IN THE SUPREME COURT OF TENNESSEE

ROBERT GLEN COE	)	
	)	
Applicant	)	No. M1999-01313-SC-DPE-PD
	)	
v.	)	
	)	
STATE OF TENNESSEE	)	
	)	
Respondent	)	

EMERGENCY
APPLICATION FOR EXTRAORDINARY APPEAL
PURSUANT TO RULE 10,
TENNESSEE RULES OF APPELLATE PROCEDURE
AND REQUEST FOR EXPEDITED RULING

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APPLICATION FOR EMERGENCY AND EXPEDITED EXTRAORDINARY APPEAL

A hearing to determine the competency of Robert Glen Coe to be executed is scheduled for 9:30 a.m. January 24, 2000, in Division IV of the Criminal Court of Shelby County. On Friday,

January 21, 2000, the trial judge entered an Order which requires the "entire files" of two members of the defense team: Dr. Herbert Meltzer, M.D. and James Walker, Ph.D. to be "sent to the Clerk of this Court, under seal, for use by the mental health experts appointed to evaluate Movant by this Court and for further in camera investigation and rulings of this Court." See Exhibit 1 (Order). Said Order was entered by the trial judge despite the defense team's assurances that neither Dr. Meltzer nor Dr. Walker would be called as witnesses during the competency hearing.

From this Order, Robert Glen Coe respectfully moves this Court to grant him an extraordinary appeal and that the appeal be expeditiously ruled upon so as to prevent the proceedings in the trial court from deteriorating to the point that a full and fair evidentiary proceeding cannot be obtained therein.

If the order of the Shelby County Criminal Court is allowed to stand, it will effectively eviscerate well-established principles recognizing the attorney-client privilege and will effectively require disclosure of otherwise privileged work-product created by experts who have been retained for the purpose of consulting with an attorney. The Court's order will also put at risk
the validity of the proceedings in the trial court as to render the proceedings below in violation of Mr. Coe's right to fundamental due process and his Sixth Amendment rights to counsel and to confront the witnesses against him. The court should grant the application.

STATEMENT OF FACTS

The Criminal Court of Shelby County has scheduled for January 24, 2000 a hearing to determine whether Robert Coe is competent to be executed. The court appointed four experts to evaluate Robert Coe. Two experts were identified by the defendant: Dr. William Kenner and Dr.

James Merikangas. Two other experts were identified by the State: Dr. Daniel Martell and Dr. Bruce Mathews.

In the course of investigating his case, Defendant Robert Coe had retained the services of several other experts to consult with his attorneys concerning issues in the case. In particular, he had retained the services of Dr. Pamela Auble (psychologist), Dr. Jim Walker (neuropsychologist) and Dr. Herbert Meltzer (psychiatrist). Dr. Meltzer is a licensed practicing physician in Nashville, Tennessee. Dr. Pamela Auble and Dr. James Walker are licensed practicing psychologists in the State of Tennessee.

Neither Dr. Walker, Dr. Auble nor Dr. Meltzer has been appointed by the Court for purposes of the hearing. Each of those doctors were employed by Mr. Coe for consultation purposes only. Counsel has also consulted with one or more of them for purposes of preparing cross-examination. As such, their dealings with Mr. Coe and their impressions are covered by the attorney-client and work-product privilege and are not the proper subject of discovery or disclosure under existing law or any logical extension of existing law.

In particular, the trial court erred by: (1) failing to acknowledge the clear existence of privilege attaching to consulting experts; (2) failing to acknowledge the clear privilege between patient and doctor; (3) erroneously relying on a statute which has no applicability here; and (4) relying on an assertion of relevance, which *does not* override the existence of a privilege. In sum, the trial court not only failed to acknowledge extant privileges, but ordered disclosure of evidence based upon an erroneous view of a state statute and an assertion of relevance. As a result, the trial court=s ruling fails to fall within established legal norms, and the extraordinary appeal should be granted.

