IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT GLEN COE,	)	
	)	
Petitioner-Appellee,	)	
Cross-Appellant,	)	
	)	
v.	)	**No. 97-5148**
	)	**97-5503**
RICKY BELL, Warden,	)	
	)	
Respondent-Appellant,	)	
Cross-Appellee.	)	

RESPONSE OF RESPONDENT-APPELLANT/CROSS-APPELLEE TO MOTION TO RECONSIDER AND/OR REHEAR AND TO CONTINUE STAY OF MANDATE IN LIGHT OF INTERVENING CIRCUMSTANCES

The respondent-appellant/cross-appellee, Ricky Bell, Warden ("respondent") respectfully submits the following response to the motion to reconsider and/or rehear and to continue stay of mandate in light of intervening circumstances filed by petitioner-appellee/cross-appellant, Robert Glen Coe ("petitioner"). For the reasons that follow, the motion should be dismissed for lack of jurisdiction or, in the alternative, denied.

First, this Court lacks jurisdiction to entertain the motion. This Court's judgment reversing the district court's grant of habeas relief was entered on November 16, 1998, and a petition for rehearing was denied on February 23, 1999. This Court stayed its mandate pending the filing of a timely petition for a writ of certiorari. On June 2, 1999, the petitioner

filed a petition for a writ of certiorari. On October 4, 1999, the Supreme Court of the United States denied the petition. There was no remand to this Court for further proceedings.

No statute or rule confers jurisdiction on a court of appeals to entertain a motion to reconsider or rehear a decision following the denial of certiorari. Indeed, a petition to rehear may only be filed within 14 days after entry of judgment. Rule 40(a), F.R.A.P. And Rule 41(c), F.R.A.P., provides that "[t]he court of appeals *must* issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed." (emphasis added) Similarly, Sixth Circuit Rule 41(c) provides that "[u]pon the filing of a copy of an order of the Supreme Court denying the petition for a writ of certiorari, the mandate *shall* issue immediately." (emphasis added) Therefore, in the event of a denial of certiorari, as in this case, this Court can do nothing more than issue its mandate. There is no jurisdiction to entertain a motion to reconsider and/or rehear the decision.[1]

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[1]Similarly, there is no jurisdiction to continue a stay of this Court's mandate, as requested by the petitioner. An order staying the mandate only stays the mandate until the Supreme Court's final disposition. Rule 41(d)(2)(B), F.R.A.P. While two Ninth Circuit decisions appear to suggest that there may be inherent authority of a court of appeals to entertain a motion to stay the mandate following the denial of certiorari, *see Adamson v. Lewis*, 955 F.2d 614 (9th Cir. 1992), *cert. denied*, 505 U.S. 1213 (1992), and *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990), both decisions require a demonstration of extraordinary circumstances by the petitioner. However, as evidenced by the argument below, the petitioner's contentions do not satisfy that burden.

Furthermore, even if this Court had jurisdiction to entertain the petitioner's motion, the petitioner has not demonstrated that he is entitled to any relief. First, *State v. Harris*, 989 S.W.2d 307 (Tenn. 1999), furnishes no basis for reconsideration of this Court's holding that error in the jury's instructions on the "heinous, atrocious or cruel" aggravating circumstance was harmless. In *Harris*, the relevant statutory aggravating circumstance read: "the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." Tenn. Code Ann. § 39-13-204(i)(5)(1997). In *Harris*, the jury's verdict form indicated that the jury had found only "[t]hat the murder was especially heinous and atrocious." Thus, the jury wholly failed to make any finding as to the torture or serious physical abuse limitation of the aggravating circumstance. Under these circumstances, the Tennessee Supreme Court found that the incomplete finding by the jury was statutory error. 989 S.W.2d at 318.

However, the Tennessee Supreme Court has never required a verbatim statement of the aggravating circumstances. Indeed, in *State v. Teel*, 793 S.W.2d 236 (Tenn. 1990), the jury found that "[t]he murder was especially heinous, atrocious in that it involved depravity of mind while the Defendant was engaged in committing rape." The relevant aggravating circumstance was that "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." The Supreme Court found that, while the jury's finding was not in strict compliance with the trial court's instructions,

> the statute makes no requirement of a verbatim statement of the aggravating circumstances. *See*, T.C.A. § 39-2-203(a). The finding of the jury is sufficient to comply with the statute in that

> the aggravating circumstances found are clearly those allowed by the statute and permit effective appellate review of the sentence.

793 S.W.2d at 250.

Similarly, the petitioner's jury, in addressing the statutory aggravating circumstance that "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind," found that "the murder was especially heinous, atrocious, or cruel and involved torture." Unlike Harris' jury, the petitioner's jury did not fail to make a finding as to whether either of the limiting circumstances modifying "especially heinous, atrocious, or cruel" existed. Like Teel's jury, the petitioner's jury made a finding sufficient to comply with the statute and permit effective appellate review as a matter of Tennessee law. Thus, *Harris* on its face does not present intervening case law warranting reconsideration of this Court's decision.[2]

In addition, even if *Harris* could be read as furnishing a basis for questioning the validity of the jury instruction on the aggravating circumstance in this case, it is entirely

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[2]Since *Harris* clearly does not govern the petitioner's case, his reliance on *Lilly v. Virginia*, 527 U.S. ___, 119 S.Ct. 1887 (1999), for the proposition that the Tennessee Supreme Court should initially assess the error is misplaced. But regardless *Lilly* is a direct appeal case involving erroneously admitted evidence. Under the circumstances, the Court followed its general custom of remanding to the state supreme court for consideration in the first instance whether the constitutional error was harmless beyond a reasonable doubt in light of substantive state criminal law. 119 S.Ct. at 1901. However, the petitioner's case, a habeas case, is controlled by *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which enjoins habeas courts from granting relief unless the petitioner demonstrates that the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 637. *See also Calderon v. Coleman*, ___ U.S. ___, 119 S.Ct. 500 (1998)(per curiam). The *Brecht* harmless error analysis is ipso facto undertaken in light of substantive state criminal law.

superfluous in light of this Court's conclusion that the instruction was constitutionally infirm. Regardless of the source of the infirmity, this Court's analysis was premised on error in the instruction. Whether the error stems from vagueness, as the Court found, or from a *Harris* error makes no difference to the harmless error analysis.

Finally, it should be noted that the grounds on which the petitioner now rests his motion to reconsider were presented to the United States Supreme Court in the petition for writ of certiorari and in the petitioner's reply brief filed in response to the respondent's brief in opposition. Petition, pp. 7, 39; Reply Brief, pp. 11-12. Thus, the Supreme Court had an opportunity to review these grounds, but obviously concluded that they furnished no basis for granting review. These grounds are no more compelling now.

CONCLUSION

The motion to reconsider and/or rehear and to continue stay of mandate in light of intervening circumstances should be dismissed or, in the alternative, denied.

Respectfully submitted,

_____
PAUL G. SUMMERS
Attorney General & Reporter

_____
MICHAEL E. MOORE
Solicitor General

_____
GORDON W. SMITH
Associate Solicitor General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-4150
B.P.R. No. 5906

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by facsimile transmission and First Class U.S. mail, postage prepaid on this the _____day of October, 1999.

Henry A. Martin
Federal Public Defender
Middle District of Tennessee

Paul Bottei
Assistant Federal Public Defender

810 Broadway, Suite 200
Nashville, Tennessee 37203

GORDON W. SMITH
Associate Solicitor General