

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENN.
MAR 31 2000

ROBERT GLEN COE)

Petitioner)

v.)

RICKY BELL, Warden)

Respondent)

No. 3:00-0239

Judge Trauger

by _____
DEPUTY CLERK

MOTION TO ALTER OR AMEND

Comes the Petitioner, Robert Glen Coe, and respectfully moves this Court to alter or amend its March 29, 2000 memorandum and order denying his petition for writ of habeas corpus. In particular, Robert Coe respectfully notes that this Court has misapprehended the facts and the law in denying his petition for writ of habeas corpus. This Court should grant the motion to alter or amend, grant the motion for evidentiary hearing, and grant Robert Coe habeas corpus relief, as requested in his petition. In support of this motion, Petitioner respectfully states:

1. On March 29, 2000, this Court denied Robert Coe's petition for writ of habeas corpus, and also denied his motion for evidentiary hearing and discovery.

2. In its March 29, 2000 Memorandum, this Court stated that application of §2254(d)(1)'s "unreasonable application" standard to Robert Coe's competency claims under *Ford* is "as the Sixth Circuit and the petitioner would have it be." Memorandum, p. 8. While Robert Coe has asserted that competency is a mixed question of law and fact, he has never asserted that §2254(d)(1)'s "unreasonable application" standard applies here. Rather, it is his position that the AEDPA does not apply, but even were it to apply, §2254(c) simply does not apply, because the state courts never even resolved the operative question of his 'competency to be executed' but instead

made a conclusion about his competency at some past point in time. Petitioner's Reply, pp. 7-9.

3. In addition, Robert Coe has never asserted that the "unreasonable application" standard of §(d)(1) would apply to any mixed question of law and fact. A Sixth Circuit panel's conclusion that the "unreasonable application" standard applies to mixed questions of law and fact imposes a framework upon the AEDPA which simply does not exist. See O'Brien v. DuBois, 145 F.3d 16, 24 (1st Cir. 1998). Rather, even were the AEDPA to apply to his *Ford* claims, the "contrary to" standard applies, not only because the Supreme Court has decided *Ford*, but also because he is entitled to relief under 28 U.S.C. §2244(b)(2)(A), which requires the application of any new retroactive rule of law, including the proper application of the *Ford* standard for competency, which is the standard governing at common law. (Andinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680 (1993); See Penry v. Lynaugh, 492 U.S. 302, 329-333 (1989)(application of proper standard under *Ford* raises no retroactivity concerns, as *Ford* makes petitioner ineligible for execution). Even so, the state courts' failure to apply the common law standard is unreasonable as well.

4. In denying relief, this Court has also made various inaccurate factual assertions which misapprehend the facts. In particular, without hearing any proof in this matter, this Court has questioned Dr. Kenner's conclusion that Robert Coe will dissociate when faced with the imminent threat of his own extinction. This court's conclusion does not comport with available psychiatric knowledge. As Dr. Kenner informs the Court in a contemporaneously-filed affidavit, this court's assumptions are inaccurate:

I have read that portion of the District Court's Memorandum entered March 29, 2009, that describes my testimony at the hearing in Memphis in January of this year. What the Court describes at the bottom of page 14 of the Memorandum as a "leap" on my part is in fact a conclusion drawn by me based upon almost three decades of practice, my professional education, my specific research into the Dissociative Identity Disorder, and my treatment of several persons who suffered

from that disorder. While a logical analysis is certainly a part of any scientific study, "logic" alone is not a legitimate basis for making a psychiatric diagnosis. Behavior of the mentally ill is not logical nor predictable by logical analysis - at least not one based upon common experience without benefit of training and experience.

5. Dr. Kenner further notes that this court's attempt to undermine his conclusions by differentiating between the psychiatric effects of threatened sexual abuse and the psychiatric effects of imminent death does not comport with the reality of Robert Coe's mental illness - either will cause dissociation:

As it relates to this case and my opinion about Mr. Coe's condition, it is true that the closer a stressful or threatening situation approximates the sexually and physically abusive treatment of Mr. Coe by his father, the more likely he will dissociate, i.e., fragment to avoid the painful feeling at hand. However, there are, in my professional opinion, other situations that sufficiently resemble the original trauma in critical ways to provoke a dissociative state. During his childhood, Mr. Coe's father repeatedly tried to kill his son. He hit Mr. Coe in the head with a hammer and shot him with a rifle. Given that those specific traumatic events in Mr. Coe's past, one can reasonably predict that his date with the executioner will have powerful emotional connections with his earlier traumatic experiences in childhood. While I cannot describe all such situations, nor can I guarantee that any such situation will provoke a dissociative state, I can, with a reasonable degree of medical certainty, predict that certain particularly dangerous or stressful situations will provoke such a state.

