

**IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE
DIVISION III**

ROBERT GLEN COE,
Petitioner,

vs.

STATE OF TENNESSEE.

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No. B-73812

**ORDER GRANTING IN PART AND DENYING IN PART PETITION TO PROHIBIT
EXECUTION UNDER COMMON LAW, FORD V. WAINWRIGHT, 477 U.S. 399 (1986)
AND THE TENNESSEE CONSTITUTION**

This matter comes before the Court on a PETITION TO PROHIBIT EXECUTION UNDER COMMON LAW, FORD V. WAINWRIGHT, 477 U.S. 399 (1986) AND THE TENNESSEE CONSTITUTION, filed by the Petitioner, Robert Glen Coe. Petitioner cited all applicable law, including common law, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Ford v. Wainwright, 477 U.S. 399 (1986), and Article I §§ 6, 8, 9, 13, 15, 16, 17, 20 & 32 of the Tennessee Constitution as authority for filing his petition.

FINDINGS OF FACT

Petitioner was convicted of first-degree murder, aggravated rape, and aggravated kidnaping in the Criminal Court of Shelby County on February 28, 1991. He was sentenced to death on the murder charge, and to life imprisonment on the remaining charges. The Tennessee Supreme Court affirmed the conviction and sentence, State v. Coe, 655 S.W.2d 903 (Tenn. 1983), and the United States Supreme Court denied certiorari. Coe v. Tennessee, 464 U.S. 1063 (1984).

Petitioner filed three petitions for post-conviction relief, and two petitions for habeas corpus relief. Ultimately, both Petitioner's conviction and sentence were upheld.

On December 15, 1999, the Supreme Court of Tennessee issued an order holding that the

Petitioner had exhausted the standard three-tier appeals process, and set an execution date of March 23, 2000 for the Petitioner. The Court also held that the time was ripe for Petitioner to

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challenge his present mental competency to be executed, and remanded the issue to this Court, where the Petitioner was originally tried and sentenced, in accordance with the procedures adopted by the Supreme Court in Van Tran v. State, S.CT.NO. W1998-00175-SC-R11-PD, Nov 23, 1999. Coe v. State, S.CT.NO. M1999-01313-SC-DPE-PD, Dec. 15, 1999.

The Petitioner filed his present motion on December 29, 1999, which requests among other things that this Court prohibit his execution based upon his mental incompetency, and further requests that this Court grant him a hearing to determine whether Petitioner is presently competent to be executed.

BASIS FOR RELIEF

Petitioner first notes that he considers the holding of the Supreme Court in Van Tran regarding the procedures governing a competency hearing to be mere dicta, but graciously has complied with said dicta by filing the current petition.

Petitioner asks this Court to grant him relief on the following matters:

1. Petitioner first requests that this Court prohibit his execution because he is not mentally competent;
2. Petitioner asserts that he has made a threshold showing that he is not competent to be executed, and moves this Court to order a hearing to determine his present mental competency;
3. Petitioner moves this Court to appoint mental health experts for the purpose of a full evaluation of his present mental competency; and
4. Petitioner moves this Court to empanel a jury to determine his present mental competency in the event he is granted his competency hearing.

Each of Petitioner's requests will be addressed separately.

CONCLUSIONS OF LAW

At the outset, this Court notes that the style of the present petition is not in accord with

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the procedures set forth in Van Tran. Although entitled Petition to Prohibit Execution, Petitioner has requested both that this Court prohibit his execution due to his present mental incompetency, and that this Court grant him a hearing to determine his present mental competency to be executed.

This Court will first address Petitioner's request that this Court prohibit his execution due to his present mental incompetency. Petitioner apparently misunderstands the holding of Van Tran. Nowhere in Van Tran does the Court give the trial courts the authority to prohibit an execution. Rather, a proper request under Van Tran is that the trial court grant a hearing to determine present mental competency of a prisoner to be executed.

Petitioner asserts that Van Tran held only that a petitioner could not raise a claim of incompetency in a post-conviction hearing. Petitioner further asserts that Van Tran contains extensive *dicta* concerning standards governing competency and procedures for determining competency, and asserts that this *dicta* is not binding, and that its application is actually prohibited as invading the separation of powers under Article II § 1 & 2 of the Tennessee Constitution.

Dicta is defined by Black's Law Dictionary as follows:

Opinions of a judge which do not embody the resolution or determination of the court. Expressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases.

Black's Law Dictionary, 408 (5th ed, 1979).

In contrast to Petitioner's assertion that the Court's opinion was mere *dicta*, Van Tran specifically adopted and set forth the procedure that a prisoner sentenced to death must follow in

order to assert his or her right to challenge competency to be executed. See Van Tran, 15-20

The Court designated that a hearing was to be held if competency to be executed is found to be in issue, and held that the "cognitive test" was the standard to be used at such hearings to determine the competency of a prisoner to be executed. The Court also set a very specific time frame to guide the trial courts through this newly adopted procedure. The Court further held that it is the duty of the trial judge alone to determine whether the prisoner in question is competent. The decision to set forth and adopt procedures governing mental health competency hearings is in no way, shape or form mere dicta.

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Petitioner has been found guilty of murder in the first degree, and has been sentenced to death. An execution date has been set for Petitioner by the Supreme Court of Tennessee. Petitioner's request that this Court prohibit his execution is not properly before this Court. Rather, the issue that is properly before this Court, in accordance with Van Tran, is whether the Petitioner is presently mentally competent to be executed. Therefore, Petitioner's request that this Court prohibit his execution is DENIED.

However, this denial of Petitioner's request that this Court prohibit his execution does not preclude a discussion of whether Petitioner has made a threshold showing that his present mental competency is genuinely in issue in order that he be granted a hearing to determine his present mental competency.