I.

THE INFORMATION IS NOT SUBJECT TO DISCOVERY

The material and information is not subject to discovery under either the Tennessee Rules of Criminal Procedure, the Tennessee Rules of Civil Procedure, or any reasonable common law Asupplementary@ rule of discovery.

Rule 16(b)(1)(A) and (B) of the Tennessee Rules of Criminal Procedure specifically limits the State=s discovery to documents and reports Awhich the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to the witness= testimony.@ This rule in conjunction with the Awork product@ doctrine which is contained in Tenn. R. Crim. P. 16(b)(2) effectively provides that defense counsel is not required to provide discovery with regard to any expert who the defendant does not intend to call at trial or whose report is not intended to be introduced at trial. See Harris v. State, 947 S.W.2d 156, 178 (Tenn. Crim. App. 1996).

Likewise, Rule 26.02(4)(A)(i) and (ii) of the Tennessee Rules of Civil Procedure limits the discovery of such information to experts that the party intends to call to testify at trial. Unless the expert witness is to be called to testify at trial, the information is not available in discovery.

In addition to being inappropriate under the existing rules of discovery, the discovery authorized in the present case is also inappropriate under any reasonable Asupplementary@ rule of discovery which could be adopted in the present case under the court=s inherent powers. In State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998), this Court concluded that the trial courts of this state may adopt Asupplementary@ rules of procedure so long as they don't conflict with or are inconsistent with the present rules of procedure. (citing Tenn. Code Ann. ' 16-3-407 and Tenn. R. Crim. P. 57). The Court also stated that:

> A...when issues arise for no procedure is otherwise specifically prescribed, trial courts in Tennessee have inherent power to adopt appropriate rules of procedure to address the issues. Rules adopted pursuant to this inherent power must be consistent with constitutional principles, statutory laws, and generally applicable rules of procedure. Indeed, when circumstances mandate the adoption of supplemental rules, *trial courts should pattern such rules upon analogous generally applicable rules of procedure*.@

Appellant respectfully submits that the discovery procedure authorized by the trial judge in the present case is not by any means patterned after that which is authorized under existing rules and is in direct conflict with the scope of discovery and procedure under the existing rules.

II.

DENIAL OF THE PRIVILEGE OF CONSULTING EXPERTS

DENIES THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

The plain fact is that the professionals whose information the state seeks were retained in order to assist counsel in assessing the issues involved in this case. Counsel are not mental health professionals, and as such, counsel has required the assistance of such experts to assist counsel in evaluating and preparing his case. When an expert has been employed to consult with counsel to assist the defense in preparing the defense=s case, the information in the possession of the consulting expert may not be elicited from the State. *See Downing v. Bowater, Inc.*, 846 S. W. 2d 265 (Tenn. App. 1992) (retained consulting experts are covered by the work product doctrine.)

Indeed, Aa party may not discover the identity of facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation or preparation for trial and who is not to be called as a witnesses at trial except as provided in Rule 35.02 or upon a showing that the party seeking discovery cannot obtain facts or opinions on the same subject by other means.@ Tenn. Rules Civil Procedure 26.02(4)(B). And here, the state has retained its own experts, who have reached their own conclusions concerning Robert Coe=s mental health. There is no basis for disclosing the

consulting experts= information, especially where counsel relied upon the right to consult with experts without any adverse consequences.

Tennessee law is fully consistent with that throughout the nation. A non-testifying consulting expert is not required to disclose privileged information. F.T.C. V. Grolier Inc., 462 U.S. 19, 103 S.Ct. 2209 (1983); In Re Murphy, 560 F.2d 326 (8th Cir. 1977); United States v. Leggett & Platt, 542 F.2d 655 (6th Cir. 1976). The reasons for this are clear: AThe primary purpose of the work product privilege is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party.@

The same goes for consulting experts. As respected commentators on the consulting-expert privilege have aptly stated:

> If the price for seeking expert consultation is possibly to live or die by the unknown opinion of the expert first consulted, there will be even more reluctance to consult.

