

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

MOTION TO RECONSIDER
AND/OR REHEAR AND TO CONTINUE STAY OF MANDATE
IN LIGHT OF INTERVENING CIRCUMSTANCES

Pursuant to Fed.R.App.P. 2, 40, & 41, and all other applicable law, Robert Glen Coe respectfully requests that this Court continue its stay of mandate pending reconsideration of issues presented in his appeal in light of intervening circumstances, and to grant him relief from the death sentence which has been infected by an unconstitutional “heinousness” aggravating circumstance.

In support of this motion, Petitioner states:

1. This Court stayed issuance of its mandate pending certiorari proceedings in the United States Supreme Court.
2. After this Court’s ruling on Robert Coe’s appeal and consideration of his petition for rehearing *en banc*, there have been two intervening events which warrant this Court’s reconsideration of its prior ruling denying habeas relief, and continuing the stay of mandate previously issued by this Court: (1) The Tennessee Supreme Court’s intervening decision in State v. Harris, 989 S.W.2d 307 (Tenn. 1999); and (2) The United States Supreme Court’s intervening decision in Lilly v. Virginia, 527 U.S.____ (June 10, 1999).

3. State v. Harris, 989 S.W.2d 307 (Tenn. 1999) and Lilly v. Virginia, 527 U.S. _____ (June 10, 1999) warrant this Court's reconsideration of its earlier ruling that the jury's consideration of the unconstitutional "heinousness" aggravating circumstance was "harmless":

a. In this case, the jury was instructed that it could impose the death sentence if it found aggravating circumstance #5, Tennessee's "heinous, atrocious, or cruel" statutory aggravating circumstance. Jury instructions provided verbatim:

5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

"HEINOUS"	means extremely wicked or shockingly evil.
"ATROCIOUS"	means outrageously wicked and vile.
"CRUEL"	means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

Tr. 2531.

b. On their verdict form, however, the jury wrote: "5. The murder was especially heinous, atrocious or cruel & involved torture." This differs from the statutory language of the aggravating circumstance. Compare Tr. 2536 (verdict form) with Tr. 2531 (statutory definition).

c. Robert Coe has alleged that, under the Eighth and Fourteenth Amendments, the jury's weighing of the "heinous, atrocious, or cruel" aggravating circumstance invalidated the death sentence.

d. This Court agreed that the aggravating circumstance was unconstitutionally vague. Coe, 161 F.3d at 333. Nevertheless, this Court rejected the contention that the case should be remanded to the Tennessee courts for constitutional harmless-error analysis, and then held that the error was "harmless" because the verdict form included the work torture. Id. at 334-336.

e. Since this Court's earlier consideration of this claim, the Tennessee Supreme Court has ruled in State v. Harris, 989 S.W.2d 307 (Tenn. 1999) that an incomplete jury finding of a "heinous, atrocious, or cruel" aggravating circumstance - exactly as was found here - precludes its use as an aggravating circumstance under Tennessee law.

f. Harris holds that despite the fact that a jury may have included any particular words in its finding, the jury's consideration of the "heinousness" circumstance is not valid unless the entire aggravating circumstance has actually been found by the jury. When viewed in conjunction with the Tennessee Supreme Court's holding in State v. Williams, 690 S.W.2d 517 (Tenn. 1985) - that bare instruction using the word torture without further definition invalidates the use of the "heinousness" circumstance - Harris demonstrates that this Court's earlier finding of "harmlessness" is incorrect.

g. In sum, contrary to this Court's earlier conclusion, Harris makes clear that use of the aggravating circumstance in this case was not and could not be "harmless," because the mere use of the words "and involved torture" did not otherwise save or render "harmless" the otherwise incomplete jury finding of the "heinousness" circumstance in this case. Robert Coe is therefore entitled to a new sentencing hearing, contrary to this Court's earlier conclusion.

h. Moreover, the Supreme Court's intervening decision in Lilly v. Virginia, 527 U.S. ____ (1999) further demonstrates that this Court should properly apply Harris and substantive Tennessee law in any harmlessness calculus. As explained in Lilly, upon the finding of constitutional error, a reviewing court should "assess the effect of erroneously admitted evidence *in light of substantive state criminal law*." Lilly, 527 U.S. at ____ (emphasis supplied)(remanding to state court for consideration of harmfulness of error in light of state substantive law). This Court has yet to consider the significance of Harris or any state substantive law (including Williams, as well), in any harmlessness calculus, but Lilly indicates that this is the proper course of action.

4. Accordingly, this Court should continue the stay of the mandate, and reconsider the

harmlessness *vel non* of the “heinous, atrocious, or cruel” aggravating circumstance in light of State v. Harris, 989 S.W.2d 307 (Tenn. 1999) as well as substantive state law on the validity of the aggravating circumstance, as dictated by Lilly v. Virginia, 527 U.S. ____ (1999). The court should also order further briefing, as necessary.

CONCLUSION

There have been intervening events which call into question the validity of this Court’s prior determination that Robert Coe is not entitled to a new sentencing hearing based upon the jury’s consideration of a vague “heinous, atrocious, or cruel” aggravating circumstance. In the interests of justice in this capital case, this Court should continue the stay of mandate previously entered, reconsider its ruling on the “heinousness” aggravating circumstance, and grant Robert Coe relief from the unconstitutional death sentence under which he now labors.

Respectfully Submitted,

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By: _____

CERTIFICATE OF SERVICE

I certify that a copy of this motion for stay of mandate has been served this 5th day of October 1999, upon a counsel for Appellant, Gordon W. Smith, 425 Fifth Avenue North, Nashville, Tennessee 37243-0497.
