IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE	)	COFFEE COUNTY
	)	ORIGINAL APPEAL NO.
v.	)	M1987-00067-SC-DPE-DD
	)	**Filed November 18, 2005**
GREGORY THOMPSON	)	

MOTION FOR PROTECTIVE ORDER
AND
MOTION FOR ORDER REQUIRING RECIPROCAL DISCOVERY

Gregory Thompson is a returning *Ford* petitioner.[1] In this case of first impression, the issue is whether the State Attorney General's Office may obtain unfettered access to confidential records regarding a state prisoner without judicial supervision and without providing reciprocal discovery. Counsel for Mr. Thompson respectfully moves this Court to enter an order protecting Mr. Thompson's right to privacy and enter an order requiring reciprocal discovery.[2]

I. INTRODUCTION

Counsel has a good faith belief that since January 2004, the State Attorney General's office has enjoyed unlimited access to records documenting most aspects of Thompson's daily existence on death row. Some of these records are open to the public but some of them are privileged and confidential.

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[1] *Ford v. Wainwright*, 477 U.S. 399 (1986).

[2] This Court has original jurisdiction over matters regarding *Ford* claims. *Van Tran v. State*, 6 S.W.3d 257, 267, 272 (Tenn. 1999).

The State Attorney General's office obtained records of Mr. Thompson's visitor's log, recordings of Mr. Thompson's telephone conversations, his institutional disciplinary records, educational records and medical and mental health records. These records were obtained *via* a written request to Warden Ricky Bell. Mr. Thompson's medical and mental health records, which are privileged and confidential under Tennessee law, were obtained in the same manner and with the inclusion of an extra-judicial subpoena.

Counsel initiated correspondence with the State Attorney General's Office in an attempt to obtain reciprocal discovery. The State Attorney General's Office claims recordings of Mr. Thompson's telephone calls are confidential under Tennessee's Public Records Act and will not disclose them to counsel. No explanation has been offered as to how or why the State Attorney General's Office was able to obtain these records if they are confidential. The State Attorney General's Office has also declined to engage in reciprocal discovery of the other records in its possession.

This motion is necessary to protect Mr. Thompson's constitutional right to adequate *Ford* proceedings.

II. BACKGROUND

On September 27, 2005, this Court set Gregory Thompson's execution for February 7, 2006.

On September 29, 2005, counsel filed a motion for a stay of execution. This motion alerted the Court that the federal habeas proceeding was not completed, that there has been a change in Mr. Thompson's mental health status and that he is insane and incompetent to be executed. It also requested a certificate of commutation. The motion was supported by two affidavits of Dr. Sultan, a psychologist who has monitored

Mr. Thompson's mental health since the inception of his federal habeas proceeding. Dr. Sultan opined that there had been a substantial change in Mr. Thompson's mental health status since he was last before this Court. Dr. Sultan found Mr. Thompson is incompetent to be executed under *Ford v. Wainwright* and *Van Tran v. State*. Counsel notified the Court that a request for the most-current prison records was pending and more time was needed to obtain expert evaluations and investigate Mr. Thompson's current mental health status. Counsel also noted that state court procedures for a subsequent *Ford* determination are unsettled.

On October 18, 2005, this Court entered an order holding Mr. Thompson's subsequent *Ford* claim in abeyance until November 18, 2005. On that date, Mr. Thompson is to submit any further evidence supporting his claim of a change in his mental health status.

On November 8, 2005, counsel notified this Court that the federal court of appeals is actively considering Mr. Thompson's case. Counsel requested a stay until the federal proceedings are completed. This motion remains pending.

III. NEW INFORMATION REQUIRING THIS COURT'S INTERVENTION

When counsel received Mr. Thompson's current prison records, they contained copies of two memoranda written by Jennifer L. Smith, Senior Counsel, Capital Team Leader, on letterhead of the State of Tennessee, Office of the Attorney General, Criminal Justice Division. The memoranda are dated January 21, 2004, and March 2, 2004. There was also a blind subpoena authored by District Attorney General Mickey

Layne and issued by the Coffee County Circuit Court.[3] It appears that District Attorney General Layne obtained the blind subpoena on behalf of Assistant Attorney General Smith (Attachment B). The subpoena purports to compel the Tennessee Department of Corrections in Nashville to release Gregory Thompson's medical information to the Office of the State Attorney General. The subpoena was served *via* facsimile upon Debra Inglis, of the State Attorney General's Office and General Counsel for the Department of Correction.

