

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN)
(formerly known as James Lee Jones))
)
) DAVIDSON COUNTY CRIMINAL
)
vs.) NO. M1988-00026-SC-DPE-PD
)
)
STATE OF TENNESSEE)

Filed: December 21, 2001

NOTICE OF PUTATIVE FORD CLAIM AND
MOTION TO MODIFY VAN TRAN PROCEEDING

I INTRODUCTION

Under Ford v. Wainwright, 477 U.S. 399 (1986), the Eighth and Fourteenth Amendments, and Article I §§ 8 and 16 of the Tennessee Constitution, Abu-Ali Abdur'Rahman has two distinct rights: (1) a substantive right not to executed if incompetent (Substantive Ford Claim); and (2) a right to have available a process for determining his competency should he become incompetent at any time prior to his execution. (Procedural Ford Claim).

While Mr. Abdur'Rahman acknowledges that, at this point in time, he cannot establish that he is incompetent to be executed, he places this Court on notice that there exists a probability that at or near the date and/or hour of his yet-to-be scheduled execution he will be incompetent.

Under the process this Court established in Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999), Tennessee courts determine whether a condemned inmate is *presently* competent months before a scheduled execution. Because competence at or near the time of execution is the relevant inquiry,

not months before, initiating Van Tran proceedings now would be a futile gesture that would violate Mr. Abdur'Rahman's substantive right not to be executed if incompetent and his procedural right to have available a process for determining his competence at any time that he becomes incompetent. This Court should therefore enter an order that because Mr. Abdur'Rahman possesses a putative Ford Claim, (1) the Warden of Riverbend Maximum Security Institution shall allow Mr. Abdur'Rahman access to mental health professionals at all times prior to his execution; and (2) a hearing will be made available for Mr. Abdur'Rahman at any time he becomes incompetent for his execution.

II ABU-ALI ABDUR'RAHMAN POSSESSES A PUTATIVE SUBSTANTIVE FORD CLAIM

Under Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999), a prisoner must raise the issue of competency to be executed when filing a written response to the State's motion to set an execution date. Van Tran, 6 S.W.3d at 267. To ensure that he does not run afoul of this procedural requirement, Mr. Abdur'Rahman notifies this Court of a probability that at or near the time of his scheduled execution he will be incompetent for execution. This probability is based on the following.

As a child, Mr. Abdur'Rahman's father beat him with a Billy club, a military strap, and a baseball bat. Exhibit 1, 1/14/98 Report of Dr. Robert L. Sadoff at 5. Mr. Abdur'Rahman's father stung the end of his penis by blows to it, and he forced Mr. Abdur'Rahman to eat his own vomit. Id.; Exhibit 2, 12/21/01 Declaration of George W. Woods, Jr., M.D., at 2. He repeatedly tied Mr. Abdur'Rahman's penis to string, tied the string to a clothes hook in a closet, and locked Mr. Abdur'Rahman in the closet without lighting for long periods of time. Exhibit 1, 1/14/98 Report of

Dr. Robert L. Sadoff at 5; Exhibit 2, 12/21/01 Declaration of George W. Woods, Jr., M.D., at 2.

It was during these early traumatic experiences, that Mr. Abdur'Rahman began to "drift off", experience "lost time", lose his mind, or, in clinical terms, experience dissociative episodes.

Exhibit 1, 1/14/98 Report of Dr. Robert L. Sadoff at 12, 15, 18; 12/21/01 Declaration of George W. Woods, Jr., M.D., at 3. During such an episode, Mr. Abdur'Rahman's mental processes separate from his surrounding environment, and he has no cognitive recognition of the events occurring around him or the reasons why they are occurring. See Exhibit 2, 12/21/01 Declaration of George W. Woods, Jr., M.D., at 3.

After his childhood, Mr. Abdur'Rahman continued to experience dissociative episodes when placed in a stressful environment. Exhibit 1, 1/14/98 Report of Dr. Robert L. Sadoff at 18. For example, because Mr. Abdur'Rahman has slight features, he was the target of sexual attacks during periods of incarceration. Id. at 11. During these sexual attacks, Mr. Abdur'Rahman would dissociate in the same manner in which young girls dissociate when they are sexually abused. Id. at 21; see 12/21/01 Declaration of George W. Woods, Jr., M.D., at 3.

