IN THE CRIMINAL COURT OF TENNESSEE
FOR THE 30TH JUDICIAL DISTRICT
AT MEMPHIS DIVISION 3

ROBERT GLEN COE,	)	
	)	
Petitioner,	)	
	)	**Case No. P-3577, 6594, 1435**
v.	)	**POST-CONVICTION**
	)	**(Death Penalty)**
STATE OF TENNESSEE,	)	
	)	
Respondent.	)	

RESPONSE TO MOTION TO REOPEN
POST-CONVICTION PETITION

Petitioner has moved to reopen his post-conviction petition alleging five (5) claims. He cites the due process clause of the Fourteenth Amendment; Article VI §2 of the United States Constitution; Tenn. Code Ann. §40-30-217; Tennessee Constitution Arts. I §§6, 8-9, 14, 16-17, 32, Art. II §1, Art. XI §16; and *Burford v. State,* 845 S.W.2d 204 (Tenn. 1992) as authority for filing his motion to reopen.

A. Authority to file a motion to reopen.

At the outset, it must be noted that the only authority for filing a motion to reopen a post-conviction petition is Tenn. Code Ann. §40-30-217. Post-conviction relief is purely a statutory creation. There is no constitutional right to post-conviction relief. *Oliphant v. State,* 806 S.W.2d 215, 217 (Tenn. Crim. App. 1991). Hence, there is no constitutional right to reopen a post-conviction petition.

B. The motion to reopen is insufficient as filed.

Tenn. Code Ann. §40-30-217(b) requires that the motion to reopen "must set out the factual basis underlying its claims and must be supported by affidavit." This affidavit must contain information which "would be admissible through the testimony of the affiant under the rules of evidence." Furthermore, the factual allegations in the affidavit, if true, must meet the requirements of Tenn. Code Ann. §40-30-217(a). If they do not, the motion shall be denied. Petitioner has failed to file such an affidavit(s). **C. Specific Claims.**

1. *Ferguson* Claim

Petitioner contends that the State's alleged destruction of what he claims to be exculpatory

evidence violated his right to due process under the Tennessee Constitution, and specifically under *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). He further claims that the Tennessee Supreme Court's opinion in *Ferguson* established a new constitutional right authorizing this Court to reopen his post-conviction petition under Tenn. Code Ann. §40-30-217(a)(1).

Tenn. Code Ann. §40-30-217 permits a trial court to reopen a prisoner's post-conviction petition in certain limited circumstances. The only provision relevant in this proceeding states that a petition may be reopened if:

> The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial.

Accordingly, unless a claim is based upon a ruling that establishes a new constitutional right and that is required to be applied retroactively, the petition cannot be reopened. In addition, the motion must include the factual basis for the claim and be accompanied by a supporting affidavit that would constitute admissible evidence at a hearing. Tenn. Code Ann. §40-30-217(b). Where these conditions are not met, the motion must be denied without a hearing. *State v. Fletcher*, 951 S.W.2d 378, 380 (Tenn. 1997).

Petitioner has failed to demonstrate that *Ferguson* established a new constitutional right. In fact, contrary to petitioner's assertion, no new constitutional right was established in that case. In *Ferguson* the Tennessee Supreme Court specifically indicated that the State has *always* had a duty to preserve evidence. *Ferguson*, 2 S.W.3d at ___. Rather, *Ferguson* simply further defined what "factors. . .should guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory." Accordingly, the State's duty to preserve evidence discussed in *Ferguson* is not part of a "new constitutional right" afforded to criminal defendants because it existed prior to *Ferguson*. *Ferguson* simply modifies the set of factors to be examined in determining whether this pre-existing right has been violated.[1]

In addition, the petitioner has failed to demonstrate that *Ferguson* is "required" to be applied

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[1]The State also notes that in petitioner's memorandum he specifically alleges that "the evidence was destroyed in bad faith." (Memorandum at 4) Accordingly, his claim would have been cognizable under the test enunciated in *Arizona v. Youngblood* and the Tennessee cases adopting the *Youngblood* test. Because this claim existed at the time of petitioner's initial petition, it is not "based" upon *Ferguson*. Furthermore, because the petitioner failed to include this claim in his original petition, it is waived. Tenn. Code Ann. §40-30-206(g).

retroactively. Tenn. Code Ann. §40-30-217(a)(1). At no point in the *Ferguson* opinion does the Supreme Court *require* or even *suggest* retroactive application. Finally, the petitioner has failed to include an affidavit in support of the factual basis for his underlying claims.

