

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. )

MEMORANDUM

Petitioner has also filed a Motion for an Evidentiary Hearing on his Petition for Writ of Habeas Corpus (Docket No. 6) to which Respondent has filed a response (Docket No. 11). Respondent has filed a Motion to Dismiss Petition for Writ of Habeas Corpus (Docket No. 10) to which Petitioner has responded (Docket No. 13).

The following motions also remain pending before this court: Petitioner's Motion to Reconsider Case Assignment (Docket No. 14); Petitioner's Motion for Order to Disqualify Attorney General's Office (Docket No. 16); and Petitioner's Motion for Discovery (Docket No. 31).

I. *Motion for Evidentiary Hearing*

Prior to the enactment of the AEDPA, a request for an evidentiary hearing to resolve a federal habeas challenge was guided by Rule 8(a) of the Rules Governing §2254 Cases<sup>1</sup> and by Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1963), as modified by Keeney v.

<sup>1</sup>Rule 8(a) provides that "[i]f the petition is not dismissed at a previous stage in the proceeding," the district court "shall determine whether an evidentiary hearing is required."

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Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L.Ed.2d 318 (1992). While stating that, in many cases, the federal courts were permitted to exercise their discretion in deciding whether to hold an evidentiary hearing,<sup>2</sup> Townsend required that an evidentiary hearing be held where it was shown that the "habeas applicant did not receive a full and fair evidentiary hearing in a state court." Townsend, 372 U.S. at 312. Under Townsend, a federal court was to hold an evidentiary hearing if:

- (1) the merits of the factual dispute were not resolved in the state hearing;
- (2) the state factual determination is not fairly supported by the record as a whole;
- (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing;
- (4) there is a substantial allegation of newly discovered evidence;
- (5) the material facts were not adequately developed at the state-court hearing; or
- (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Id. at 313. In Keeney, the Supreme Court held that, where the failure to develop the record was attributable to the petitioner, an evidentiary hearing under Townsend's fifth circumstance was only required if the petitioner could "show cause for his failure to develop the facts" and "actual prejudice resulting from that failure." Keeney, 504 U.S. at 11.

The AEDPA restricts the power of a federal court to grant an evidentiary hearing. 28

U.S.C. §2254(e)(2) provides:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

- (A) the claim relies on –

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<sup>2</sup>The Supreme Court stated that a federal court could grant an evidentiary hearing "where an applicant for a writ of habeas corpus alleg[ed] facts which, if proved, would entitle him to relief." Townsend, 372 U.S. at 312.

- (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

(3) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found that applicant guilty of the underlying offense.

Where the petitioner has not developed the factual record in the state court proceeding,

§2254(e)(2) does not apply and the federal court may determine whether a hearing is appropriate or mandatory under Townsend.<sup>3</sup> See Cardwell v. Green, 152 F.3d 331, 336-37 (4th Cir. 1998). See also Baia v. Ducharme, 187 F.3d 1075 (9th Cir. 1999); Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998); McDonald v. Johnson, 139 F.3d 1056, 1050 (5th Cir. 1998); Burris v. Parke, 116 F.3d 256 (7th Cir. 1997); Love v. Morton, 112 F.3d 131 (3d Cir. 1997).

Petitioner seeks an evidentiary hearing on his petition for habeas corpus in which he seeks relief from the state court's determination that he is competent to be executed (Docket No.

1). Specifically, Petitioner argues that he is entitled to an evidentiary on his Ford claim because

- (1) the state courts failed to determine his competence for execution and the exact nature of his mental illness;
- (2) the state courts applied an improper standard of review and an improper burden of proof;
- (3) the state trial court conducted a non-adversarial hearing in violation of Ford and the dictates of due process;

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<sup>3</sup>Townsend seems only to require a federal court to hold an evidentiary hearing on "issues of fact." In a footnote, the Supreme Court states that, by "issues of fact" we mean to refer to what are termed basic, primary, or historical facts: facts "in the sense of a recital of external events and the credibility of their narrators." These "issues of fact" are to be distinguished from "[s]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations." Townsend, 372 U.S. at 309 n.6.

