Mr. Thompson was asked what he believed was going to happen, he replied, “I’m either going to Hawaii or I’m going back home.”[35] It is the opinion of Mr. Thompson’s current lawyer, based upon close contact and interaction with Gregory Thompson, that he is incompetent to be executed.[36]

On February 27, 2004, Mr. Thompson’s investigator informed him that an execution date has been scheduled for August 19, 2004. Mr. Thompson replied, “It is more important than ever that you find my money and uniform.”[37] It is the opinion of Mr. Thompson’s current investigator, based upon close contact and interaction with Gregory Thompson, and the fact that Mr. Thompson’s beliefs are not reality based, that he does not understand the reasons for and the implications of the August 19th execution date.[38]

V. State’s Response

In its response to Mr. Thompson’s petition the State did not dispute the facts submitted in support of Mr. Thompson’s incompetency but merely offered a different interpretation of selected portions of the facts and expert reports and/or mischaracterized those facts and expert reports. The State did not submit any additional facts.

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a competency inquiry. *Drope v. Missouri*, 420 U.S. 162, 177 (1975).

[35]*Id.,* Exhibit 1 (R.49), Affidavit of Dana C. Hansen Chavis ¶6.

[36]*Id.* at ¶7 (R.49).

[37]*Id.*, Exhibit 14 (R.251), Affidavit of Michael R. Chavis ¶4.

[38]*Id.* at ¶9 (R.252).

VI. Circuit Court's Order

The lower court held that Mr. Thompson's petition did not reach a "high threshold showing" necessary to require a hearing... (Order p.3)(R.310). The lower court made no independent findings of fact but simply adopted the State's response to support its order (*id.* at p.2)("In this case many of the assertions made by the State in response to said petition came to the mind of the undersigned while reading the petition, and the State's response generally enunciates the opinion and findings of this Court.")(R.309).

ARGUMENTS

I. THOMPSON SATISFIED THE THRESHOLD SHOWING REQUIRED FOR AN EVIDENTIARY HEARING

In *Van Tran,* 6 S.W.3d at 269, this Court set forth the test for determining whether an evidentiary hearing is mandated: (1) the petitioner must make a threshold showing that he is "presently incompetent" (2) that showing must be "sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency" and (3) if the trial court is satisfied that there exists a genuine disputed issue "then a hearing should be held."

A. Thompson raised a genuine, triable issue that his competency is seriously in question.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the plurality stated "[i]t may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity." *Id.* at 417 *citing Pate v. Robinson*, 383 U.S. 375, 387 (1966)(hearing on competency to stand trial required if "sufficient doubt" of competency exists). The current proceeding is Mr. Thompson's first litigation of a *Ford* claim under an impending execution date. Justice

Powell, in concurrence, stated that a "petitioner does not make his claim of insanity against a neutral background." *Ford*, 477 U.S. at 425. Justice Powell noted that the petitioner will have undergone prior proceedings in which he "must have been judged competent to stand trial or his competency must have been sufficiently clear as not to raise a serious question..." *Id.* at 426. Accordingly, this "background" of prior competency justifies a presumption that the petitioner is competent and "may require a substantial threshold showing of insanity merely to trigger the hearing process." *Id. citing Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985). In Mr. Thompson's case, there exists over eighteen (18) years of "background" establishing his diminished and impaired mental capacity. This background includes the Tennessee Attorney General's record statement that Mr. Thompson "is incapable of making rational decisions"[39] and prior court findings that Mr. Thompson is "clearly mentally ill"[40] and "could go into a manic phase at any point."[41]

Nevertheless, Tennessee automatically requires a *Ford* litigant to satisfy a "threshold showing" before being given an opportunity to litigate the competency issue in an adversarial nature and required Mr. Thompson to make this showing despite an absence of reasons justifying this preliminary showing.

The decision to grant an evidentiary hearing turns on whether "the prisoner has made the required threshold showing that his or her competency to be executed is

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[39]Petition, Exhibit 3(R.148), Petition by Attorney General and Reporter Paul G. Summers For Appointment of Conservator at p.1.

[40]Petition, Exhibit 7 (R.180), 9/9/03 Hearing Transcript at p.172.

[41]*Id.* Exhibit 6 at pp.172-173 (R.175-176) .

genuinely in issue." *Van Tran*, 6 S.W.3d at 268.

