

No. 98-9606

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ROBERT GLEN COE,

Petitioner

v.

RICKY BELL, Warden,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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INTRODUCTION

In this capital case, this Court should grant rehearing because there have been at least three intervening events which counsel the grant of rehearing and certiorari:

(1) On October 11, 1999, directly contrary to the holding of the Sixth Circuit below, the Tennessee courts have definitively held that Campbell v. Louisiana, 523 U.S. 392 (1998) *does not* constitute a new rule of criminal procedure, thus creating a direct conflict between the Sixth Circuit and the Tennessee courts on this critical issue, which is presented as Question Presented #1 in the Petition For Writ Of Certiorari. U.S.S.Ct.R. 10,

(2) On October 26, 1999, this Court granted certiorari in Bryan v. Moore, U.S.No. 99-6723 cert. granted 528 U.S. ____ (Oct. 26, 1999) to address the constitutionality of electrocution, which is at issue in this case as well; and

(3) On September 1, 1999, this Court granted certiorari in Weeks v. Angelone, U.S.No. 99-5746, cert. granted 527 U.S. ____ (Sept. 1, 1999), which will resolve the proper application of the standard of Boyd v. California, 494 U.S. 370, 380 (1990) to sentencing instructions which may preclude the jury's consideration of mitigating evidence. This, too is at issue in this case (Question Presented #2).

In light of these new circumstances, this Court should: (1) grant the petition for rehearing and grant certiorari; or (2) hold the petition for rehearing pending the upcoming decisions in Bryan and Weeks; and/or (3) grant rehearing and grant certiorari, and then remand in light of the upcoming decisions in Bryan and Weeks. See e.g., Adams v. Ewart, 511 U.S. 1001 (1994) (in capital case, granting rehearing petition, granting certiorari, and remanding for further consideration in light of intervening Supreme Court decision).

I THERE IS NOW A DIRECT CONFLICT IN THE LOWER COURTS ON WHETHER Campbell v. Louisiana, 523 U.S. 392 (1998) CONSTITUTES A NEW RULE OF CONSTITUTIONAL CRIMINAL PROCEDURE

Question 1 in the Petition For Writ Of Certiorari requests this Court to determine whether Campbell v. Louisiana, 523 U.S. 392 (1998) constitutes a new rule of constitutional criminal procedure within the meaning of Teague v. Lane, 489 U.S. 288 (1989). Petition For Writ of Certiorari, p. i, Question Presented 1. As Robert Coe noted earlier, the Sixth Circuit's decision declaring Campbell a new rule of law is inconsistent with the clear "axiomatic" language of Campbell and any notion of what constitutes a "new rule of constitutional criminal procedure" under Teague. Petition For Writ of Certiorari, pp. 23-26; Petitioner's Reply To Brief In Opposition, pp. 1-2. In the Brief In Opposition, Respondent contended that certiorari should be denied because there was no conflict in the lower courts on this issue.

As of October 11, 1999, there is such a conflict. On October 11, 1999 the Tennessee Supreme Court denied permission to appeal in the case of Morris v. State, No. 03C01-9906-CR-234 (Tenn. Cr.App. July 13, 1999). See Appendix 1 (Tennessee Court of Criminal Appeals Opinion and Tennessee Supreme Court Opinion). In Morris, the Tennessee courts have held that Campbell's holding that a defendant has due process standing to challenge exclusions from the grand jury *does not* constitute a new rule of law, but was dictated by prior cases from this Court. See Appendix 1, p. 3. This is contrary to the Sixth Circuit's decision below. The conflict in the lower courts is thus manifest. With the Tennessee courts and the Sixth Circuit at odds on this important constitutional issue, certiorari is warranted. U.S.S.Ct. 10.

Thus, not only does the Sixth Circuit's decision in Coe directly contradict the unanimous decision of this Court in Campbell, Coe and the recent decision in Morris cannot be reconciled.

Still, Robert Coe faces execution of the death sentence even though his conviction was secured in violation of the Constitution. Given the conflict with the express language of Campbell and now the direct conflict between the Sixth Circuit and the Tennessee courts, this Court should grant rehearing, grant the petition for writ of certiorari, and reverse the Sixth Circuit's judgment.