- (4) the state trial court denied Petitioner a fair hearing by requiring Petitioner to disclose evidence from consulting experts;
- (5) the state trial court relied on materials never introduced as evidence and thus denied Petitioner due process, right to confrontation and right to the assistance of counsel;
- (6) the state trial court denied Petitioner due process because he was prevented from presenting relevant expert and lay testimony;
- (7) the state court relied upon unreliable, illegal and otherwise tainted evidence;
- (8) Petitioner may have been denied his due process right to an impartial arbiter; and
- (9) the state was represented by attorneys in the Attorney General's office.

(Docket No. 6 at 16-88)

(1) *Failure to Resolve Critical Issues*

*a. Present Competency*

Petitioner first asserts that this court must hold an evidentiary hearing because the state court never resolved issues critical to the determination of his competency to be executed. Petitioner contends that the trial court only addressed the issue of "present competency" and not competency to be executed. According to Petitioner, by only addressing the issue of "present competency," there were no findings in the state courts as to his "competency to be executed."

(Docket No. 6 at 20)

The court finds that Petitioner is not entitled to an evidentiary hearing in this claim.<sup>4</sup> In his opinion setting forth his conclusions of law, Judge Colton referred to Petitioner's "present

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<sup>4</sup>In addition to opposing Petitioner's request for an evidentiary hearing on this issue, Respondent also argues that Petitioner failed to present this claim in his Petition for Writ of Habeas Corpus and, thus, this court does not have jurisdiction to consider it. This court finds that Petitioner adequately raised this issue in his petition in that Petitioner has challenged the standard used by Judge Colton for purposes of competency to be executed.

competency." (Trial Ct. Op. at 3, 28) While Petitioner objects to the finding that he was presently competent to be executed based on the testimony and evidence presented during the competency hearing, this court does not find that the state court's finding was contrary to Ford or Van Tran. As noted by Justice O'Connor in Ford,<sup>5</sup> "[b]y definition, this interest [in suspending the execution of a death sentence during incompetency] can never be conclusively and finally determined. Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary." Ford v. Wainwright, 477 U.S. 399, 430 (1986) (citing Hazard & Louisell, Death, the State and the Insane: Stay of Execution, 9 U.C.L.A. L.REV. 381, 399-400 (1962)).<sup>6</sup>

It appears to this court that the trial court properly followed the standard as set forth in Van Tran. In finding on February 2, 2000 that Petitioner was "presently mentally competent to be executed," the trial court made the appropriate findings. (Trial Ct. Op. at 28) Indeed, in Van Tran, the Tennessee Supreme Court accounted for the possibility that an individual sentenced to death who had been found competent to be executed would later become incompetent to be executed. As stated in Van Tran,

If a prisoner is found to be competent, subsequent Ford claims will

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<sup>5</sup>In Ford, Justice O'Connor with Justice White concurred in the result in part and dissented in part. See Ford, 477 U.S. at 427-31.

<sup>6</sup>In their article, the authors cogently state, "[b]y definition, the [insanity] exemption applies at the time of execution. Obviously, the determination of sanity has to be made before execution. Therefore, the determination of sanity can never be made as of the time that it becomes legally relevant. Hence, the legal issue required to be decided – insanity at the precise moment of execution – literally can never be determined." Hazard & Louisell, at 400

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.

Van Tran v. State, 5 S.W.3d 257, 272 (1999). Thus, as impliedly recognized by Van Tran, the determination of competency to be executed will not be made at the very moment of execution and such a determination could change before the execution is carried out.