2. *Harris* Claim

Petitioner's second claim is that his death sentence "was tainted by an unconstitutional and improper finding" of the heinous, atrocious or cruel aggravating circumstance, Tenn. Code Ann. §39-2404(i)(5). In support of this claim he cites to *State v. Harris,* 989 S.W.2d 307 (Tenn. 1999).

In order for the *Harris* case to afford any basis for relief, that case must have established a new constitutional right. Tenn. Code Ann. §40-30-217(a)(1). But *Harris* did not announce a new constitutional right requiring retrospective application. In *Harris,* "the verdict form indicated that the jury found only that '[t]he murder was especially heinous and atrocious.'" *Harris* 989 S.W.2d at 313. Although *Harris* was a life without the possibility of parole case, the Court noted *in dicta* that, "in the death penalty context, jury findings of statutory aggravating circumstances similar to the jury's findings in this case have been held to be unconstitutionally vague." *Id.* at 315-16 and n.9 (citing *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and *Godfrey v. Georgia,* 446 U.S. 420, 428-29, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980)).[2] This statement certainly does not establish a new constitutional right; rather it merely notes that such verdicts might be inadequate in death cases.

Further, any constitutional claim related to this aggravating circumstance is moot. In his federal habeas corpus proceeding, petitioner challenged the heinous, atrocious or cruel aggravating circumstance as being unconstitutionally vague. The Sixth Circuit agreed, but found the error to be harmless and upheld Coe's death sentence. *Coe v. Bell,* 161 F.2d 320, 333-36 (6th Cir. 1998), *cert. denied,* 120 S.Ct. 110 (1999), *reh'g denied,* 1999 WL 1068300 (U.S.). Accordingly, this aggravating circumstance no longer remains as an aggravator supporting petitioner's death sentence.

3. *Campbell* Claim

Petitioner's third claim is that there was discrimination in the selection of the grand jury foreperson. He cites *Campbell v. Louisiana,* 532 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998), as authority for bringing this claim. *Campbell* also fails to satisfy the statutory criteria of Tenn. Code

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[2]In petitioner's case, the jury returned the following: "5. The murder was especially heinous, atrocious or cruel & involved torture." *State v. Coe,* T.E. at 2536.

Ann. §40-30-217(a) for two reasons:

First, *Campbell* was decided on April 21, 1998. §217(a) requires that a motion to reopen must be filed within one year of a ruling of the United States Supreme Court establishing a new constitutional right requiring retrospective application. Petitioner's motion to reopen was not filed until December 9, 1999. Therefore, any claim under *Campbell* is untimely.

Second, *Campbell* did not establish a new constitutional right requiring retrospective application. *Campbell* held that a white criminal defendant has standing to challenge exclusion of blacks from a grand jury under both equal protection and due process theories, even though he is not a member of the excluded class. *Campbell,* 118 S.Ct. at 1424-25. There was nothing in *Campbell* directing retrospective application of the rule it announced. When faced with this issue in petitioner's federal habeas corpus appeal, the Sixth Circuit held that "*Teague*[3] bars us from applying *Campbell* retroactively. . . ." *Coe v. Bell,* 161 F.3d at 355.[4] A similar claim has been rejected by the Court of Criminal Appeals, with the Tennessee Supreme Court refusing to hear it on T.R.A.P. 11 Application. *See Duncan v. State,* Sumner County, C.C.A. No. 01C01-9905-CR-00167, Order filed Jul. 7, 1999, at Nashville, *perm. to appeal denied* (copies attached).

4. Time on Death Row Claim

Petitioner's fourth claim is that the length of time he has remained on death row constitutes cruel and unusual punishment. None of the authorities he cites satisfies the criteria of Tenn. Code Ann. §40-30-217(a)(1), for a variety of reasons.

The United States Supreme Court opinions that he cites are memoranda opinions respecting the denial of certiorari on the exact claim he posits. Denials of certiorari do not constitute a ruling on the merits. *Knight v. Florida,* 120 S.Ct. 459 (1999); *Lackey v. Texas,* 115 S.Ct. 1421, 1422 (1997).[5] In fact, the United States Supreme Court has never held that a delay in the time between trial and execution constitutes a constitutional violation. Even assuming that *Lackey* created a new constitutional right requiring retrospective application, however, petitioner's claim would be untimely. *Lackey* was decided in 1997 and petitioner has brought this claim in December of 1999.

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[3]*Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[4]*See Coe v. Bell,* 161 F.3d at 352-55, for the 6th Circuit's rationale behind its holding that *Campbell* would not be given retrospective application.