Wright, Miller & Marcus, Federal Practice and Procedure, Civil 2d '2032, p. 449 (1994). Yet this is the precise unfair situation in which Robert Coe is placed. His attorneys are not experts. They needed experts to assist them. But instead of being able to use those experts to help their client, the trial court has held that those experts may be used in whatever manner they may hurt him. This hardly seems fair.

In such a situation, an attorney in need of assistance no longer becomes the advocate for his or her client, but instead potentially pits the attorney against his own client, by requiring the defendant=s expert to possibly be turned against him. This certainly is not the type of *adversarial* procedure which the Sixth Amendment requires, nor the discovery rules as well. The federal courts have been highly reluctant to endorse any procedure in which an attorney or a party working on behalf of a defendant is in reality working against the defendant. Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997).

Without a doubt, the trial court=s ruling creates a chilling effect upon counsel in the exercise of their roles as advocate. The trial court=s conclusion essentially places an attorney who is working on behalf of a death-sentenced inmate in an untenable position. Counsel is unable to hire consulting witnesses **B** as can any other attorney investigating or preparing his or her case **B** except at the risk of disclosing privileged work-product and impressions used in the preparation and evaluation of the case.

An attorney who is not an expert cannot evaluate his or her case without the assistance of experts. In this case, an attorney cannot make an informed judgment about the issues surrounding Robert Coe=s mental state without the assistance of an expert. However, if the ruling of the trial court remains intact, every attorney would therefore be forced to try to evaluate his or her case either without expert assistance, or, if using expert assistance, be forced to disclose information which is otherwise privileged in order to exercise his or her right to properly represent one=s client. It can hardly be said that a defendant receives the effective assistance of counsel, or a fully fair state court proceeding, if counsel is required to disclose information which other attorneys are not required to disclose. It is not a fair process to have the rights of the death-sentenced inmate placed into the hands of an attorney who cannot effectively represent the defendant without experts, but in using experts, risks not effectively representing the defendant. Fair process requires counsel who can investigate and prepare the case as an advocate, not an attorney who plays Russian-roulette with the life of his or her client.

The trial court=s ruling fails to acknowledge well-settled privilege law, denies the defendant the effective assistance of counsel, and places counsel in the untenable position of having to secure expert assistance **B** but only at the cost of harming the client. The application should be granted, and the trial

court=s ruling should be reversed.

III.
THE MATERIALS ARE COVERED BY PRIVILEGE WHICH THE TRIAL COURT FAILED TO EVEN ADDRESS

In the Criminal Court, Robert Coe made clear that the relations and communications between him and mental health professionals were privileged under Tennessee law. Specifically, Tenn. Code Ann. ' 63-11-213 provides as follows:

> ...The confidential relations and communications between licensed psychologists or psychological examiner and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

As this statute makes eminently clear, there is nothing to Arequire any such privileged communication to be disclosed.@ Rather, Robert Coe=s communications with such experts were privileged. Yet the trial court nowhere even mentions this privilege.

IV.
THE TRIAL COURT ORDERED THE DISCLOSURE OF MATERIALS UNDER A STATUTE WHICH IS WHOLLY INAPPLICABLE HERE

Further, in ordering disclosure, the trial court relied upon a wholly inapposite provision of Tennessee law, Tenn. Code Ann. '33-3-104(10)(iv). T.C.A. '33-3-104(10)(iv) is contained in Title 33 of the Tennessee Code, which applies *only* to the treatment of mentally ill persons by institutions of the State of Tennessee, viz. AGeneral Rules Applicable To Patients And Residents@ of State mental health facilities.