> This burden may be met by the submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency. In most circumstances, the affidavits, depositions, or medical reports attached to the prisoner's petition should be from psychiatrists, psychologists, or other mental health professionals. If the trial court is satisfied there exists a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held.

Id. at 269 *citing State v. Harris*, 114 Wn.2d 419, 789 P.2d 60, 69-70 (Wash. 1990)("the court is required to hold an evidentiary hearing if competent evidence is submitted which raises a triable issue of incompetence or insanity.")[42].

Notably *Van Tran* discusses Ford's acquiescence to requiring in some instances, a "high threshold showing" before affording a hearing on competency.[43] However, *Van Tran* does not explicitly adopt this condition precedent to a hearing; instead, *Van Tran* requires simply a "threshold showing" which is satisfied by the submission of evidence demonstrating a genuine question regarding the condemned's present competency. *Coe v. Bell*, 209 F.3d 815, 821 (6th Cir. 2000). Accordingly, the trial court erred by placing a higher burden upon Mr. Thompson requiring him to satisfy a "high threshold showing" (Order at p. 3)(R.310).

Under the proper standard, Mr. Thompson's medical records, the record facts of the conservatorship proceedings, the reports of Dr. Rabun, Dr. Sultan and Dr. Woods, and the affidavits of Mr. Thompson's attorney and investigator present "credible

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[42]In *Harris*, the court justified a "substantial threshold requirement" when presented with a conclusory petition containing "specious insanity claims." *Harris*, 789 P.2d at 69.

[43]The Supreme Court expressly noted the State's ability to provide greater protections to its citizens. *Ford*, 477 US. at 422 n.3.

evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency." *Van Tran*, 6 S.W.3d at 269. There is no dispute that Mr. Thompson suffers from a long history of mental illness.[44] The expert reports submitted to the lower court reflect a diagnosis of Mr. Thompson's mental illness as Schizophrenia.[45] The medical records,[46] the record facts of the conservatorship proceedings[47] and expert reports fairly raise the issues of Mr. Thompson's mental capacity to understand the fact of the impending execution and the reason for it,[48] his capacity to appreciate why he is being punished,[49] his capacity to rationally prepare himself for his own death,[50] his capacity to understand that his execution is

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[44]Petition, Exhibit 3 (R.151), Petition by Attorney General and Reporter Paul G. Summers For Appointment of Conservator, attached competency affidavit of Dr. Arney.

[45]Petition, Exhibit 8 (R.190-192), Report of John S. Rabun, M.D. at pp.9-11; Exhibit 12(R.231), report of Faye E. Sultan, Ph.D. p.1; Exhibit 10 (R.208), Report of George W. Woods, Jr., M.D., p.2.

[46]Petition, Exhibit 2 (R.50), partial prison records of Gregory Thompson containing an original Bates number and electronic Bates numbers 1 - 96 located at the bottom center of each page.

[47]Petition, Exhibit 4 (155), Case No. 01-1041-II, Order appointing conservator; Exhibit 6 (R.168), Case No. 01P-1394, Order terminating conservatorship; Exhibit 6 (R.175-176), 9/9/03 Hearing Transcript at pp. 172-173; Exhibit 10 (R.208,210-211), Report of George W. Woods, Jr., M.D., pp.2, 4-5.

[48]Petition, Exhibit 8 (R.195), Report of John S. Rabun, M.D. at p.14; Exhibit 12 (R.233), report of Faye E. Sultan, Ph.D. p.3; Exhibit 10 (R.208), Report of George W. Woods, Jr., M.D., p.2.

[49]Petition, Exhibit 8 (R.193-194), Report of John S. Rabun, M.D. at pp.12-13.

[50]Petition, Exhibit 8 (R.194-195), Report of John S. Rabun, M.D. at p.13, 14; Exhibit 12 (R.233), report of Faye E. Sultan, Ph.D. p.3; Exhibit 10 (R.209), Report of George W. Woods, Jr., M.D., p.3.

approaching,[51] his capacity to appreciate the finality of his execution,[52] and his capacity to rationally perceive the connection between his crime and the punishment of death.[53] The lay opinions presented to the lower court identify Mr. Thompson's response to the State's efforts to execute him[54] and a lack of understanding regarding the August 19th execution date.[55] These opinions raise a substantial question about Mr. Thompson's present competency to be executed. Accordingly, the lower court erred when it failed to determine whether a substantial question about Mr. Thompson's competency was raised by the evidence and instead, determined that the petition did not reach a "high threshold showing" to require a hearing (Order at p. 3)(R.310).