6. As Dr. Kenner continues, there is no meaningful distinction between Robert Coe's reaction to facing imminent sexual attack and death (as threatened by Mr. Saripkin) and imminent physical assault and death, which will occur during any execution. Either will cause dissociation:

In my opinion, the imminent execution of Robert Coe, will for him, present sufficient intolerable stress that he will fragment into a dissociative state. Clearly, different forms of execution may produce different levels of stress for the person executed. However, no matter how apparently "benign" the manner of execution may be, the forced extinction of a human life, is for the person whose life is to be terminated, an extraordinarily stressful experience. While the letter Mr. Coe received from inmate Saripkin described assaultive behavior that resembled the treatment Mr. Coe had received from his father, it was from an inmate in another secure institution half way across the state - yet it still produced a dissociative state in Mr. Coe - while he was

still "safely" imprisoned on death row in Riverbend Maximum Security Institution. Similarly, previous execution dates may not have produced a dissociative state because of the relative lack of reality of occurrence because of continuing litigation. However, when it becomes apparent to Mr. Coe's primary personality that the execution will occur, the stress on him will mount and in my professional opinion, in the hours before the execution, he will flee from that stress and fear by dissociating into a personality fragment that has no knowledge of his execution or the reasons for that sentence.

Kemper Affidavit, pp. 2-3. In sum, therefore, this Court's attempted distinction between types of attacks upon Robert Coe is simply incorrect.

7 In addition, this Court's conclusion that Robert Coe will not dissociate because he supposedly looks forward to his execution also fails to account for the troubled mental state which has plagued him for decades.

The Court disagrees with my opinion and finds it invalid because she believes that Mr. Coe looks forward to his execution and therefore would not see his execution as threatening, thus no dissociative state would be provoked. With all due respect to the Court, I believe that this is a question within the particular expertise of a psychiatrist. Robert Coe's suicidal tendencies are a symptom of his complex psychological makeup. For many mentally ill people there is a significant difference between dying at their own hands as opposed to being killed by someone else. This is the case for Robert Coe - a person whose first authority figure, his father, tried to kill him several times while Mr. Coe was a very young child. He survived these and other assaults by some basic animal instinct for survival, and by fragmenting into an altered, dissociative state. In my professional opinion, when his current authority figure, the State of Tennessee's executioner, is ready to forcefully take his life, Robert Coe will use the same primitive defenses to survive as he has learned, by fragmenting into part of his personality that allows him to avoid the painful and frightening reality at hand.

Kemper Affidavit, p.3.

8. This Court also has incorrectly stated that Robert Coe's counsel during the state court proceedings did nothing to try to control Robert Coe during his outburst in the state court proceedings. As counsel James Walker makes eminently clear in his affidavit (Exhibit 2), counsel

do everything they could to keep Robert Coe from being in the courtroom and/or from disrupting the proceedings. Their efforts ranged from seeking to have his presence waived for the proceeding, meeting with Robert Coe during the proceedings, and getting a Catholic priest to talk to Robert to try to calm him down. Walker Affidavit, pp. 2-3. They also had no choice except to continue with the proceedings despite the outburst in the courtroom, because their responsibility was to conduct the proceeding, not talk to Robert Coe. *Id.* This court's contention that the outbursts by the mentally disturbed Robert Coe were somehow contrived by counsel is simply not true.

9. Likewise, the court has asserted that there was no problem with divulging privileged and confidential information from Robert Coe's retained experts, because such information was brought out on direct examination of Robert Coe's expert witnesses. This misses the mark. Once the trial court violated the work-product privilege, Robert Coe had no choice but to address such issues through his testifying witnesses. The fact that Robert Coe was forced to address such issues does not minimize the fact that he had to do so because the trial court had already violated his right to due process by ordering disclosure of his experts' information. See Walker Affidavit, p. 3. The offense to due process occurred long before Robert Coe's witnesses took the stand, and their testimony is not relevant to the due process violation.