Given the events in Mr. Abdur'Rahman's life, Mr. Abdur'Rahman was diagnosed in 1998 as suffering from post-traumatic stress disorder and borderline personality disorder with dissociative episodes. Exhibit 1, 1/14/98 Report of Dr. Robert L. Sadoff at 20. These diagnoses were confirmed today. Exhibit 2, 12/21/01 Declaration of George W. Woods, Jr., M.D., at 2-3. As stated by Dr. Woods, persons suffering from these disorders are particularly vulnerable to dissociative phenomena. 12/21/01 Declaration of George W. Woods, Jr., M.D., at 3. As stated by Dr. Sadoff, "The greater the stress on the individual with these diagnoses, the more likely they are to dissociate." Exhibit 1, 1/14/98 Report of Dr. Robert L. Sadoff at 21.

There can be no more a stressful event than being deliberately killed at a predetermined place and time. Therefore, given Mr. Abdur'Rahman's diagnoses, he "has a significant potential for complete dissociation, with the impairment of cognitive functioning that has been the hallmark of past dissociative episodes, at the time or near the time of his scheduled execution." Exhibit 2, 12/21/01 Declaration of George W. Woods, Jr., M.D., at 4. Under any applicable standard, including the standard set out in Van Tran, Mr. Abdur'Rahman would then be incompetent to be executed. See VanTran, 6 S.W.3d at 265-66.

III GIVEN THE PUTATIVE NATURE OF MR. ABDUR'RAHMAN'S FORD CLAIM, FOLLOWING VAN TRAN PROCEDURES WOULD BE A FUTILE GESTURE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I §§ 8 & 16 OF THE TENNESSEE CONSTITUTION

If this Court ordered a proceeding under Van Tran, it would remand this case to the trial court where Mr. Abdur'Rahman must make a "threshold showing" of *present* incompetence. Van Tran, 6 S.W.3d at 269. Mr. Abdur'Rahman acknowledges that, at this point in time, he cannot make this showing. Mr. Abdur'Rahman asserts not that he is incompetent now, when his execution date is in the unknown future, but that he may become incompetent as that date approaches. As Ford recognizes, the relevant inquiry focuses on that date - not a date months removed from the execution.

A The Relevant Inquiry Is Mr. Abdur'Rahman's Mental State At Or Near The Date And Time Of His Scheduled Execution, Not His Present Competence

The very question posed and answered in Ford v. Wainwright, 477 U.S. 399 (1986), was whether it is unconstitutional to execute a person *who is incompetent at the time of the execution*.

In fact, the specific question presented in Ford was:

Whether the Eighth Amendment forbids the execution of a condemned person who is *incompetent at the time of execution*?

Brief Of Petitioner, Ford v. Wainwright, U.S.No. 85-5542 (O.T. 1985), p. 1 (emphasis supplied)
(Available on Lexis).

In answering whether a person could be executed at a time when he is incompetent, the United States Supreme Court held that any such execution would violate the Eighth Amendment. The main opinion in Ford thus acknowledged that the question before it was “the question of executing the insane” and the state’s “power to take the life of an insane prisoner.” Ford, 477 U.S. at 405. In resolving the question presented, the Court was “compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.” Id., 477 U.S. at 409-410. The main opinion restated its conclusion:

The Eighth Amendment prohibits the State from inflicting the penalty of death upon
a prisoner who is insane.

Id., 477 U.S. at 410 (emphasis supplied).

Justice Powell also recognized that the question before the court was the constitutionality of the “executions of the insane.” Id., 477 U.S. at 421 (Powell, J., concurring). Similarly, as Justices O’Connor and White noted, the question before the Court was whether the Eighth Amendment creates a right “not to be executed *while insane.*” Id., 477 U.S. at 427 (O’Connor, J., concurring). Thus, it is clear from the Court’s decision in Ford and the opinions of the concurring Justices that the question of competency involves competency at the time of the scheduled execution, not at a point in time removed from that date and hour.

