

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED

December 9, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

ROBERT GLEN COE,

Respondent
SC-DPE-PD

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No. M1999-01313-

v.

STATE OF TENNESSEE

Movant

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RESPONSE TO MOTION TO SET EXECUTION DATE

Petitioner Robert Glen Coe moves this Court to deny Respondent's motion to set an execution date because both the Tennessee and federal courts are presently considering claims relating to the constitutionality of Robert Coe's conviction and sentence, and an execution date is otherwise premature under the circumstances. The motion should be denied to await what appears to be the expeditious resolution of the claims now pending in the courts.

THE MOTION SHOULD BE DENIED BECAUSE
ROBERT COE IS STILL PURSUING HIS AVAILABLE
STATE COURT AND FEDERAL COURT REMEDIES

As this Court indicated in Van Tran v. State, 1999 WL 1060445 (Tenn. Nov. 23, 1999), it is appropriate to set an execution date only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence . . . @ Van Tran, Westlaw slip op. at *7 (A In Tennessee, execution is imminent only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence . . . @). Here, Robert Coe is still pursuing legitimate state court and federal court remedies testing the validity of his conviction and

sentence, and therefore the motion should be denied.

Pending Proceedings In The Tennessee Courts: In the state courts of Tennessee, Robert Glen Coe is pursuing a Motion To ReOpen his post-conviction petition, based upon claims which have only recently become available through rulings made by this Court following his earlier post-conviction proceedings. See Exhibit 1 (Motion To ReOpen); Exhibit 2 (Memorandum In Support Of Motion To ReOpen). Petitioner's motion to reopen has been filed expeditiously following the denial of rehearing in the United States Supreme Court, and the Honorable John Colton, Judge of Division 3 of the Criminal Court of Shelby County, Tennessee, has set the case for oral argument next Friday, December 17, 1999. An execution date, therefore, is premature.

Moreover, the motion to reopen has merit. As more fully explained in the Motion To Reopen and Memorandum, since Robert Coe's last post-conviction proceedings, there have been no fewer than three intervening cases from this Court and the United States Supreme Court which warrant post-conviction relief under the circumstances: (1) State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999); (2) State v. Harris, 989 S.W.2d 307 (Tenn. 1999); and (3) Campbell v. Louisiana, 523 U.S. 392 (1998). In addition, Robert Coe may not be denied the fundamental right to be free from cruel and unusual punishment, and he may not be executed in violation of the evolving standards of decency: The jury did not consider the alternative punishment of Life Without Parole **B** despite the Tennessee Legislature's later acknowledgment that jurors should be given the option to consider such an alternative punishment in all capital cases. In short, if the death penalty is to be imposed, it must be imposed only in those circumstances in which no lesser punishment is appropriate in the eyes of the jury. Otherwise, there is a risk that the death sentence was imposed arbitrarily. That lesser sentencing option, however, was never given to the jury in this case.

In the Tennessee courts, Robert Coe has legitimate claims which need to be addressed, including claims which have arisen only after prior state court proceedings, and in light of intervening

decisions by this Court -- decisions over which Robert Coe has had no control. Given these intervening events and the legitimate claims which arise from those cases, he has raised those claims, and the Tennessee courts should be allowed to carefully consider such issues before the setting of any possible execution date.

Pending Federal Court Proceedings: And while Robert Coe is pursuing legitimate state court remedies, there are also continuing proceedings in the United States District Court concerning his petition for writ of habeas corpus. Robert Coe has not yet received a final ruling on claims in his habeas petition, and he is entitled to review of a claim concerning the constitutionality of electrocution. See Statement Of Petitioner In Support Of This Court's Jurisdiction Over Petitioner's Initial Habeas Petition (Exhibit 3); Supplemental Memorandum In Support Of Reconsideration Of Denial Of Amendment Concerning Electrocution Claim, And Request For Further Proceedings (Exhibit 4).

In sum, because there are ongoing proceedings both in the Tennessee courts and the federal courts on viable constitutional claims, the motion should be denied as premature, without prejudice to the setting of a date if such proceedings ultimately do not result in relief.¹

CONCLUSION

Given these circumstances, the Movant's motion should be denied.

Respectfully Submitted,

A claim of competency to be executed only becomes available upon the conclusion of all state and federal appeals, which have concluded in this case. Van Tran, Westlaw slip op. at *7 (*In Tennessee, execution is imminent only when a prisoner sentence th has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction . . .*); Id., slip op. at *10 n. 14 (*[A] proceeding to determine competency may be initiated only after all other available and state remedies have been exhausted.*). The text and terms of Van Tran clearly state that any such potential issue is here, because there are pending legal claims in state and federal court. No such issue is therefore raised in response to nature motion to set execution date. Robert Coe reserves the right to raise any such claim when and if it is appropriate under and facts.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to Glenn R. Pruden, Assistant Attorney General, 425 5th Avenue, North, Nashville, TN 37243, on this the _____ day of December, 1999.