10. This Court has also stated that the matters relating to the death threats made to the judge are not matters within the record, and therefore ought not be considered. This court has failed to acknowledge that Robert Coe raised such issues in a motion before the Tennessee Supreme Court, but that court denied him a remand for a hearing. Having been denied a hearing in the state courts, he is entitled to discovery and to a hearing on such issues in this court and cannot be denied relief on such issues without being accorded the process due him in the federal courts.

CONCLUSION

The Motion To Alter Or Amend should be granted. This Court should grant Robert Coe his requested evidentiary hearing, and after such a hearing, grant Robert Coe habeas corpus relief.

Respectfully Submitted,

James H. Walker
801 Woodland Street
Nashville, Tennessee 37206
(615) 254-0202

Henry A. Martin
Paul Botti
Kalley Henry
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: Paul Botti

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid to Glenn R. Pruden, Assistant Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243, on this 21 day of March, 2000.

Paul Botti

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE,)
)
 Petitioner,)
)
 v.) NO. 3:00-0239
) JUDGE TRAUGER
 RICKY BELL, Warden,)
)
 Respondent.)

STATE OF TENNESSEE)
) ss
 COUNTY OF DAVIDSON)

AFFIDAVIT

I, WILLIAM D. KENNER, first after being duly sworn, swear and state as follows:

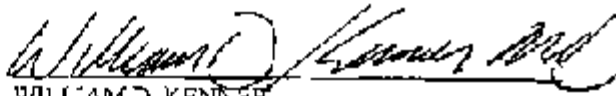
1. I have read that portion of the District Court's Memorandum entered March 29, 2000, that describes my testimony at the hearing in Memphis in January of this year. What the Court describes at the bottom of page 14 of the Memorandum as a "leap" on my part is in fact a conclusion drawn by me based upon almost three decades of practice, my professional education, my specific research into the Dissociative Identity Disorder, and my treatment of several persons who suffered from that disorder. While a logical analysis is certainly a part of any scientific study, "logic" alone is not a legitimate basis for making a psychiatric diagnosis. Behavior of the mentally ill is not logical, nor predictable by logical analysis - at least not one based upon common experience without benefit of training and experience. As it relates to this case and my opinion about Mr. Coe's condition, it is true that the closer a stressful or threatening

situation approximates the sexually and physically abusive treatment of Mr. Coe by his father, the more likely that he will dissociate, *i.e.*, fragment to avoid the painful feeling at hand. However, there are, in my professional opinion, other situations that sufficiently resemble the original trauma in critical ways to provoke a dissociative state. During his childhood, Mr. Coe's father repeatedly tried to kill his son. He hit Mr. Coe in the head with a hammer and shot him with a rifle. Given that those specific traumatic events in Mr. Coe's past, one can reasonably predict that his date with the executioner will have powerful emotional connections with his earlier traumatic experiences in childhood. While I cannot describe all such situations, nor can I guarantee that any such situation will provoke a dissociative state, I can, within a reasonable degree of medical certainty, predict that certain particularly dangerous or stressful situations will provoke such a state. In my opinion, the imminent execution of Robert Coe, will for him, present sufficient intolerable stress that he will fragment into a dissociative state. Clearly, different forms of execution may produce different levels of stress for the person executed. However, no matter how apparently "benign" the manner of execution may be, the forced extinction of a human life, is for the person whose life is to be terminated, an extraordinarily stressful experience. While the letter Mr. Coe received from inmate Sarpkin described assaultive behavior that resembled the treatment Mr. Coe had received from his father, it was from an inmate in another secure institution half way across the state - yet it still produced a dissociative state in Mr. Coe - while he was still "safely" imprisoned on death row in Riverbend Maximum Security Institution. Similarly, previous execution dates may not have produced a dissociative state because of the relative lack of reality of occurrence because of continuing litigation. However, when it becomes apparent to Mr. Coe's primary personality that the

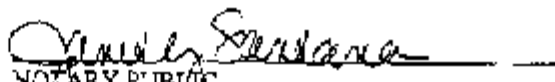
execution will occur, the stress on him will mount and in my professional opinion, in the hours before the execution, he will flee from that stress and fear by dissociating into a personality fragment that has no knowledge of his execution or the reasons for that sentence.