On January 21, 2004, the date of the first memorandum requesting Thompson's records, there was no claim by Mr. Thompson of incompetency nor was Mr. Thompson's case in any sort of discovery posture.[4] However, it appears that Assistant Attorney General Smith was directing Warden Bell to provide her copies of Thompson's visitor log from December 2003 to the present and bi-weekly copies thereafter. She also requested bi-weekly recordings of Thompson's telephone conversations (Attachment C, 1/21/04 memo). The visitor log is a public record. However, when

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[3]In 2002, the conservatorship court entered a protective order precluding the attorneys in the Criminal Justice Division of the Office of the Attorney General and Reporter, and/or any person supervising or in a position of authority over said attorneys ("CJD"), from ready access to Mr. Thompson's medical information. Clearly contemplating judicial oversight, the Court's order required CJD to follow discovery procedures in the criminal case if it wished to obtain Mr. Thompson's medical information. The court also ordered a Chinese Wall between the state attorneys representing the Department of Correction and the state attorneys in CJD, for the purposes of preventing the sharing of medical information pertaining to Gregory Thompson that is not public record (Attachment A).

[4]On January 20, 2004, the United States Supreme Court denied Mr. Thompson's rehearing petition. *Thompson v. Bell*, 540 U.S. 1158, 124 S.Ct. 1162, 157 L.Ed.2d 1058 (2004). Mr. Thompson's execution remained stayed by order of the federal district court.

requesting the telephone recordings, Smith wrote: "[w]e have received this type of information in previous cases, and I hope there will be no problem instituting this request as to this inmate." The State Attorney General's Office and the Department of Correction will not give counsel copies of Mr. Thompson's telephone conversations. The Attorney General's Office alleges that disclosure is shielded by the Tennessee Public Records Act, TENN. CODE ANN. §10-7-504(a)(8) (Attachment D, letter). The Department of Correction has given no explanation for withholding this information.

In March 2004, Smith directed Bell to provide her with weekly copies of those items. In addition, she requested copies of Thompson's institutional disciplinary records from January 1999, copies of Thompson's institutional educational records from January 1995, and copies of all "institutional records related to medical treatment, and psychological/psychiatric complaints and/or treatment since coming into custody of the Tennessee Department of Correction" (Attachment B, 3/2/04 memo). To gain access to Thompson's confidential medical records Smith tendered the blind subpoena as authority for disclosure. It appears this disclosure was taking place since March 2, 2004, prior to any decision as to whether a *Ford/Van Tran* hearing would be granted.

To undersigned's knowledge, neither Ricky Bell, Debra Inglis nor any other person in the Department of Correction contested the subpoena. Nor did any person notify Mr. Thompson's counsel of the subpoena or in any other manner attempt to protect Mr. Thompson's privacy rights. To undersigned's knowledge, neither Ricky Bell, Debra Inglis nor any other person contested the State Attorney General's Office request for Mr. Thompson's telephone conversations.

IV. REQUESTS FOR RELIEF

This Court has original jurisdiction of *Ford* proceedings. *Van Tran v. State*, 6 S.W.3d at 267. In *Van Tran*, this Court indicated a motion raising a defendant's competency to be executed may constitute consent to submit to a State examination, *id.* at 269 n.14.[5] This Court did not hold that the defendant waives all medical privacy rights. It did not hold that the State is entitled to unlimited and unfettered access to records of the defendant's medical and mental health history nor even current mental health records. Of course, those records are confidential under both state and federal law. In *Van Tran*, this Court's emphasis was on the importance of the state and defense sharing information known about the defendant's mental state. This Court, in its efforts to implement *Ford's* teachings, admonished in *Van Tran* that there was to be no hiding of evidence. *Id.* ("the prisoner and the State should freely disclose to each other all information relating to the prisoner's competency as this proceeding may be, in a very real sense, the last avenue of reprieve available to an inmate sentenced to death.").[6]