B. The lower court misapplied the Constitutional standard governing competency to be executed.

"From medieval times the common law has recognized that the insane or mentally incompetent should not be executed." *Van Tran v. State*, 6 S.W.3d at 262. "It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty

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[51]Petition, Exhibit 8 (R.194-195), Report of John S. Rabun, M.D. at p.13, 14; Exhibit 12 (R.232-233), report of Faye E. Sultan, Ph.D. p.2, 3; Exhibit 10 (R.209), Report of George W. Woods, Jr., M.D., p.3, 5, 6.

[52]Petition, Exhibit 8 (R.194), Report of John S. Rabun, M.D. at p.13; Exhibit 12 (R.233), report of Faye E. Sultan, Ph.D. p.3; Exhibit 10 (R.209,211,212) , Report of George W. Woods, Jr., M.D., p.3, 5, 6.

[53]Petition, Exhibit 8 (R.195), Report of John S. Rabun, M.D. at p.14; Exhibit 12 (R.232), report of Faye E. Sultan, Ph.D. p.2; Exhibit 10 (R.209), Report of George W. Woods, Jr., M.D., p.3.

[54]Petition, Exhibit 1 (R.48), affidavit of Dana C. Hansen Chavis.

[55]Petition, Exhibit 14 (R.251), affidavit of Michael R. Chavis.

or its implications." *Ford v. Wainwright*, 477 U. S. 399, 417 (1986)(Marshall, J., joined by Brennan, Blackmun and Stevens, JJ.); *see also id.* at 421 (Powell, J., concurring)("The more general concern of the common law – that executions of the insane are simply cruel – retains its vitality."). The prohibition on executing the insane was first recognized by Tennessee in 1910. *Jordan v. State*, 124 Tenn. 81, 87, 135 S.W. 327, 328 (Tenn.1910). Accordingly, if after judgment a prisoner becomes *non compos* "he shall not be ordered for execution" and the judge "ought to reprieve him." *Van Tran*, 6 S.W.3d at 262 (finding "a madman is punished by his madness alone").

With the seminal decision of *Ford v. Wainwright*, 477 U.S. 399, 409 (1986), the United States Supreme Court concluded that the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane. The Court found that "[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." *Id.* at 410.

In *Van Tran v. State*, *supra,* this Court adopted a "cognitive test" for determining whether a prisoner is competent to be executed under Tennessee law. Under this test 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." *Van Tran*, 6 S.W.3d at 266. The basis for this standard was Justice Powell's opinion in *Ford* which concurred in the *Ford* judgment (comprised of four other justices) on more narrow grounds. *Id., see also Coe v. Bell*, 209 F.3d at 818 (explaining that Justice Powell's concurring opinion in *Ford* was on grounds more narrow than the position taken by the

plurality opinion).

Importantly, Justice Powell's concurrence in *Ford* explained that a standard prohibiting execution of "those who do not have the mental capacity to understand the nature of the death penalty and why it was imposed on them" 477 U.S. at 421 (citations omitted), "appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition" *id.* at 422, because:

> It is true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose.
> ...
>
> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing.

Id. at 421, 422. Accordingly, Justice Powell, in concurrence, summarized the Eighth Amendment standard as forbidding the execution "of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422.[56]

In the instant case, the lower court again employed an improper, limited standard where "[a]ll that is necessary for competence to be executed is that the prisoner need only to be aware of the fact of his impending execution and the reason for it." (Order p.2). This standard omits the required mental capacity component. *Van Tran*, 6 S.W.3d at 266. Nowhere in the lower court's order was Mr. Thompson's mental

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[56]In *Ford*, a psychiatrist opined that Ford "does not know that he is to be executed, but rather believes that the death penalty has been invalidated." 477 U.S. at 422. The Court stated, "If this assessment is correct, petitioner cannot connect his execution to the crime for which he was convicted," *id.* at 422-423, and "has raised a viable claim under the Eighth Amendment." *Id.* at 427.

capacity in relation to the impending execution and reasons for the execution discussed. The lower court simply opined "that Thompson is presently aware that he is under a death sentence for the murder..." (Order p.2)(R.309) but did not delineate any findings to support this opinion.