[5]As Justice Thomas notes in his concurrence in *Knight,* every state that has addressed this claim since *Lackey,* has "resoundingly" rejected it. *Knight,* 120 S.Ct. at 461.

Finally, petitioner cites no Tennessee Supreme Court case supporting his claim, and the foreign cases and treaties he cites simply are not authority establishing a new constitutional right requiring retrospective application.

Conveniently absent from petitioner's claim is the fact that during the entire period he laments he has been "cruelly and unusually" kept on death row, he has been pursuing state and federal appeals in an effort to overturn his conviction and sentence or, at a minimum, to secure its almost-indefinite postponement. As one court has aptly held:

> It is a mockery of our system of justice, and an affront to lawabiding citizens who are already rightly disillusioned with that system, for a convicted murderer, who, through his own interminable efforts of delay and systemic abuse has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional. This is the crowning argument on behalf of those who have politicized capital punishment even within the judiciary. With this argument, we have indeed entered the theater of the absurd, where politics disguised as "intellectualism" occupies center stage, no argument is acknowledged to be frivolous, and common sense and judgment play no role. And while this predictable plot unfolds with our acquiescence, if not our participation, we lament the continuing decline in respect for the courts and for the law.

Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995).

Petitioner has been accorded every possible opportunity to test the legitimacy of his conviction and sentence. The delay of which he now complains is a direct consequence of his own litigation strategy, abetted (ironically, although not surprisingly) by the broad leeway allowed him by the courts to challenge his conviction and sentence repetitively.

5. Life Without Possibility of Parole Claim

Petitioner's fifth and final claim is that his jury was not allowed to consider life without parole as "an alternative punishment." He cites no authority satisfying the criteria of Tenn. Code Ann. §40-30-217(a)(1). The one United States Supreme Court case he does cite, *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 130 (1994), not only fails to support his claim, but would make it untimely if it did.

In *Simmons,* the United States Supreme Court held that, where the State argued that the death penalty was appropriate based on the defendant's future dangerousness, it was a denial of due process not to allow the jury to know that the defendant would not be eligible for parole under state law if sentenced to life imprisonment. *Simmons,* 512 U.S. at 161. This makes *Simmons* readily

distinguishable from petitioner's case.

Furthermore, notwithstanding the untimeliness of this claim under *Simmons,* the rule announced in *Simmons* has not been given retroactive application. *Spreitzer v. Peters,* 114 F.3d 1435, 1444 (7th Cir. 1997); *O'Dell v. Netherland,* 95 F.3d 1214, 1224-38 (4th Cir. 1996) (*en banc*); *Johnson v. Scott,* 68 F.3d 106, 111 n. 11 (5th Cir. 1995).

Finally, it is worth noting that the only two punishments authorized for first-degree murder at the time petitioner kidnaped and brutally and savagely raped and murdered Cary Ann Medlin were death and life imprisonment. *See* Tenn Code Ann. §39-2402. Life without parole did not become an authorized punishment until July 1, 1993. Acts 1993, Ch. 473 §16. Respondent knows of no authority, and petitioner cites none, that would have allowed the judge to instruct and/or the jury to consider and impose a punishment not authorized by law.

CONCLUSION

Based upon the foregoing, this Court should deny petitioner's motion to reopen his post-conviction petition. The claims he presents are patently frivolous and should not be countenanced. His motion to reopen is a thinly veiled attempt to further protract the already lengthy course of proceedings in which he has litigated the constitutionality of his conviction and death sentence.

The fact that petitioner faces a death sentence cannot and should not excuse such a flagrant abuse of the judicial process, squandering precious judicial resources. Such abuse of the judicial process merely bestirs the public to ridicule it. *Turner v. Jabe,* 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, Circuit Judge, Concurring); *cf. Delaware v. VanArsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) (reversal for error regardless of effect encourages abuse of judicial process and leads public to ridicule that process).

Coe has had a trial, direct appeal, three state post-conviction proceedings, and a federal habeas corpus proceeding in which to litigate the constitutionality of his conviction and sentence over the past eighteen and one-half years. He was sentenced to death, not to a lifetime of litigating about death. *See In re Sapp,* 118 F.3d 460, 463 (6th Cir. 1997).

For the same reasons, this Court should not grant petitioner any stay of execution.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded via hand-delivery, to Robert L. Hutton, Esquire, Glankler Brown, PLLC, One Commerce Square, Suite 1700, Memphis, Tennessee 38103 on this the ____ day of December, 1999.

JOHN W. CAMPBELL
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