In fact, T.C.A. '33-3-104 specifically enumerates AThe following rights of patients and residents,@ which Ashall apply whenever appropriate, to both the mentally ill and the mentally retarded.@ Subsection (10) refers specifically to ACONFIDENTIAL RECORDS@ and applies only to materials Amade or information received pursuant to this title *and* directly or indirectly identifying a patient or

resident or former patient or resident under this title. . . .@ Thus, 33-3-104(10) applies only when three prerequisites are met:

(1) It involves a person who is a patient or resident of a Tennessee mental health facility;

(2) It involves information made or received pursuant to Title 33 of the Tennessee Code; and

(3) It involves information directly or indirectly identifying a patient, resident, former patient, or former resident.

None of these prerequisites have been met here. Robert Coe is not in a Tennessee mental health facility. The information was not made or received pursuant to Title 33 of the Tennessee Code. And the information has nothing to do with identification of any present or former resident of any such facility. Therefore, 33-3-104 does not apply, and the trial court departed from the normal course of judicial proceedings to hold otherwise.

V.

Van Tran CANNOT AND DOES NOT ABROGATE THE APPLICABLE PRIVILEGES

In addition, the trial court stated that because the Tennessee Supreme Court stated in the case of Van Tran v. State, ___ S.W.3d ___ (Tenn. 1999) a preference that the prisoner and the state freely disclose information in a competency proceeding, the otherwise privileged information from the doctors must therefore be disclosed. **However, *Van Tran* is not a case about privilege; nor did it purport to be one**. The fact that there may be a preference for disclosure does not abrogate the well-established law of privilege. Thus, for example, the fact that a defendant has stated something privileged to a Catholic priest does not mean that *Van Tran* requires its disclosure. The privilege always remains. The fact whether information is relevant is wholly beside the point.

Indeed, the law recognizes that potentially relevant evidence does not lose its character as privileged just because it is relevant. An attorney cannot be required to disclose evidence from his or her client simply because it is relevant. Also, a husband cannot be forced to provide privileged information about his wife just because it is relevant. Instead, the law acknowledges that there are policy reasons requiring privileges, for example, to facilitate the marriage relationship, the relationship between priest and penitent, the relationship between attorney and client.

And in this case, the law acknowledges that the relationship between a patient and psychologist, as well as an attorney and a consulting expert remain inviolate. The trial court, however, refused to acknowledge the existence of valid privileges by instead relying on a claim of relevance. Relevance is not the question **B** privilege is. And it remains. Because this Arelevance@ test was not the proper test for determining the appropriateness of disclosure of privileged evidence, the trial court=s ruling departs from the standard course of proceedings, and therefore the application should be granted.

While the Tennessee courts may ultimately modify somewhat the law of privilege in future competency to be executed cases, what the trial court has done here goes beyond a modification of the privilege and effectively converts counsel for the petitioner into another information gatherer for the court. This is not the role of counsel. Counsel is to be an advocate, and by lessening the role of counsel as advocate, the right to counsel is thwarted, and the fairness of any competency proceedings called into question.

CONCLUSION

The application should be granted. If the trial judge opens the sealed documents and reviews them in camera, he may become tainted. Access by the judge or the prosecution will taint the entire

process. The trial court=s order requiring disclosure of consulting experts= information should be reversed and a protective order should be granted to the Appellant preventing the trial judge, the prosecution, or any other party from obtaining said information and/or from opening any such sealed documents, and for such other relief as appropriate.

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CERTIFICATE OF SERVICE

This application has been served upon counsel for the State, Assistant Attorney General Glenn R. Pruden and to Ms. Kathy Morante, by fax this 23 day of January, 2000.

I also certify that attached are true and correct copies of :

1. ORDER TO PRODUCE MEDICAL/pSYCHOLOGICAL RECORDS etc

2. ORDER GRANTING EX PARTE MOTION FOR FUNDS FOR EXPERT ASSISTANCE

3. MOTION TO QUASH SUBPOENAS

4. RESPONSE OF STATE etc.

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