

Summary of SC94880, *State ex rel. Andre Cole v. Cindy Griffith, in her capacity as Warden, Potosi Correctional Center*

Original proceeding in habeas corpus

Submitted on the Court filings April 9, 2015; opinion issued April 9, 2015

Attorneys: Cole was represented by Joseph W. Luby and Carol R. Camp of the Death Penalty Litigation Clinic in Kansas City, (816) 363-2795. The state was represented by Stephen Hawke, Michael J. Spillane, Caroline M. Coulter, Gregory M. Goodwin and Jessica M. McKee of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man scheduled to be executed April 14, 2015, for the 1998 stabbing death of another man alleges he legally is incompetent to be executed. In a 4-3 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri denies relief. The man is competent to be executed. Considering all the evidence presented, he has failed to show he is incompetent to be executed.

Judge Laura Denvir Stith dissents. She would hold that the man has made a substantial threshold showing of incompetence, entitling him to a stay of execution and a fair hearing to determine whether the man's current mental capacity bars his execution.

Facts: Andre Cole was convicted of first-degree murder for the 1998 stabbing death of a man visiting Cole's ex-wife and was sentenced to death. This Court affirmed his conviction and sentence as well as the subsequent denial of his motion for post-conviction relief. Cole then filed a petition for a writ of habeas corpus in the federal courts, which denied relief. This Court ordered that Cole be executed April 14, 2015. On March 23, Cole petitioned this Court for relief. He alleges that his mental status has deteriorated over the past four years and that he hears voices, has trouble communicating, has trouble following a train of thought for more than short periods, has withdrawn, exhibits odd behavior and has become paranoid. Cole argues, in short, that he is not competent to be executed under the standards articulated by United States Supreme Court in its 1986 decision in *Ford v. Wainwright* and its 2007 decision in *Panetti v. Quarterman* and by the state legislature in section 552.060, RSMo.

PETITION DENIED.

Court en banc holds: (1) Cole is competent to be executed. Considering all the evidence presented, this Court finds Cole is not incompetent to be executed under *Ford* and *Panetti* to justify staying his execution so his competence can be determined after an evidentiary hearing or that he is incapable of understanding arguments for extenuation or clemency as required by section 552.060. The Eighth Amendment to the United States Constitution prohibits a state from executing a person who is insane, and *Ford* and *Panetti* set the standard for how this constitutional prohibition is applied. Under *Ford*, a prisoner may not be executed if he suffers from a mental illness that prevents him from comprehending the punishment he is about to suffer

and the reason for it. If a prisoner makes a sufficient threshold showing that his current mental state bars his execution, he is entitled to a “fair hearing” or an opportunity to be heard.

In support of his incompetency claim, Cole relies on a current report and prior report of a forensic psychiatrist who had testified in his post-conviction relief proceeding and on his attorneys’ affidavits. After conducting a recent examination and reviewing his previous examination, the psychiatrist concluded that Cole is suffering from depression with symptoms of psychosis, specifically “gross delusions that prevent Mr. Cole from comprehending or forming a rational understanding of the reason for the execution to which he has been sentenced.” The psychiatrist, however, did not attempt to specifically connect his conclusions with the behavior described in his report, but, presumably, the gross delusions to which the psychiatrist referred were the voices that are described in more detail in Cole’s attorneys’ affidavits.

The Court finds the psychiatrist’s conclusions and the statement offered in the attorneys’ affidavits are not persuasive in light of audio recordings of Cole’s recent telephone conversations, which undermine his claims that his mental state has deteriorated or that he is suffering from delusions preventing him from rationally understanding his sentence. Instead, the recordings reveal that he has a rational understanding of his execution, including the reason for it. Further, the department of correction’s records from February 25, 2015, demonstrate Cole’s reaction to the reading of his execution warrant – he understands his execution is scheduled. And his telephone conversations demonstrate that Cole understands he was convicted of murder and that his sentence is a result of the conviction.

(2) Cole also is competent to be executed under section 552.060. Neither the forensic psychiatrist nor his attorneys specifically explain how Cole is unable to understand matters in extenuation, arguments for clemency, or reasons why the sentence should not be carried out. During Cole’s post-conviction proceedings, his trial counsel testified that Cole was “very intelligent, articulate” and that the two of them “could talk about ideas, about the law, and it seemed to [trial counsel] that [Cole] understood.” Through his attorneys’ affidavits and the psychiatrist’s report, Cole claims he has experienced deterioration in his mental condition since his trial. As previously discussed, this Court does not find the psychiatrist’s report to be credible and questions the genuineness of Cole’s self-reported delusions and behavior described in the affidavits.

(3) By finding that Cole is competent to be executed, this Court has not deprived Cole of an opportunity to be heard. Cole has submitted his counsel’s argument and his own evidence, including expert psychiatric evidence, and has responded to the state’s evidence with his counsel’s argument and evidence. The Court considers such argument and evidence in ruling on Cole’s writ petition. Accordingly, even assuming Cole’s evidence makes a substantial showing of incompetency, he has received all process to which he is entitled under *Ford* and *Panetti*.

Dissenting opinion by Judge Stith: The author would hold that Cole has made a substantial threshold showing of incompetence, entitling him to a stay of execution and a fair hearing to determine whether his current mental incapacity bars his execution. The United States Supreme Court in its 1986 decision in *Ford v. Wainwright* and its 2007 decision in *Panetti v. Quarterman* set the standard for granting a stay of execution in the face of an incompetence claim. Both decisions are clear that there is a two-part test. First, a court must determine whether

a substantial threshold showing has been made of incompetence. If that showing is made, then there must be a second procedural step – a “fair hearing” at which the prisoner can support his claim with further evidence. During the fair hearing, evidence is weighed and credibility determinations are made as to the prisoner’s competence. Although the majority recognizes the two procedural steps set out in *Ford* and *Panetti*, the majority improperly merges the determinations made at the threshold stage with the determinations made at the fair hearing granted after a threshold showing has been made. Although courts have struggled to pin down the exact phrase properly to be used to describe the standard necessary to meet the threshold showing of incompetence, courts are consistent that it is less than that required to show incompetency itself because the threshold requirement is simply the basis for holding a hearing on competency. Cole has presented sufficient evidence to make a threshold showing of incompetence in the form of a forensic psychiatrist concluding that Cole is not competent to be executed and observations from his counsel as to his competence. The majority concludes that Cole is competent to be executed based on weighing the evidence Cole and the state have presented in making their threshold showing filings. But the evidence weighing and credibility determinations should occur at a fair hearing and not in this writ proceeding in an appellate court that does not have the benefit of briefing and oral argument and that has not held an evidentiary hearing. This matter should be referred to a special master for a fair hearing at which evidence may be presented.