Important here is that (1) the Assistant Attorney General has been obtaining confidential medical and mental health records based on the mere auspices of her office and without Court approval or supervision (2) the Department of Correction has

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[5]This portion of *Van Tran* did not address the implications of HIPPA, etc.. Although unclear, it is reasonable to presume any waiver of privacy rights would only be triggered upon a factual dispute and in contemplation of an evidentiary hearing. Here, the State did not and has not disputed the facts presented by Mr. Thompson. Nor was an evidentiary hearing granted in the first *Ford/Van Tran* proceedings and a hearing has not yet been granted in the current proceeding.

[6]To this end, in the first *Ford* proceeding, Mr. Thompson's claim was accompanied by those portions of his medical and mental health records that are relevant to the issue of his present competency to be executed.

acceded to the Assistant Attorney General's requests (3) the Assistant Attorney General has been amassing information about Mr. Thompson without revealing it to opposing counsel and this Court (4) at the same time that the information has been compiled, the Assistant Attorney General has been arguing it is irrelevant to the issues before this Court[7] (5) Mr. Thompson's counsel has been denied the same access to information, and (6) the Assistant Attorney General has not used or disclosed this information so she, not defense counsel and not this Court, knows the substance of all of the available evidence.

A. An Order of This Court is Required to Curb this Abusive Use of Power and to Protect Mr. Thompson's Privacy Rights

Gregory Thompson is an inmate whose death this Court scheduled for February 7, 2006. Yet he still possesses some of the same rights as all Tennesseeans. Gregory Thompson has a right to privacy in his medical and mental health records. The mere filing of a lawsuit or becoming embroiled in a legal action where mental status is at issue does not constitute a wavier of HIPAA rights or privacy protections. *United States v. Sutherland*, 143 F.Supp.2d 609 (W.D.Va. 2001); *Alsip v. Johnson City Medical Center*, 2005 WL 1536192 (Tenn.Ct.App. 2005).

This Court has not determined that a claim of incompetence to be executed constitutes a wholesale waiver of privacy protections. *Van Tran*, 6 S.W.3d at 269 n.14. Nor has there been any pronouncement that the State Attorney General's Office may obtain unfettered and unilateral access to a prisoner's confidential information before a

[7] *See e.g.* Brief of the State of Tennessee, March 24, 2004 p.10 (arguing medical records and history do not establish present incompetency).

Ford claim is asserted or when the State does not dispute the facts supporting a *Ford* claim or before the case has reached the discovery stage or evidentiary hearing stage.

Tennessee courts certainly have not sanctioned the use of an extra-judicial blind subpoena to acquire a prisoner's confidential medical records for use in capital litigation. To the contrary, the Tennessee Court of Appeals, in a related context, has prohibited the use of alternative means to circumvent rules governing discovery. In *Swift v. Campbell*, 159 S.W.3d 565, 575-76 (Tenn.Ct.App. 2005), the court held that a prisoner could not use the Tennessee Public Records Act as a sword to cut through ordinary discovery rules and obtain information which the rules deem not discoverable. Here, the state legislature has enacted laws governing the requisition of inmate medical records and issuance of judicial subpoenas. *See* TENN. CODE ANN. §4-6-140(c) ([a]ny information contained in an inmate record that is otherwise made confidential by the provisions of §10-7-504, shall remain confidential); TENN. CODE ANN. §10-7-504(a)(1) (medical records of persons receiving medical treatment at the expense of the state, county or municipality shall be treated as confidential); TDOC Administrative Policies and Procedures #113.52 (A)-(C), (D), (E)(1) (medical and mental health information is confidential and may be disclosed only if there is a need to know by those persons responsible for the inmate's care, the inmate signs a release or a third party obtains a court order); 45 C.F.R. 160.203(b) (HIPPA regulations preempt state laws which provide lesser protections and exempt from preemption state laws which provide more stringent protections); *see also Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987)(a party cannot obtain by subpoena that which is not otherwise discoverable); *State v. Cage*, C.C.A. No. 01C01-9605-CC-00179, 1999 Tenn.Crim.App. LEXIS 62 *23-