2. The Court disagrees with my opinion and finds it invalid because she believes that Mr. Coe looks forward to his execution and therefore would not see his execution as threatening, thus no dissociative state would be provoked. With all due respect to the Court, I believe that this is a question within the particular expertise of a psychiatrist. Robert Coe's suicidal tendencies are a symptom of his complex psychological makeup. For many mentally ill people there is a significant difference between dying at their own hands as opposed to being killed by someone else. This is the case for Robert Coe - a person whose first authority figure, his father, tried to kill him several times while Mr. Coe was a very young child. He survived these and other assaults by some basic animal instinct for survival, and by fragmenting into an altered, dissociative state. In my professional opinion, when his current authority figure, the State of Tennessee's executioner, is ready to forcefully take his life, Robert Coe will use the same primitive defenses to survive as he has learned, by fragmenting into part of his personality that allows him to avoid the painful and frightening reality at hand.

FURTHER AFFIANT SAYETH NOT.


WILLIAM D. KENNER

Sworn to and subscribed before me on this 31st day of March 2000.


NOTARY PUBLIC

My Commission Expires: 7/28/2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE,)
)
 Petitioner,)
)
 v.) NO. 3:06-0239
) JUDGE TRAUGER
 RICKY BELL, Warden,)
)
 Respondent.)

STATE OF TENNESSEE)
) ss
 COUNTY OF DAVIDSON)

AFFIDAVIT

James Holt Walker, being duly sworn, deposes and states as follows:

1. My name is James Holt Walker. I am an attorney licensed to practice law in the State of Tennessee, before the United States District Court for the Middle District of Tennessee and before the United States Court of Appeals for the Sixth Circuit. My business address is 601 Wood and Street, Nashville, TN 37206. I give this affidavit from my personal knowledge.

2. I have been appointed to serve as co-counsel for Robert Glen Coe in various proceedings in the United States District Court for the Middle District of Tennessee. I was also appointed by the Tennessee Supreme Court to serve as lead counsel to Robert Glen Coe in state competency-to-be-executed proceedings.

3. I have read the District Court's Order and Memorandum Opinion (dated March 29, 2000) in its entirety.

4. Footnote 34 of that Memorandum opinion states:

The videotape reveals that, during the two days of trial prior to the onset of this outrageously disruptive conduct, petitioner and his lawyers talked back and forth on many occasions. However, once this disruptive conduct started, not one of his several counsel attempted to talk with him, calm him down, or convince him to change his behavior.

Memorandum Opinion (dated March 29, 2000) at p. 40, footnote 34 (emphasis added).

5. Footnote 35 of that Memorandum Opinion states:

The videotape shows that Coe stopped his stream of obscene rantings when something was happening in court that he wanted to listen to.

Id. at p. 41, footnote 35.

6. I respectfully submit that the two foregoing footnotes are not factually accurate.

a) To begin with, my co-counsel (Robert Huller) and I made numerous requests to waive Robert Glen Coe's presence at the state competency-to-be-executed proceedings. We did not, and do not believe that our client was or is competent to waive any constitutional right for himself, but we still felt that bringing a severely mentally ill man (who had been largely in solitary confinement for the past twenty years) from his cell to a totally different, emotionally charged, media-packed environment for a week's time, could result in a situation in which his severe mental illness was manifested in disruptive ways. As a result, we repeatedly (without success) attempted to waive his presence for him.

b) When Robert Glen Coe arrived in Memphis and the competency-to-be-executed proceedings began, both my co-counsel and I met with our client before the proceedings began each day, after the proceedings ended each day and during every recess. Without divulging the substance of any privileged communication, to say that we, as his lawyers, did or said nothing to curtail his behavior is not true. We did everything we could think of to calm him, but neither my co-counsel nor I are trained mental health professionals or otherwise equipped to counsel our client on this issue or provide therapy designed to calm his outbursts that were the product of his severe mental illness.

