

No. 10-6196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	DEATH PENALTY CASE
GAYLE RAY, in her official capacity)	
as Tennessee’s Commissioner)	<u>EXECUTION DATE:</u>
of Correction, et al.,)	November 9, 2010
)	
Respondent/Appellees.)	

**MOTION FOR STAY OF MANDATE PENDING
PETITION FOR WRIT OF CERTIORARI**

Pursuant to FED.R.APP.P. 41 and 6TH CIR. R. 41, Stephen Michael West respectfully requests that this Court stay issuance of the mandate to allow him time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case. In support of this motion, Mr. West states:

1. On November 4, 2009, the Court, by a vote of 2 to 1, affirmed the decision of the United States District Court for the Middle District of Tennessee.

2. Under 28 U.S.C. § 2101(c) and SUP. CT. R. 13.1, West has 90 days in which to file a petition for writ of certiorari in the United States Supreme Court seeking review of this Court’s judgment. Due to his imminent execution date, however, he will seek such review within a matter of days, if not hours.

3. FED.R.APP.P. 41(d)(2)(B) (amended December 1, 1998) permits a stay of the mandate for 90 days. The presumptive 90-day stay of RULE 41 precisely mirrors the time available for seeking review on certiorari. *See* 28 U.S.C. §2101(c); SUP. CT. R. 13.1. RULE 41 is designed to ensure that all parties receive a full 90 days to prepare and file a petition.

4. The 90-day stay adopted in 1998 replaces the prior presumptive stay of 30 days, which was adopted when only 30 days were permitted for certiorari in criminal cases. The 90-day stay conforms with existing rules for seeking certiorari. *See e.g.*, Judicial Conference of the United States, Minutes of The Advisory Committee on Appellate Rules, Oct. 25-27, 1994, 1994 WL 880349, at *15 (pre-1998 RULE 41 permitting stay for only 30 days was adopted when period for filing certiorari was 30 days in criminal cases; with petitioners in all cases now given 90 days to file a petition for writ of certiorari, 90-day stay of mandate is appropriate).

5. In the capital context, RULE 41 also ameliorates the concern previously expressed by various Supreme Court Justices that some capital petitioners were being denied their right to the same certiorari consideration as other litigants. *See e.g.*, *Kyles v. Whitley*, 498 U.S. 931 (1990)(Stevens, J., concurring)(“I regularly vote to stay any scheduled execution in order to be sure

that a death row inmate may have the same opportunity to have his or her federal claims considered by this Court as does any other applicant.”); *Breard v. Greene*, 523 U.S. 371, 380 (1998) (Stevens, J., dissenting)(“There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases.”); *Id.* at 381 (Breyer, J., dissenting)(“I can find no special reason here to truncate the period of time that the Court’s rules would otherwise make available” for filing and considering certiorari petition); *Id.* (Ginsburg, J., dissenting)(voting to grant stay “in order to consider in the ordinary course the instant petition”); *See also McDonald v. Missouri*, 464 U.S. 1306 (1984)(Blackmun, J.)(capital petitioner entitled to stay to permit filing and consideration of petition for writ of certiorari on direct review). A stay of the mandate will ensure that Mr. West has the same opportunity as other litigants to petition the Supreme Court for review.

6. In this case, there is further good cause for a stay of the mandate because under the Federal Rules of Appellate Procedure and the Rules of the Sixth Circuit Mr. West’s certiorari petition “would present a substantial question” for review.

7. Those issues include, but are not limited to:

a. Whether the panel’s decision is contrary to, *Warth v. Seldin*, 422 U.S.

490 (1975), a case cited therein, because *Warth* arose not when the court was determining whether it had the power to reach the merits of another contested issues of law, *e.g.*, statute of limitations, but rather when it was determining whether the complaints should have been dismissed for lack of standing, 422 U.S. at 517-518.

- b. Whether the panel's assumption of jurisdiction is flatly contrary to the Supreme Court's decision in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), where the Supreme Court emphatically stated that the court may not reach a contested issue of law without resolving a challenge to the court's subject matter jurisdiction:

While some of the above cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of "hypothetical jurisdiction" that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment-which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal niceties are at stake here. The statutory and (especially) constitutional

elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. *See United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227(1974).

523 U.S. at 101.

CONCLUSION

In this case, because a petition for writ of certiorari would present significant and substantial issues, Mr. West respectfully requests this Court to grant the motion for stay of mandate. In accordance with RULE 41, the mandate should be stayed pending the filing of a petition for writ of certiorari and disposition of the case by the United States Supreme Court.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, the foregoing Motion for Stay of Mandate Pending Petition for Writ of Certiorari was filed electronically. Notice electronically mailed by the Court's electronic filing system to:

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Notice delivered by other means to all other parties via regular U.S. Mail.

Parties may access this filing through the Court's electronic filing system.

s/Stephen M. Kissinger
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