Petitioner's claim is without merit. The court finds that the issue of Petitioner's competency to be executed was properly addressed by the trial court, made at a time when execution was imminent, see Van Tran, 6 S.W.3d at 253-64, and reviewed by the Tennessee Supreme Court. The question of Petitioner's competency to be executed was fully resolved in the state courts.

b. *Nature and Extent of Petitioner's Mental Illness*

Petitioner next claims that an evidentiary hearing is required because Judge Colton did not make any finding as to the precise nature and extent of Petitioner's mental illness in determining that Petitioner was competent to be executed.<sup>7</sup>

During the competency hearing, various mental health professionals opined that

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<sup>7</sup>Respondent argues that this claim cannot support Petitioner's request for an evidentiary hearing because this claim was not raised before the Tennessee Supreme Court and is therefore procedurally defaulted. (Docket No. 11 at 6, citing O'Sullivan v. Boerckle, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999)). Whether or not the claim is procedurally defaulted, the court finds it to be without merit.

Petitioner suffered from a variety of mental health diagnoses.<sup>1</sup> In finding that Petitioner was competent to be executed, Judge Colton stated that “[i]t appears to this Court that Petitioner is suffering from some sort of personality disorder, as attested to by the majority of the mental health examiners” (Trial Ct. Op. at 27). However, in rendering his decision, Judge Colton made clear that the “fact most relevant to the determination of Petitioner’s competency to be executed is the answer to the question of whether Petitioner lacks the mental capacity to understand the fact of his impending execution and the reason for it.” Id. Judge Colton evaluated Petitioner’s competency with reference to the Van Tran standard and not on a particular diagnosis of mental illness.

The court finds that the state court’s failure to make a finding as to the specific condition from which Petitioner suffers does not require this court to hold an evidentiary hearing. Judge Colton was presented with the opinions of the numerous mental health professionals as to the precise nature of Petitioner’s mental illness and took these precise diagnoses into account in rendering his opinion.<sup>2</sup> However, he properly followed the requirements of Van Tran in deciding

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<sup>1</sup>Judge Colton found as follows with regard to these diagnoses: Dr. Merikangas diagnosed Petitioner as suffering from chronic paranoid schizophrenia; Dr. Kenner diagnosed Petitioner as suffering from Dissociative Identity Disorder, generalized anxiety disorder, schizoaffective disorder (bipolar type), poly-substance abuse, learning disorder, reading disorder, and schizoid personality disorder with antisocial features; Dr. Matthews testified that Petitioner suffered from paraphilia, poly-substance dependence in a controlled environment, adjustment disorder with mixed anxiety and depressed mood, nicotine dependence, malingering, possible neuroleptic induced Parkinsonism, noncompliance with medical treatment, antisocial personality disorder, borderline personality disorder, and schizotypal personality disorder; Dr. Martell testified that Petitioner is a manipulative and psychopathic individual. (Trial Ct. Op. at 4, 8, 18, 23-24)

<sup>2</sup>While not addressing the precise issue presented by the petitioner here, the Tennessee Supreme Court stated:

whether Petitioner is competent to be executed.<sup>13</sup> And Ford certainly does not require that a specific diagnosis be made either: "... 'evidence' will always be imprecise." Ford, 477 U.S. at 417.

*(2) Standard of Review and Burden of Proof*

Petitioner next argues that he is entitled to an evidentiary hearing because the state court used an improper standard for determination of competency to be executed and applied an improper burden of proof. (Docket No. 6 at 23-32) The court has addressed these issues at length in its memorandum issued today deciding the pending petition and finds that the trial court did not violate due process. See Docket No. 36. Thus, because this court finds that the proper standard for competency to be executed and the proper burden of proof as articulated in

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Interestingly, a great deal of time, energy, and proof at this hearing was devoted to either describing the various diagnoses of mental disorders or to establishing and rebutting the claim of malingering. Without question, all of the mental health professionals eventually concluded that the appellant had some type of mental disorder, although there was some disagreement as to the precise diagnosis and to the seriousness of the disorder. However, the problem for [Petitioner] is that the existence of a mental disorder does not automatically translate into a finding of incompetency to be executed.

Coe v. State, 2000 WL 246425, at \*25 (Tenn. Mar. 6, 2000).