c) Robert Glen Coe made numerous outbursts on the first two days of his proceedings in Memphis. On the third day of his proceedings (the day of his gagging), his outbursts intensified. Many of the outbursts were directed at my co-counsel and me. Throughout this time period, my co-counsel and I were attempting to try a case on behalf of Robert Glen Coe and to confront the prosecution's case. This meant, at minimum, that we had to attempt to hear what was going on in the courtroom. The noise made by our client was concededly disruptive for the entire courtroom, but it was most distracting to us since we were the closest people to Robert Glen Coe. Since Judge Colton insisted on going forth with the proceedings, it was essential that my co-counsel and I do our best to concentrate on the proof.

d) I have represented Robert Glen Coe in various courts for the better part of six years. As a result, I have come to know him fairly well. I know that when Robert Glen Coe's mental illness causes him to become agitated (for lack of a better word), anything that I try to do to calm or curb his behavior often only exacerbates his agitation.

e) On the date of Robert Glen Coe's ultimate gagging, my co-counsel and I repeatedly requested that, instead of gagging, he be removed from the courtroom and placed in a cell with a

closed-circuit television monitor (what was finally done) to watch the proceedings, or that he be returned to Reverbend.

f) Robert Glen Coe's outbursts were not controlled and were not curtailed when something was happening in the courtroom that he wanted to heter to. For example, the state moved at a sidebar conference to prohibit me from questioning a jailer (Sgt. Horton) about a disciplinary complaint made against him. Specifically, he was charged with receiving oral sex from a guard while on duty. The trial judge denied the prosecution's motion, and I was allowed to cross examine him on this matter. Robert Glen Coe yelled throughout this particularly embarrassing proof concerning one of his jailers to the point where no one in the courtroom could hear.

g) Co-counsel and I repeatedly attempted to calm Robert Glen Coe during recesses. We requested that he be allowed to meet with Father Bruce Neili (a Catholic Priest attending the proceeding on his behalf) in the hopes that this would have a calming influence. We made additional requests that we believe would have had a similar effect. All of our requests were denied.

I offer the foregoing to dispel any suggestion that Robert Glen Coe's attorneys did not attempt to maintain decorum in the courtroom and any suggestion that Robert Glen Coe's disruptive actions were deliberate or contrived by counsel.

7. The March 29 Memorandum Opinion further provides that "Petitioner complains of not being able to present testimony from family members, but petitioner's counsel made the decision not to call family members at the hearing." Memorandum Opinion at p. 27.

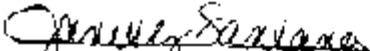
8. The reason why family members were not called to testify was that Judge Cotton denied Robert Glen Coe's motion to exclude cameras (including video cameras) from the courtroom. Much of the testimony that would have been offered from these witnesses concerned severe sexual and physical abuse suffered by them and Robert Glen Coe during childhood. To avoid statewide broadcast of such sensitive and personally painful information, they were not called to testify.

9. On page 23 of the March 29 Memorandum Opinion, it is stated that Robert Glen Coe voluntarily offered proof concerning the findings and opinions of his consulting experts. This respectfully misses the point. Prior to the commencement of the state competency-to-be-executed proceedings, the contents of the files of Robert Glen Coe's consulting experts were known to the prosecution and its experts. Since Robert Glen Coe's testifying experts were treating physicians and could not remain for the entire proceedings, it was important for them to have the opportunity to comment on the consulting experts' opinions in their direct testimony because the prosecution's experts would surely do so. But for this unexpected departure from well-settled Tennessee law, proof about the work product of Robert Glen Coe's consulting experts would not have been adduced in his case in chief.

FURTHER THE AFFIANT SAITH, NOT


JAMES HOLT WALKER

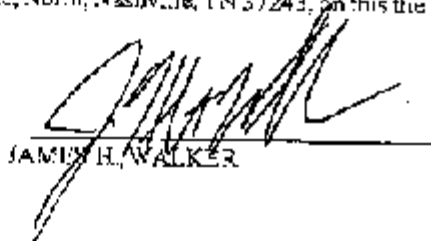
Sworn to and subscribed before me
on this the 21st day of March, 2000.


NOTARY PUBLIC

My Commission Expires: 7/28/2001

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been provided to Glenn
Pruitt, Assistant Attorney General, 425 Fifth Avenue, North, Nashville, TN 37243, on this the 31
day of March, 2000.


JAMES H. WALKER