A prisoner must have the mental capacity to understand and have an actual understanding of the nature and purpose of the punishment if the punishment is to have moral purpose and retributive force. *See Ford*, 477 U.S. at 421. The understanding must be a rational understanding as well as a "factual" understanding. For example, in competency to be executed cases, the prisoner must understand that he will die in the near future (and what it means to die), and that the reason the State will kill him is to punish him for what he did. If, as in Mr. Thompson's case, the prisoner does not think he will die, he doesn't have a factual understanding of the nature of the punishment. If the prisoner, like Mr. Thompson, does not understand the State is executing him because of the murder (but because of another reason) then the purpose of the punishment is extinguished. Clearly, the evidence demonstrates Mr. Thompson's mental capacity, even when artificially enhanced, is severely impaired due to schizophrenia and delusional thoughts. In addition, Mr. Thompson's actual mental capacity, *i.e.*, without medication, is non-existent due to florid psychosis. Therefore, he is "insane or mentally incompetent" and should not be executed. *Van Tran*, 6 S.W.3d at 262.

The lower court stated, Mr. Thompson is "aware of the fact that he is under a death sentence for the murder of Brenda Lane." (Order p.2)(R.309). This is not the same as finding Mr. Thompson has the mental capacity to understand the punishment

he is about to suffer and why he is to suffer it.[57] First, being aware that one is sentenced to death is much different from being aware that one is about to be executed. *Coe*, 209 F.3d at 827 (the condemned must be "aware of his imminent execution"). Second, being aware that one is sentenced to death for a murder is much different from being aware that the State seeks to execute you on a specific date because of that murder. *Id.* (there must be a showing that the condemned "has made the requisite connection between his crime and his punishment."). Third, being aware, *i.e*., "having or showing realization, perception or knowledge",[58] is different from understanding, *i.e*., "to grasp the meaning of".[59] *Van Tran*, 6 S.W.3d at 266 (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."). Fourth, being aware of a fact is different from being aware of a concept and understanding a concept like death and punishment. *Ford*, 477 U.S. at 422 (prisoners should be considered insane for the purpose of execution if they "are unaware of the punishment they are about to suffer and why they are to suffer it."). Accordingly, the lower court misapplied the Constitutional standard governing competency to be executed.

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[57]"Capacity" is defined as "mental ability to make a rational decision, which includes the ability to perceive and appreciate all relevant facts." *Barron's Law Dictionary*, 3d Ed. p.59 (1991). "Mental capacity" is defined as "such a measure of intelligence, understanding, memory, and judgment (relative to the particular transaction) as will enable the person to understand the nature of his act." *Black's Law Dictionary*, Rev. 4th Ed. p.1137 (1968).

[58]*Merriam-Webster Online Dictionary* located at http://www.merriam-webster.com.

[59]*Id.*

C. The lower court failed to apply the proper standard for determining, and in fact failed to determine at all, whether under Tennessee common law Mr. Thompson is competent to be executed.

In *Ford*, the United States Supreme Court set forth the constitutional standard for competency to be executed. In *Van Tran*, however, this Court recognized that, not only does the Constitution of the United States prohibit the execution of the insane, the execution of the insane is also prohibited under Tennessee common law. *Van Tran v. State*, 6 S.W.2d at 266.

> Accordingly, we exercise our inherent supervisory authority and hereinafter adopt and set forth the procedure that a prisoner sentenced to death must follow in order to assert his or her common law and constitutional right to challenge competency to be executed.

Id. at 265 (emphasis supplied). The common law prevents an insane person from being punished if the insanity exists at the time punishment is to be implemented. *Jordan v. State*, 124 Tenn. at 90. "[T]o require one who has been disabled by the act of God" to submit to punishment, especially capital punishment, "would be inhuman". *Id.* at 87. In its plainest terms, the common law clearly speaks to the person's actual mental condition and not of any artificially induced chemical condition.