Petitioner's second request is that this Court grant him a hearing in order to determine his present mental competence to be executed. Petitioner asserts that he has made a threshold showing that his present mental competency is genuinely in issue, thus entitling him to the requested hearing. In support of this assertion, Petitioner sets out his past history of mental illness in detail, and also submits the affidavit of Dr. William Keener, M.D., a forensic psychiatrist, which contains the conclusions of a preliminary mental evaluation of the Petitioner conducted on December 22, 1999.

After evaluating the affidavit of Dr. Keener, it is the opinion of this Court that Petitioner

has met the threshold showing that his present mental competency is genuinely in issue as set forth in Van Tran. Therefore, in accordance with Van Tran, Petitioner's request for a hearing to determine if he is presently mentally competent to be executed is hereby GRANTED.

Petitioner's third request is that two experts be appointed for the purpose of conducting further evaluation of Petitioner to determine his present mental competency to be executed.¹ Because Petitioner has made a threshold showing that his competency is genuinely in issue, in accordance with Van Tran, Petitioner's request for the appointment of experts for the purpose of

¹ In a footnote of his Petition, Petitioner requests that to the extent this Court does not feel constrained by Van Tran's limitations on the number of experts to be appointed, this Court allow him to supplement his current request for additional experts and/or funds for the presentation of this petition. The Supreme Court in Van Tran specifically limited the number of experts to be appointed by the trial court to two. Van Tran, at 19. This Court refuses to deviate from the limits set by the Supreme Court. Therefore this request warrants no further discussion. Two experts are appointed by this Court, and the request for additional experts is denied.

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a mental evaluation is GRANTED.

This Court hereby appoints Dr. William Keener, M.D., of Nashville, Tennessee and Dr. James Merikangas, M.D., of New Haven, Connecticut to serve as mental health experts, and be compensated by the Court during the course of these competency proceedings. The fees charged by the two doctors named above are approved.

Petitioner's final request is that this Court grant him a jury trial on this matter. Petitioner asserts that because he is requesting the enforcement of his common law right, he is entitled to a jury trial on this matter as a matter of common law, and under both the United States Constitution and the Tennessee Constitution, Article I §§ 8 and 9, and Van Tran v. State, ___ S.W.3d ___ (Tenn. 1999)(Birch J., dissenting).

The Court in Van Tran specifically addressed who shall determine the issue of competency in these proceedings. Id., at 20. The Court discussed that contrary to Petitioner's assertion, even at common law, a prisoner had no absolute right to a jury trial on the issue of competency, although the trial court at common law did have the discretion to impanel a jury. Id., citing, Nobles, 168 U.S. at 407, and Jordan, 124 Tenn. at 90-91.

The Court went on to point out that under existing Tennessee law, a judge rather than a jury determines the closely analogous question of competency to stand trial. Id., citing State v. Johnson, 673 S.W.2d 877 (Tenn. Crim. App. 1984). Accordingly, the Court held without hesitation that a prisoner is not entitled to have a jury determine the issue of competency to be executed. This Court refuses to deviate from the explicit holding of the Supreme Court of Tennessee. Therefore, Petitioner's request for a jury trial on this matter warrants no further discussion and is **DENIED**.

CONCLUSION

The Court has considered the Petition To Prohibit Execution Under Common Law, Ford v. Wainwright, 477 U.S. 399 (1986) and the Tennessee Constitution, its accompanying affidavits, and the State's response, and finds that some of the requests in the Petition do have merit, while some do not. Therefore, the Petition is **DENIED** as to the request that this Court prohibit Petitioner's execution and as to the request that this Court empanel a jury to determine

Petitioner's mental competency. The Petition is however GRANTED as to the request for a hearing to determine the present mental competency of Petitioner, and as to the request for the appointment of mental health experts to perform a mental evaluation of Petitioner.

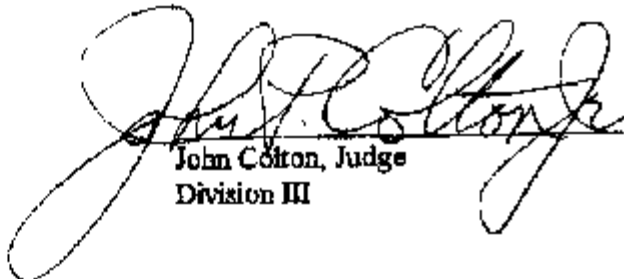
Petitioner, Robert Glen Coe, has made a threshold showing that his present competency to be executed is genuinely in issue, and accordingly a hearing to determine Petitioner's present mental competency is warranted and hereby ORDERED.

In order to determine his present mental competency to be executed, the Petitioner shall be evaluated by Dr. William Kenner, M.D. and Dr. James Merikangas, M.D., who were selected by the Petitioner. The Petitioner will also be evaluated by Daniel A. Martel, Ph.D., and Daryl Bruce Matthews, M.D., Ph.D., who were selected by the State.

In accordance with the time frame set forth by the Tennessee Supreme Court in Van Tran, the mental health professionals selected by both the Petitioner and the State shall file written evaluations of the Petitioner's present mental competency with this Court within ten days of the entry of this order, that deadline being January 13, 2000. Within ten days after the evaluations are submitted to the Court, this Court will set a date for Petitioner's competency hearing.

It is therefore ORDERED, ADJUDGED, AND DECREED that the PETITION TO PROHIBIT EXECUTION UNDER COMMON LAW, FORD V. WAINWRIGHT, 477 U.S. 399 (1986) AND THE TENNESSEE CONSTITUTION is DENIED in part and GRANTED in part.

Entered this 3rd day of Jan 2000.


John Colton, Judge
Division III

FILED 1-3-00
WILLIAM B. KEY, CLERK
BY L. Moore D.C.