24 (same); *State v. Schaff*, 727 S.W.2d 255 (Tenn.Crim.App 1986) (A district attorney general does not have subpoena power except through the process of the court. Material obtained pursuant to the subpoena should have been returned to the court to be inspected and used under the court's discretion); *State v. Sams*, 802 S.W.2d 635, 637, 641 (Tenn.Crim.App. 1990) (assistant district attorney general abused the subpoena power when information obtained was not intended to be used and the right of family members to be present in the courtroom was violated). To obtain a prisoner's confidential medical records, the law requires a prosecutor to present a judge with a sworn affidavit explaining the need for the confidential records. The judge will review the request and, if appropriate, cause a subpoena to issue.

There is no indication that the subpoena procured by District Attorney Layne on behalf of Assistant Attorney General Smith was reviewed by *any* judicial authority. It appears that a person, probably not District Attorney Layne, wrote "DA's Office Mickey Layne 723-5055" on the subpoena, had the Coffee County Circuit Court Clerk sign the subpoena and then faxed a copy of this subpoena to the Criminal Justice Division of the Attorney General's Office in Nashville, which then faxed it to the Department of Correction. When the subpoena was sent by Assistant Attorney General Smith to a Department of Correction's lawyer, who is also within the Attorney General's Office, instead of Riverbend Maximum Security Institution which houses Mr. Thompson and maintains his records, the Department of Correction failed to ensure that any disclosure of confidential records was in compliance with the law. Even the basic requirements for a valid subpoena were not fulfilled. For example, under Tennessee law, the subpoena was not effective because it was not signed by Mickey Layne. TENN. CODE ANN. § 23-3-

105(b).

The law contains no exception that would permit the Assistant Attorney General to circumvent established procedure in the manner which she did. Here, several members of different parts of the same office essentially caused a subpoena to issue upon itself, with which it then complied, in order to obtain confidential records outside of the ordinary judicial process. This conduct raises the specter of the government's unchecked and unlimited ability to obtain confidential and privileged information, not just about Mr. Thompson, but about any Tennessee citizen. Accordingly, this Court should enter a protective order requiring the State Attorney General's Office to seek information in a lawful manner and/or setting forth parameters for the disclosure of Mr. Thompson's medical and mental health records.

B. An Order of This Court is Required to Provide Mr. Thompson with Equal Access to Information Relevant to His *Ford* Claim

The State Attorney General's Office has obtained recordings of Mr. Thompson's telephone calls since January 2004. The recordings were released by Mr. Thompson's custodian, the Warden of Riverbend Maximum Security Institution, upon a written request. Both the Assistant State Attorney General, who has invoked a confidentiality provision of Tennessee's Public Records Act, and the Warden have refused to supply those same recordings to Mr. Thompson's counsel. The denial of equal access to information violates Mr. Thompson's federal due process rights, *Ford*, *supra*, *Brady v. Maryland*, 373 U.S. 83 (1963) (governing the prosecutor's role in turning over exculpatory evidence), *Cicenia v. La Gay*, 357 U.S. 504 (1985) (disclosure of the defendant's statements is the "better practice"), and *Van Tran*, 6 S.W.3d at 271 ("Any

procedure that unreasonably precludes the prisoner from attending and 'presenting material relevant to [the question of] his sanity or bars consideration of that material by the fact finder is necessarily inadequate.'") *quoting Ford*, 477 U.S. at 414.[8] Furthermore, by using the Tennessee Public Records Act as a shield to disclosure, the State has circumvented existing rules, a tactic which the courts have resoundingly reproached. *Gretchen v. Swift*, *supra*; *Van Tran*, 6 S.W.3d at 269 n.14 ("the prisoner and the State should freely disclose to each other all information relating to the prisoner's competency"). Under these circumstances, the Tennessee Public Records Act should not be used as a shield to disclosure if it is also well-settled that the Act cannot be used as a sword.