The common law standard is more rigorous than the constitutional standard delineated in *Ford*. A person must be "capable of understanding the nature and object of the proceedings going on against him" and "rightly comprehend[] his own condition in reference to such proceedings." *Jordan*, 124 Tenn. at 87-88. In *Van Tran* this Court expounded on the additional requirement set forth in *Jordan* that the prisoner "can conduct his defense rationally":

> At common law a more rigorous standard was applied. In addition to requiring that the prisoner be aware of the penalty and its purpose, the

> prisoner must also have been able to assist in his or her own defense. *See* 4, Blackstone, *Commentaries* ("the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings.")

Van Tran, 6 S.W.2d at 265.

The trial court was required to not only apply the Eighth Amendment standard which the Constitution of the United States requires (which it did, but incorrectly), but also to analyze Mr. Thompson's competency under the common law as recognized in *Jordan* and *Van Tran* (which it did not even purport to do). Mr. Thompson amply demonstrated he has been "disabled" by mental illness and accordingly cannot understand "the nature and object of" the current execution proceedings going on against him, nor does he "rightly comprehend[] his own condition in reference to such proceedings." Accordingly, the lower court abused its discretion in failing to determine whether Mr. Thompson made a sufficient showing to entitle him to an evidentiary hearing on the issue of whether he was incompetent to be executed under Tennessee common law and whether, indeed, Mr. Thompson is incompetent to be executed under Tennessee common law.

II. THE TRIAL COURT'S ORDER DENYING A HEARING DID NOT RELIABLY AND FAIRLY RESOLVE DISPUTED ISSUES OF FACT AND LAW AND DOES NOT REFLECT INDEPENDENT JUDICIAL JUDGMENT. ACCORDINGLY, THIS COURT SHOULD GIVE NO DEFERENCE TO THE TRIAL COURT'S FINDINGS

The trial court serves the important function of assessing the facts in a fair and impartial manner and making the findings of fact for the appellate court to review. Pursuant to *Van Tran*, "[i]f the trial court determines that the prisoner has failed to meet the required threshold showing, the trial court shall enter an order denying the petition, which shall include written detailed findings of fact and conclusions of law." *Van Tran*, 6 S.W.3d at 269. Because the lower court's order failed to include "detailed findings of fact and conclusions of law" this Court should conduct its own independent, *de novo* review of all factual and legal questions presented.

A. Denial of a neutral and independent adjudication of the facts and law.

The trial court, as fact finder "is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts." *United States v. Forness*, 125 F.2d 928, 942-43 (2nd Cir. 1942)(Hand, J.). When a tribunal, sitting as finder of fact, delegates its obligation to make findings of fact and conclusions of law to a litigant, it abandons its institutional role and brings about a fundamental reworking of the relationship between the trial court and courts of appeal. In this case, the order denying relief did not reliably and fairly resolve disputed issues of fact and law and does not reflect independent judicial judgment, because the lower court simply adopted the State's response to the petition as "generally enunciat[ing] the opinions and findings of [the] Court." (Order p.2)(R.309). The trial court's wholesale

adoption of the Attorney General's response deprived Mr. Thompson of procedural due process and a neutral and independent adjudication in violation of the State and Federal Constitutions.[60]

The practice of adopting, in whole or substantial part, a party's proposed findings has been criticized:

> Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings ... and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules ... . I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the courts of appeals in determining why the judge decided the case.

United States v. El Paso Natural Gas, 376 U.S. 651, 657 n.4 (1964), *quoting* J. WRIGHT, *The Nonjury Trial – Preparing Findings of Fact, Conclusions of Law, and Opinions, Seminars for Newly Appointed United States District Judges* 159, 166 (1962)).

With the decision of *Delevan-Delta Corp. v. Roberts*, 611 S.W.2d 51, 52-53 (Tenn. 1981), this Court joined the vast majority of state and federal courts which have criticized the practice of a trial court substantially adopting a party's findings. This Court commented that the "preparation of findings and conclusions is a high judicial function" and that the "trial court's findings and conclusions [should] be its own." *Id.* at 52.

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[60] Importantly, the trial court did not actually set forth which portions of the State's response it was adopting as its findings. Mr. Thompson alleges that the State's response was not, and could not be, adopted by reference in the Order Denying Hearing. To the extent that this Court may consider whether the arguments of the State's counsel amount to the findings of the trial court, Mr. Thompson argues that the Court's findings were improper as set forth *supra*.