<sup>13</sup>In addition to setting forth the test for competency to be executed, Van Tran indicated what should be included in the trial court decision following the competency hearing. The Tennessee Supreme Court stated that, "[a]lthough likely based upon expert medical and mental health testimony, the ultimate question as to whether the prisoner is competent is a question of fact. . . . Therefore, in the written findings of fact, the trial court shall set out any undisputed facts, explain its assessment of the credibility of the various expert witnesses and their conflicting opinions, and include findings as to the prisoner's behavior during the hearing." Van Tran, 6 S.W.3d at 271. Thus, there is no requirement that a particular medical diagnosis be made. Instead, the focus is to be on whether the individual sentenced to death "lacks the mental capacity to understand the fact of the impending execution and the reason for it." Id. at 266.



Van Tran and consistent with the dictates of Ford were used, there is no basis for granting Petitioner's request for an evidentiary hearing on these matters.

*(3) Non-Adversarial Nature of the Competency Hearing*

This court has found that the competency hearing before Judge Colton was as "fully adversarial" as it needed to be under Ford and Van Tran. See Docket No. 36 at 20-22. An evidentiary hearing is not warranted on this claim.

*(4) Disclosure of Evidence from Petitioner's Consulting Experts*

The court found, based on its own review of the record, that the disclosure of these expert reports was not a violation of due process and was contemplated in Ford and Van Tran. See Docket No. 36 at 22-23. Petitioner has not satisfied his burden to establish that he is entitled to an evidentiary hearing on this claim.

*(5) State Court Reliance on Materials not Introduced as Evidence*

As addressed in this court's memorandum opinion ruling on Coe's petition, the trial court properly considered all evidence relevant to the issue of Coe's competency to be executed. See Docket No. 35 at 22-23. This court, therefore, denies Coe's request for an evidentiary hearing on this ground.

*(6) Limitation on Presentation of Relevant Expert and Lay Testimony*

The court finds that the petitioner has failed to establish that he is entitled to an evidentiary hearing on this ground. As this court has found, Coe was not prejudiced by the trial court's denial of his motions for a continuance and there was no violation of due process. See Docket No. 36 at 24-26.

*(7) State Court Reliance upon Unreliable, Illegal and Tainted Evidence*

This court has found no violation of the petitioner's due process as a result of the state court's consideration of the testimony of Dr. Martell. See Docket No. 36 at 41-42. Thus, no evidentiary hearing is warranted

(8) *Impartial Arbitrator*

As this court addressed in its memorandum opinion ruling on Coe's petition, the Tennessee Supreme Court correctly found that the trial court was eminently fair during the course of the competency proceedings. See Docket No. 35 at 40-41. No evidentiary hearing is warranted on this claim

(9) *State's Representation by Attorney General's Office*

As this court addresses more fully below, there was no need for the disqualification of the entire Attorney General's Office as there has been no showing of prejudice to the petitioner. Accordingly, the court denies the petitioner's request for an evidentiary hearing on this issue.

II. *Motion to Dismiss Petition for Writ of Habeas Corpus and to Deny Stay of Execution*

Respondent Ricky Bell has filed a motion to dismiss Petitioner's petition for writ of habeas corpus and to deny Petitioner's motion for stay of execution. In his motion, Respondent argues that (1) this petition must be dismissed absent an order from the Sixth Circuit Court of Appeals authorizing consideration of the petition; (2) Petitioner is not entitled to habeas corpus relief on his Ford claim; and (3) Petitioner is not entitled to a stay of execution.

On March 18, 2000, this court transferred this case to the Sixth Circuit of Appeals for a determination of whether this court could review Petitioner's present petition on the merits. On March 21, 2000, the Sixth Circuit Court of Appeals issued an order stating that this court did have jurisdiction to review the petition on the merits. Accordingly, Respondent's motion to

dismiss is denied as moot.