B By Focusing On Mr. Abdur’Rahman’s Competency Months Before His Scheduled Execution, Holding A Van Tran Hearing Now Would Violate Ford v. Wainwright, The Eighth And Fourteenth Amendments, And Article I §§ 8 & 16 Of The Tennessee Constitution

Contrary to Ford, Van Tran envisions a proceeding occurring months prior to a scheduled

execution at which the condemned's *present* competence is determined. Van Tran, 6 S.W.3d at 269. Because the relevant time frame is at or near the date and hour of the scheduled execution, not months before, initiating a Van Tran process now would violate Mr. Abdur'Rahman's procedural right to have his competence determined at a time when he becomes incompetent, not a date set arbitrarily by this Court.

Mr. Abdur'Rahman acknowledges that in Coe v. Bell, 209 F.3d 815 (6th Cir. 2000), the United States Court of Appeal for the Sixth Circuit has apparently endorsed the Van Tran process which assesses competence months before a scheduled execution. This Court, however, is not bound by the Sixth Circuit's Coe opinion, Schultz v. Tennessee Farmers Mutual Insurance Co., 404 S.W.2d 480, 484 (Tenn. 1966), and it should not follow its reasoning.

In Coe, the Sixth Circuit has either rewritten (or ignored) hundreds of years of law by holding that Ford does not mean what it says, and that the Eighth Amendment and the common law permit the execution of a person who is incompetent at the time of execution: "We do not believe that the Supreme Court in Ford meant to require a state to determine a prisoner's competency at the exact time of his execution." Coe, 209 F.3d at 824. The Sixth Circuit cites no authority for this proposition, for there is none to support this conclusion. In essence, the Sixth Circuit has concluded that because determination of competency at the time of execution may be difficult, the Eighth Amendment does not require such a determination. Nothing in Ford or in the common law requires the perverse result reached by the Sixth Circuit. In fact, Ford and the common law affirmatively demand what Mr. Abdur'Rahman seeks – a determination of his competency at the time of his scheduled execution. For if he is not competent at that time, he may not be executed. Rather than resolving the question whether Mr. Abdur'Rahman's mental illnesses render him incompetent to be

executed, the Sixth Circuit apparently endorses a determination of Mr. Abdur'Rahman's "present competency" months prior to the yet scheduled execution. As other Courts of Appeals have recognized, this is patently wrong. See Caldwell v. Johnson, 226 F.3d 367, 369 (5th Cir. 2000)(competence to be executed involves "an inquiry into (the condemned's) present mental state, and at a point of time in the near future"); Singleton v. Norris, 267 F.3d 859 (8th Cir. 2001), rehearing en banc granted and opinion and judgment vacated by, Singleton v. Norris, December 5, 2001 Order.

IV CONCLUSION

Mr. Abdur'Rahman possesses a putative Ford Claim. He does not asserts that he is presently incompetent. Rather, he puts this Court on notice that there exists a probability that at or near the date of his yet-to-be scheduled execution he will be incompetent. Given the putative nature of Mr. Abdur'Rahman's Ford Claim, subjecting it to the Van Tran process, which focuses on present competence, would violate Mr. Abdur'Rahman's procedural right to have his competence assessed at any time that he may become incompetent. This Court should therefore enter an order that because Mr. Abdur'Rahman possesses a putative Ford Claim, (1) the Warden of Riverbend Maximum Security Institution shall allow Mr. Abdur'Rahman access to mental health professionals at all times prior to his execution; and (2) a hearing will be made available for Mr. Abdur'Rahman at any time he becomes incompetent for his execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby, certify that a copy of the foregoing was sent by United States Mail to Mr. Gordon W. Smith, Office of Attorney General, 425 5th Ave. N., Nashville, Tennessee 37243 on this the 21st day of December, 2001.

William P. Redick, Jr.