Other courts have recognized the corrupting effect on both the appearance and administration of justice when a tribunal, especially in a capital case, abdicates this core responsibility to litigants. For example, the Pennsylvania Supreme Court in *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999), prohibited capital post-conviction courts in that state from engaging in this type of wholesale adoption of a party's arguments. Likewise, Florida requires the courts to draft their own orders in capital cases where the stakes are so high. *See, e.g., State v. Reichmann*, 777 So.2d 342, 351 (Fla. 2000).

B. Where the trial court has not engaged in independent and neutral fact-finding, deference should not be afforded to any findings contained, or alluded to, in the order.

Ordinarily a trial court would fulfill its fact-finding function, *see Van Tran*, 6 S.W.3d at 269, and this Court would review determinations on procedural issues *de novo* and findings on the issue of competency would be "presumed correct, unless the evidence in the record preponderates against the findings." *Id.* at 272. But given the absence of proper findings by the lower court in this case, review of the trial court's order, *in toto*, should be *de novo.*

The United States Supreme Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. Bessemer City, North Carolina*, 470 U.S. 564, 572-73 (1985).

In this case, the lower court adopted Respondent's arguments *in toto* without regard to whether its findings were those of "fact" or "conclusions of law" or simply unsupported, partisan arguments. Unless this Court is prepared to believe that Mr.

Thompson, and his experts, were completely wrong and the State was completely *right* on every issue of law and fact, such a rubber stamp approval of the State's adversarial pleading cannot be the result of a fair and independent adjudicative process. The lower court's order is nothing more than "the brief[] of advocates, containing one-sided, exaggerated 'findings' that prosecutors have tailored for strategic advantage on appeal and in post-conviction review." STEPHEN B. BRIGHT AND PATRICK J. KEENAN, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOSTON U. L. REV. 759, 803-04 (1995).

Here, where the lower court's findings of fact and conclusions of law were not arrived at independently, application of a deferential standard to findings never subjected to accurate fact determination stacks one empty formalism (verbatim adoption) upon deferential review where the jurisprudential basis for the latter is wholly absent. In these circumstances, a majority of the federal circuits, six states and the District of Columbia have properly recognized that the lower court's initial failure cannot be remedied without employing a stricter standard or *de novo* review.[61] As there is simply no indication in this case that the lower court engaged in any independent fact-

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[61] *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407-08 (D.C.Cir. 1988); *In Re Las Colinas Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970); *The Severance*, 152 F.2d 916 (4th Cir. 1945); *Federal Deposit Ins. Corp. v. Texarkana Nat. Bank*, 874 F.2d 264, 267 (5th Cir. 1989); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *S.E.C. v. Rogers*, 790 F.2d 1450, 1456 n.11 (9th Cir. 1986); *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 467 (10th Cir. 1980); *In Re Colony Square*, 819 F.2d 272 (11th Cir. 1987); *Sacks v. Rothberg*, 569 A.2d 150 (D.C. 1990); *Corporate Management Advisors, Inc. v. Boghos*, 756 So.2d 246, 248 (Fla. Dist. Ct. App. 2000); *Maloblocki v. Maloblocki*, 646 N.E.2d 358 (Ind. Ct. App. 1995); *Rutanen v. Ballard*, 678 N.E.2d 133, 137 (Mass. 1997); *In re Sabrina M.*, 460 A.2d 1009 (Me. 1983); *Rice Researchers, Inc. V. Hiter*, 512 So.2d 1259 (Miss. 1987); *First National Bank of Missoula v. McGuiness*, 705 P.2d 579, 585 (Mo. 1985).

finding or drew any independent conclusions of law, review of the order should be stricter than if the judge independently produced the judgment. *See, e.g., Amstar Corporation v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980).

III. THE TRIAL COURT ERRED IN RULING UPON THE PETITION BEFORE THE ISSUE OF CONFLICTED COUNSEL WAS DECIDED

This Court recognizes ethical dilemmas arising from an appearance of impropriety. An appearance of impropriety exists in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the representation poses substantial risk of disservice to either the public interest or the interest of one of the clients. *State v. Davis*, 2003 Tenn.Crim.App. LEXIS 250 *55 (citations omitted)(unreported).