Counsel for Thompson can not obtain recordings of Thompson's telephone conversations by any other means than through disclosure by the State. The denial of access to information that only the State knows about and which could contain poignant examples of Mr. Thompson's incompetency violates *Ford* as well as the spirit of *Van Tran*. In *Ford*, the United States Supreme Court reviewed Florida's competency proceedings. There, the state used a procedure "conducted wholly within the executive branch, *ex parte*, and [which] provides the exclusive means for determining insanity." *Ford*, 477 U.S. at 412. The procedure explicitly barred advocacy by defense counsel. *Id.* at 413. The Supreme Court found this procedure inadequate because it did not allow the prisoner the opportunity to participate "in the truth-seeking process" and did

[8]These principles are reflected in Tenn.R.Crim.Pro. 16(a)(1) which directs that "the State shall permit the defendant" access to his own statements. In Tennessee, the disclosure of a defendant's own statements is "virtually an absolute right." *State v. Hicks*, 618 S.W.2d 510, 513-14 (Tenn.Crim.App. 1981).

not allow the prisoner to offer material relevant to the issue. *Id.* Further, the procedure was inadequate because it did not allow the prisoner the opportunity to "clarify or challenge the state experts' opinions" *Id.* at 415. The biggest defect in the procedure used was the "placement of the decision wholly within the executive branch." *Id*. at 416. "The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding." *Id.* The Court also noted that in "no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal." *Id.*

The concerns present in *Ford* are present here. First, the prison's staff documents and records information about Mr. Thompson. Second, the State's lawyers obtain from their colleagues, the prison's lawyers, access to that information for use in the state-court *Ford* proceeding. Third, the State then refuses to disclose this same information to Mr. Thompson. The denial of this information has caused Thompson's counsel to be operating in the dark. Without access to relevant evidence, Thompson cannot offer that evidence to the Court nor advocate for his client. The person in absolute control of this information is Assistant Attorney General Smith. As *Ford* recognized, Assistant Attorney General Smith is not the correct repository of all information concerning Thompson's competency. The Court cannot meaningfully review Thompson's claim, when the Assistant Attorney General is secreting evidence in her office.

The unilateral and unfettered access to information about Mr. Thompson by the

Assistant Attorney General raises a concern that the trial court's and this Court's prior determinations of competency, *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004), are invalid because the recent discovery of the aforementioned records suggest it was the practice of Assistant Attorney General Smith to possess information – and not disclose it – during the litigation of this matter previously. If the prior determination is invalid because of this massive breakdown in the process, that factor must be considered in conjunction with the Court's present determinations.

V. CONCLUSION

This Court recognized in its decision addressing *Ford* claims and procedures that "[i]ssues may, and no doubt, will, arise in competency proceedings which have not been addressed." *Van Tran*, 6 S.W.3d at 274 ("[s]uch issues can and will be addressed on a case-by-case basis."). These circumstances present this Court with the opportunity to address the issue of discovery which was not addressed in *Van Tran*. In addressing this issue, the Court can be guided by the basic principles that *Ford* litigants, like Mr. Thompson, must have equal access to all information necessary to demonstrate his incompetency to be executed so "that the strictures of due process" are afforded, *Van Tran*, 6 S.W.3d at 271, he has the opportunity to participate "in the truth-seeking process" and he has the ability to offer material relevant to the issue of his insanity. *Ford v. Wainwright,* 477 U.S. at 413.

Prayer for Relief

For the above-stated reasons, it is respectfully requested that this Court:

(1) issue a protective order which requires the State Attorney General's Office to

lawfully seek access to Mr. Thompson's confidential medical and mental health records pursuant to judicial review and supervision;

(2) issue an order requiring the parties to engage is open and reciprocal discovery;

(3) stay any determination on the merits of the pending proceedings until Mr. Thompson's counsel has the opportunity to review information regarding Mr. Thompson which has been obtained by the Assistant Attorney General and Mr. Thompson's experts have had an opportunity to review any of this information which may be relevant to their assessment of Mr. Thompson's mental status; and,

(4) grant any and all other relief this Court deems appropriate under the circumstances.

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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C. Michael Layne, Esquire
District Attorney General
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this ____ day of November, 2005.

The undersigned attorney prefers to be notified of any orders or opinions of the Court by email to passino@mpassino.com.

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Michael J. Passino