Respondent also seeks the dismissal of Petitioner's petition for writ of habeas corpus because the state courts' adjudication of his Ford claim did not result in (1) "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (Docket No. 10, quoting 28 U.S.C. §2254(d)(1)-(2)). Having already ruled on Petitioner's petition for writ of habeas corpus and denied Petitioner relief, this motion is denied as moot.

### III. *Motion to Reconsider Case Assignment*

Petitioner has filed a Motion to Reconsider Case Assignment (Docket No. 14) to which no response has been filed. Petitioner contends that his present petition should be reassigned to Senior United States District Judge John T. Nixon because this petition is related to prior litigation held before him. This observation is inaccurate. The present petition raises entirely new issues related to his competency to be executed. The petition ruled upon by Judge Nixon related to the underlying conviction for murder. The petitions have no relationship to each other.

Accordingly, this motion is denied.

### IV. *Motion to Disqualify Attorney General's Office and to Strike*

On March 17, 2000, Petitioner filed a Motion to Disqualify Attorney General's Office as counsel for Respondent and Motion to Strike Pleadings and Other Papers (Docket No. 16). Respondent has filed no separate response to this motion, but has responded to the petitioner's contentions in the Answer to Petition for Writ of Habeas Corpus (Docket No. 9 at 23) and in its

Response to Petitioner's Motion for Evidentiary Hearing (Docket No. 11 at 14).

On November 29, 1999, the State of Tennessee filed a motion, requesting that the Tennessee Supreme Court set a date for Petitioner's execution. On December 6, 1999, Petitioner filed a motion to disqualify Attorney General Summers<sup>11</sup> and the Attorney General's Office in the Tennessee Supreme Court.<sup>12</sup> Petitioner sought the disqualification of Attorney General Summers because General Summers had, while serving as a judge of the Tennessee Court of Criminal Appeals, authored an opinion affirming the dismissal of Petitioner's second post-conviction petition in state court and setting Petitioner's execution date. See Coe v. State, 1991 WL 2873 (Tenn.Crim.App. Jan. 15, 1991).<sup>13</sup>

On December 9, 1999, the Tennessee Supreme Court ordered the disqualification of General Summers from participating in any proceedings involving Petitioner. However, the Tennessee Supreme Court declined to disqualify other attorneys in the Attorney General's Office. In finding that Attorney General Summers should be disqualified, the Tennessee Supreme Court stated that

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<sup>11</sup>Attorney General Summers had signed papers filed on behalf of the State in matters relating to Petitioner and had appeared on behalf of the State in a hearing before Senior Judge Nixon on November 19, 1999. (Docket No. 16, Ex. A at 3)

<sup>12</sup>On November 24, 1999, Petitioner a similar motion before Senior United States District Judge John T. Nixon. On January 14, 2000, Senior Judge Nixon denied Petitioner's motion to amend his first federal habeas petition to add the present Ford claim and denied Petitioner's motion as moot. See Docket Nos. 458-59, Case No. 3:92-0180.

<sup>13</sup>In this opinion, the court addressed the issue of "whether the trial judge was correct in dismissing this second petition without an evidentiary hearing." Coe v. State, 1991 WL 2873, at \*1. The lower court had dismissed Mr. Coe's petition, finding that the claims presented "had been previously determined, waived, or were not cognizable under the Post-Conviction Procedure Act." Id.

in light of the stated policy of the Office of the Attorney General screening General Summers from any 'matter upon the merits of which he had acted in a judicial capacity'<sup>14</sup> and considering Disciplinary Rule 9-101(A),<sup>15</sup> and in light of the representations made to this Court by the State in State v. Bondurant,<sup>16</sup> the participation of General Summers in the proceedings against the respondent creates an appearance of impropriety that requires his disqualification.