On February 25, 2004, this Court appointed the Public Defender for the Fourteenth Judicial District as co-counsel to represent Mr. Thompson in the instant competency proceedings. On March, 1, 2004, the Public Defender's office filed a motion to withdraw as counsel in both this Court and the trial court. In support of the motion to withdraw, the District Public Defender submitted the affidavit of his sole investigator, Jimmy Dale Conn. Mr. Conn was a criminal investigator for the Coffee County Sheriff's Department during the 1980's, investigated the Brenda Lane murder and testified against Mr. Thompson at his capital trial.[62]

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[62]This Court denied the motion to withdraw on March 9, 2004. A motion to reconsider that order was filed on March 16, 2004. In that motion, the District Public Defender informs the Court that its office consists of three lawyers and one investigator (Mr. Conn). One of the three lawyers represented Mr. Thompson's co-defendant, Joanne MacNamara, and also suffers from a conflict of interest. That lawyer was advised by the Tennessee Board of Professional Responsibility that the Public Defender's Office could not ethically represent Mr. Thompson and must move to withdraw from the case.

The lower court ruled upon Mr. Thompson's petition before the conflict issue was resolved. In its March 8, 2004 order the court noted that this Court would be considering the motion to withdraw the following day but decided it could not "await a ruling on that issue" given the time constraints this Court imposed in *Van Tran*, *supra* (Order p.3). There is no indication in the lower court's order that it considered the appearance of impropriety standard; indeed the lower court declined to rule on the motion at all or even await one extra day for a ruling from this Court.

In *Clinard v. Blackwood*, 46 S.W.3d 177, 188-189 (Tenn. 2001)[63], the lower court, as in the instant case, did not consider the appearance of impropriety standard when presented with a conflict of interest issue. This Court therefore was bound to "find that the court abused its discretion for failure to apply an appropriate legal standard." *Id.* at 189. In addressing the ethical issue presented in *Clinard*, this Court held that a "reasonable layperson presented with the facts of this case would no doubt find a substantial risk of disservice to the [client's] interest in this case, despite the use of screening procedures." *Id.* at 188.

Applying the appearance of impropriety test to Mr. Thompson's case demands the conclusion that the motion to withdraw should have been granted. The issue before the lower court was whether Mr. Thompson is incompetent to be executed, *i.e*., whether he has the mental capacity to understand the impending execution and the reason for it. This is a fact-intensive inquiry. *Van Tran*, 6 S.W.3d at 271 ("the ultimate question as to whether the prisoner is competent is a question of fact."). Accordingly, the advocacy

[63]The rule in *Clinard*, continues under the present Rules of Professional Conduct. Tenn.Sup.Ct.R. 8, RPC 1.10, comment [9].

required on behalf of Mr. Thompson is strongly fact based necessitating extensive investigation. *Id.* ("the prisoner shall be allowed to present all evidence material and relevant to the issue of competency"). The sole investigator in the office of the District Public Defender actively investigated the Brenda Lane crime and, in conjunction with Prosecutor Mickey Layne (who is also the current prosecutor) worked to secure Mr. Thompson's conviction and sentence of death to achieve his execution for the crime. An ordinary knowledgeable citizen acquainted with these facts would conclude that the representation by the Public Defender's office poses substantial risk of disservice to either the public interest or the interest of Mr. Thompson. *See Ford*, 477 U.S. at 406-410, 419-422 (discussing the important societal interests at stake as well as the interests of the condemned). There can be no other reasonable conclusion when the investigator who worked to secure the execution of Mr. Thompson is now appointed in proceedings designed to establish whether that execution can legally occur.

The lower court abused its discretion when it failed to apply a controlling legal standard and determine the ethical issue presented before ruling on Mr. Thompson's petition. The motion to withdraw should have been granted.

CONCLUSION

The order of the trial court violates controlling principles of *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

RELIEF REQUESTED

WHEREFORE, Mr. Thompson prays that this Court

(1) reverse the judgment of the trial court finding Mr. Thompson competent to be executed;

(2) conduct a *de novo* review of the record;

(3) enter an order finding Mr. Thompson incompetent to be executed; and,

(4) issue a reprieve.

Alternatively, Mr. Thompson requests this Court remand the case for an evidentiary hearing on Mr. Thompson's competency to be executed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was forwarded by U. S. Mail, postage prepaid, to

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this ___ day of March, 2004.

_____
MICHAEL J. PASSINO