

IN 1993  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1999

ROBERT OLEN COE,  
Petitioner

v.

STATE OF TENNESSEE  
Respondent

ON PETITION FOR WRIT OF HABEAS CORPUS TO  
THE SUPREME COURT OF TENNESSEE

PETITION TO REHEAR

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Petitioner Robert Olen Coe, pursuant to Rule 44(2) of the Rules of the Supreme Court of the United States, and petitions for rehearing the Order Denying Certiorari entered by this Court on March 22, 2000.

- I. The State of Tennessee incorrectly represented to this Court that a determination of "present competency" months before execution was sufficient to resolve Robert Coe's *Ford* claim because his competency at or near the time of execution could be presented at a later date.

On March 16, 2000, Robert Olen Coe filed his Petition for Writ of Certiorari to this Court seeking direct review of the Tennessee Supreme Court's order affirming the trial court's determination pursuant to *Ford v. Wainwright* that Mr. Coe was presently competent to be executed. One of the three questions presented for review in Mr. Coe's certiorari Petition was:

1. Is the State Court's determination of "present competency" at the time of State Court proceedings (months before an execution) sufficient to resolve a petitioner's claim that he is "incompetent to be executed" under *Ford*, when the proof establishes that the petitioner will be incompetent at the point of execution?

(See Petitioner's Writ of Certiorari, pp. (1) Question Presented (2)

On March 20, 2000, the State of Tennessee was "by default" the "Respondent's Brief in Opposition" to this Court. In that response, the State of Tennessee asserted that its determination of Mr. Coe's present competency at a *Ford* hearing satisfies *Ford*'s prohibition of the execution of a mentally incompetent person, even though the hearing is months before a scheduled execution, in light of the fact that a prisoner can always go back to the State Court and obtain relief, if there is a showing of a substantial deterioration in the prisoner's mental capacity through affidavit from a mental health professional. The State of Tennessee repeated the question presented for review as follows:

- Does Tennessee's inquiry into present competency, in conjunction with a provision allowing a prisoner to again raise competency if a "substantial change" in the

prisoner's mental health occurs rendering the prisoner incompetent, satisfy this Court's requirement for competency to be executed?

(See Respondent's Brief in Opposition, Questions Presented for Review, #2)

In its brief in opposition, the State argued that the Tennessee Supreme Court procedures comply with *Ford v Wainwright* even though the state courts only determined Robert Coe's "present competency" months before his scheduled execution, and not his competency at the time when execution is imminent. The state contended that the state procedures complied with *Ford* because Robert Coe could always go back to court and obtain relief with evidence of his mental state as near the point of execution.

In fact, the Tennessee Supreme Court in its opinion in *Coe v State*, specifically averred that Mr. Coe would be able to obtain relief upon the presentation of an affidavit from a mental health professional demonstrating his lack of competency near the time of execution.

In his reply brief filed March 2, 2000, the appellant argues that the evidence at the hearing "overwhelmingly" establishes that he will be incompetent on March 23, 2000, the day of his scheduled execution. He specifically relies upon the testimony of Dr. Kenner and Dr. Meekins as in support of his assertion. The issue before the Trial Court was the appellant's present competency to be executed. The evidence in this record overwhelmingly supports the trial court's finding that the appellant is presently competent to be executed. As we stated in *Pax Thom*, "[i]f a prisoner is found to be competent, subsequent *Ford* claims will be disallowed unless the prisoner, by way of a motion for stay, provides this Court with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed." (6 S.W.2d at 272) Thus, any future change in the appellant's mental health must be raised as provided in *Pax Thom*. We emphasize, however, that conclusory affidavits will not satisfy the showing that there has been a "substantial change" in the prisoner's mental health sufficient to "raise a substantial question about the prisoner's competency to be executed." *Id.*

Slip opinion *Coe v State*, page 49 Note 15. (Attached as Exhibit 4 to Petition for Writ of Certiorari)

On March 22, 2000, this Court denied certiorari.

It is worth noting to comply with the State procedures and demonstrate that Robert Coe is not competent at the time of execution, counsel for petitioner sought to have a mental health professional examine Robert Coe. On Monday, April 3, 2000, counsel for Mr. Coe contacted Warden Rocky Bell to obtain permission to have a mental health professional examine Mr. Coe. Warden Bell refused to allow a mental health professional to have access to Robert Coe without a court order. On April 3, 2000, Mr. Coe filed with the Supreme Court of Tennessee, a "Motion to Modify Execution Date; Motion for Order to Allow Mental Health Professional Access to Robert Coe." (A copy of which has previously been provided to the court).

In that motion, Mr. Coe asserted there was medical proof in the record that as execution was imminent, Robert Coe's dissociative identity disorder would cause him to decompose to the point where he would be incompetent to be executed under *Ford v Wainwright*. Counsel then requested permission to have a mental health professional obtain access to Mr. Coe when execution was imminent, in order to examine him and determine whether he was incompetent under *Ford*. The motion also had attached to it an affidavit from Robert Hutton reflecting that the warden refused to allow a mental health professional to see Robert Coe without an order from the court (See Motion). On April 3, 2000, the Supreme Court of Tennessee entered an order denying a mental health professional access to Mr. Coe (See Order previously provided to the court).

The Tennessee Supreme Court requires an affidavit from a mental health professional to obtain relief under *Ford*, should Robert Coe become incompetent when execution is imminent. The Tennessee Supreme Court now refuses to grant Robert Coe access to a mental health professional. In effect, the Tennessee Supreme Court is denying Mr. Coe any opportunity to raise the claim of his

incompetency at the time of his execution. Under these circumstances, Tennessee's holding of present competency, as opposed to competency at the time of execution, does not comport with *Ford*

and the Eighth Amendment.

As Justice Birch said in his dissent filed with the April 3, 2000, Order:

The majority concludes that the affidavit offered by the defense counsel in support of the present motion does not, under the standard adopted in *Wainwright*, make the substantial showing required by *Ford*. While this conclusion is correct, it is completely irrelevant to the disposition of the present motion. By the present motion, counsel is not asserting a substantive legal claim. Counsel is simply attempting to obtain the opportunity to make the showing required by *Wainwright*. By denying the defendant's request, the majority is both preventing the defendant from asserting this 8th amendment right and denying the defendant access to the courts as is guaranteed by Article I, Section 17 of the Tennessee Constitution.

(See April 3, 2000 Order: dissent).

Thus, since the denial of certiorari by this Court, there has been a substantial change, in that the Tennessee Supreme Court has made clear that it will refuse to allow Mr. Coe to present any showing of his incompetency to be executed under *Ford* at the time when execution is imminent. Due to this extraordinary change in circumstances, this Court should rehear this matter and grant certiorari as prayed for in the original petition.

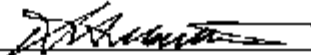
Respectfully submitted,

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By: 

#### CERTIFICATION

I hereby certify that this petition for rehearing is restored to the grounds specified in United States Supreme Court Rule 44.2 and is presented in good faith and not for delay.

By: 