(Docket No. 448, Case No. 3:92-0180), Coe v. State, No. M1999-01313-SC-DPE-PD, at 3-4) The Court stated, "it appears to the Court that no actual conflict of interest exists regarding General Summers' participation in this case." See Docket No. 448, Case No. 3:92-0180, at 3. More importantly, the court, in denying Petitioner's motion to disqualify the entire Attorney General's Office, stated

General Summers' prior judicial actions did not involve ex parte or confidential matters, and thus his participation in the present proceedings against the respondent imparted no confidential information to the staff of the Office of the Attorney General and

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<sup>14</sup>See Docket No. 16, Ex. E, at 1 (January 14, 1995 Memorandum from Solicitor General Michael E. Moore to all attorneys and staff of the Criminal Justice Division and the Enforcement Division of the Office of the Attorney General). Attorney General Summers also signed a Delegation of Authority in which he delegated his authority to act to Solicitor General Michael E. Moore for those cases and matters for which he had previously acted in a judicial capacity. In that Delegation of Authority, he stated "I have not reviewed the file or any relevant documents, nor have I conducted any discussion with any of the attorneys and/or staff of the Attorney General's Office, regarding the matters which are the subject of this delegation." See Docket No. 16, Ex. C.

<sup>15</sup>DR 9-101(A) provides "[a] lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity."

<sup>16</sup>In State v. Bondurant, the defendant filed a similar disqualification motion. The Tennessee Supreme Court denied the motion on the basis of the State's representation that screening procedures were in place to ensure that General Summers did not participate in any cases as Attorney General for which he had acted in a judicial capacity. See Docket No. 448, Case No. 3:92-0180, at 2-3.

entailed no risk of disclosing confidential information to the staff. Disqualification of the governmental office in which a disqualified lawyer works is necessary only when an actual conflict exists or when there is a risk of the disclosure of confidential information.

Id. at 4 (citing State v. Tate, 925 S.W.2d 548, 556 (Tenn.Crim.App. 1995) and State v. Mattress, 564 S.W.2d 678, 680 (Tenn.Crim.App. 1977)).

In arguing before this court that the Attorney General's Office must also be disqualified, Petitioner relies on DR5-105(D) which provides "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate, or any other lawyer affiliated with that lawyer or that lawyer's firm may accept or continue such employment." Thus, according to Petitioner, because the Attorney General has been disqualified, the entire Attorney General's Office must be disqualified. This is not the law. See United States v. Caggiano, 660 F.2d 134, 190-91 (6th Cir. 1981) and authorities cited therein. See also State v. Tate, 925 S.W.2d 548 (Tenn.Crim.App. 1995); State v. Mattress, 564 S.W.2d 678 (Tenn.Crim.App. 1977).

Accordingly, this motion is denied.

V. *Petitioner's Motion for Discovery*

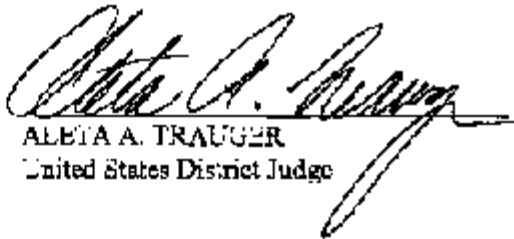
Petitioner seeks an order from this court permitting discovery concerning threats made to or about Judge Colton. Petitioner contends that such discovery is needed because it goes to the issue of whether Judge Colton was impartial in ruling on the petitioner's competency hearing.

The court denies the petitioner's request for such discovery for the reasons stated in this court's memorandum opinion on the petitioner's petition. See Docket No. 36 at 40-41.

CONCLUSION

Petitioner's Motion for an Evidentiary Hearing (Docket No. 6) is denied. Respondent's Motion to Dismiss and to Deny Stay of Execution (Docket No. 10) is denied as moot. Petitioner's Motion to Reconsider Case Assignment (Docket No. 14) is denied. Petitioner's Motion to Disqualify and to Strike (Docket No. 16) is denied. Petitioner's Motion for Discovery (Docket No. 31) is DENIED.

An appropriate Order will enter.



ALBETA A. TRAUGER  
United States District Judge