IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

ROBERT GLEN COE,	)	
	)	
Petitioner-Appellant,	)	
	)	SHELBY COUNTY
v.	)	S.CT. NO.
	)	02S01-9910-CR-00099
STATE OF TENNESSEE,	)	
	)	
Respondent-Appellee.	)	

MOTION TO RECONSIDER AND VACATE ORDER GRANTING STAY OF EXECUTION

On October 11, 1999, this Court[1] entered an order staying Coe's execution. The stay was premised upon Coe's mere representation that he intends to file a petition to rehear with the United States Supreme Court concerning the denial of certiorari entered October 4, 1999.[2] The stay was granted despite the fact that Coe does not even aver that he believes he has grounds to seek a rehearing from the United States Supreme Court, let alone disclose what those grounds might be. Because petitioner has failed to provide adequate justification that would establish good cause to stay his execution, the

[1]Although the order was signed only by the Chief Justice, it bears the designation "For the Court," and no dissenting opinion was filed.

[2]There was no dissenting opinion filed with the denial of certiorari. *See, Coe v. Bell*, 1999 WL 373745 (U.S.).

State of Tennessee requests that the Court reconsider its October 11 stay order and vacate it.

A stay is used to enforce a court's jurisdiction and to preserve the status quo on appeal. 4 C.J.S. *Appeal & Error*, §413. Except where the court is bound to allow a stay as a matter of right, a stay should only be granted for good cause shown. *Id.*, §417. In granting a stay, a court must consider the likelihood that a petitioner will prevail on the merits--that there is a reasonable probability or substantial likelihood of success. A stay should not be granted where the appeal is frivolous or meritless. *See, e.g., Gomez v. U.S. Dist. Ct. for N.D. Cal.*, 112 S.Ct. 1652, 1653 (1992) (*per curiam*) (stay denied where habeas petitioner made no convincing showing of cause for failure to raise claim in four prior federal habeas petitions). "The granting of a stay [of execution] should reflect the presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983). Stays of execution should not be automatic. The United States Supreme Court will not grant a stay unless there is a significant possibility of success on the merits. *Maggio v. Williams*, 464 U.S. 46, 48 (1983).

United States Supreme Court Rule 44.2 clearly and unequivocally establishes the high threshold that a petitioner must meet when filing a petition to rehear a denial of certiorari. A petition to rehear "shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." The petition to rehear must be accompanied by a certification of counsel that it is

restricted to these grounds and that it is "presented in good faith and not for delay. . . ." In fact, such a showing is so rare that the Supreme Court's rules specifically provide that an order denying certiorari "will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice." U.S. S.Ct. R. 16.3. And even when the Court grants a stay of execution pending disposition of a certiorari petition, it routinely provides that "should the petition for a writ of certiorari be denied, this stay shall terminate automatically." *See, e.g., Williams v. Taylor, Warden*, ___ U.S. ___, 119 S.Ct. 1353 (1999); *Faulder v. Johnson*, ___ U.S. ___, 119 S.Ct. 614 (1998).

Other than his bald assertion that he intends to file a petition to rehear, petitioner-appellant has failed to inform this Court of the issue(s) he intends to present in his petition to rehear. Therefore, this Court lacks the essential information necessary for it to make a decision as to whether or not Coe has satisfied the standards of United States Supreme Court Rule 44.2 and, if so, to "dispassionately assess the merits of the case in light of the available evidence" to determine his probability of success. *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995).

The procedural history of petitioner's case is a significant factor that should also be considered in deciding the propriety of granting a stay of execution under these circumstances. Coe's conviction and sentence have consistently been affirmed by this Court and the Court of Criminal Appeals at all levels on direct appeal and in three successive post-conviction proceedings. Likewise, his conviction and sentence have

remained intact through federal habeas corpus review. The net result is that after nearly eighteen and one-half years of exhaustive and thorough state and federal review, petitioner stands convicted of the first-degree murder, aggravated rape and aggravated kidnapping of Cary Ann Medlin and sentenced to death for her murder. Moreover, on October 12, 1999, the day after this Court granted the stay, the United States Court of Appeals for the Sixth Circuit entered an order denying Coe's "Motion to Reconsider and/or Rehear and to Continue Stay of Mandate in Light of Intervening Circumstances," filed on October 6, 1999. (Copy of order attached.) The Sixth Circuit stated that a stay of its mandate could only be granted "for extraordinary circumstances," and determined that Coe had failed to present any such circumstances.

As the United States Supreme Court has stressed on more than one occasion, the Constitution entitles a defendant to a fair trial, not a perfect one. *Delaware v. VanArsdall*, 475 U.S. 673, 681 (1986). A fair trial is exactly what petitioner received. The central purpose of a criminal trial is to decide the factual question of a defendant's guilt or innocence. *United States v. Nobles*, 422 U.S. 225, 230 (1975). The state court record clearly shows that proof of petitioner's guilt and the propriety of his sentence of death were overwhelming. Furthermore, both the state and federal records show that he has been afforded five full and fair hearings in which to adjudicate claims of constitutional error.

"Finality is essential to both the retributive and the deterrent functions of criminal

law." *Calderon v. Thompson*, 118 S.Ct. 1489, 1501 (1998). In recognition of the profound societal costs attendant with collateral review and the state's interest in finality, the United States Supreme Court, Congress and the Tennessee General Assembly have imposed significant limitations on granting collateral relief in recent years. In a case such as this one, where the lengthy state and federal proceedings have run their course, certiorari has been denied by the highest court in the land, and the mandate has issued denying federal habeas relief, finality acquires an "added moral dimension." *Id.* The power granted to the State, under both the state and federal constitutions, to pass criminal laws in an effort to articulate societal norms, means little if the State cannot carry out those laws. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). In this case, the federal courts--the Sixth Circuit by its October 12 order and the United States Supreme Court through its Rule 16.3--have declined to suspend the finality of the order denying certiorari. It is anomalous indeed for this Court--a court of the State of Tennessee--to stay enforcement of a state court judgment and sentence, the validity and constitutionality of which this Court has itself reviewed and approved on multiple occasions over a nearly twenty-year period, so that Coe may again seek relief in the United States Supreme Court on grounds he does not even deign to disclose.

Based upon the foregoing, the State of Tennessee respectfully requests that this Court reconsider and vacate its order of October 11, 1999, staying petitioner's execution. If petitioner wishes to obtain a stay pending the disposition of any petition for rehearing

filed with the United States Supreme Court, he should seek a stay from that court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been provided via facsimile and first-class U.S. Mail, postage pre-paid, to Henry A. Martin, Federal Public Defender and Paul R. Bottei, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203, on this the _____ day of October, 1999.

_____
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