II. THE CONSTITUTIONALITY OF ELECTROCUTION IS BEFORE THIS COURT IN Bryan v. Moore, U.S. No. 99-6723, AND THIS COURT'S UPCOMING DECISION HAS A DIRECT BEARING ON THE VALIDITY OF THE JUDGMENT BELOW

On October 26, 1999, this Court granted certiorari in the case of Bryan v. Moore, U.S. No. 99-6723 cert. granted 528 U.S. ____ (Oct. 26, 1999), to determine whether electrocution constitutes cruel and unusual punishment in violation of the Constitution. This Court's upcoming decision in Bryan directly affects Robert Coe's case, as his case involves a claim that electrocution constitutes cruel and unusual punishment.

In this case, Robert Coe sought to amend into his habeas petition a claim (denominated as ¶44 of an amended petition) that electrocution constitutes cruel and unusual punishment. The United States District Court denied him leave to amend his petition, concluding that any claim challenging the cruelty of electrocution was "frivolous." R. 374, July 1, 1996 District Court Memorandum, p. 4. The Sixth Circuit then affirmed the District Court's decision. Coe v. Bell, 160 F.3d 320, 341-342 (6th Cir. 1998).

This Court's recent grant of certiorari in Bryan makes clear that Robert Coe's claim challenging electrocution is not "frivolous," as held by the lower courts. And, to the extent that this Court finds in Bryan that the claim is not frivolous and/or meritorious, Robert Coe would indeed be entitled to amend his petition and to be heard on his claim.

Accordingly, this Court should hold the petition for rehearing in light of the recent grant

of certiorari in Bryan and following the decision in Bryan, grant the petition for rehearing, grant certiorari, and remand for further proceedings in the lower courts.

III THE PETITION FOR REHEARING SHOULD BE GRANTED IN LIGHT OF THIS COURT'S RECENT GRANT OF CERTIORARI IN Weeks v. Angelone, U.S.No. 99-5746, cert. granted 527 U.S. ____ (Sept. 1, 1999)

In addition, this Court should grant rehearing and/or at least hold Robert Coe's petition pending the upcoming decision of this Court in Weeks v. Angelone, U.S.No. 99-5746, cert. granted 527 U.S. ____ (Sept. 1, 1999). Weeks is directly relevant to Robert Coe's claim (presented as Question Presented #2 in his Petition For Writ Of Certiorari) that jury instructions at sentencing precluded the full consideration of his mitigating evidence of mental illness.

In Weeks, this Court is addressing the applicability of Boyd v. California, 494 U.S. 370 (1990) to ambiguous jury instructions which risked the imposition of the death sentence without full consideration of the defendant's mitigating evidence. This is precisely the issue presented by Robert Coe in his Question Presented #2, in which he has raised a claim that the jury instructions at sentencing violated the Constitution under Boyd because they were ambiguous and precluded the jury from crediting his mitigating evidence. See Petition For Writ Of Certiorari: p. i (Question Presented #2), pp. 8-12 (facts in support of Question 2); pp. 26-30 (argument); Petitioner's Reply To Brief In Opposition, pp. 2-4 (discussing jurors' failure to consider mitigating evidence).

Accordingly, given this Court's intervening grant of certiorari in Weeks, this Court should hold the petition in light of Weeks, and then grant the petition for rehearing, and grant the petition for certiorari and remand for further consideration in light of the upcoming decision in Weeks.

CONCLUSION

This Court should hold this petition for rehearing in light of Ryan and Weeks and then grant the petition for rehearing, grant certiorari, and remand for further consideration in light of Ryan and Weeks. Also, this Court should grant the petition for rehearing and grant certiorari to address Question 1 presented in the petition, viz., whether Campbell v. Louisiana, 523 U.S. 392 (1998) constitutes a new rule of constitutional criminal procedure.

Respectfully Submitted,

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By: Paul R. Botti

CERTIFICATE OF SERVICE

I certify that a copy of this petition for rehearing was served this 27th day of October, 1999 upon counsel for Respondent, Gordon W. Smith, 425 Fifth Avenue North, Nashville, Tennessee 37243-2497.

Paul R. Botti

CERTIFICATION

I hereby certify that this petition for rehearing is restricted to the grounds specified in United States Supreme Court Rule 44.2 and is presented in good faith and not for delay.

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APPENDIX 1

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

TIMOTHY MORRIS,
Petitioner.

vs.

STATE OF TENNESSEE,
Respondent.

C.C.A. No. 03C01-9908-CR-00234

Greene County

ORDER

The appellant, through the office of the post-conviction defender

has filed an application for permission to amend the Greene County Order

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the state's application for permission to appeal the Greene County Criminal Court's denial of his motion to reopen his post-conviction petition. See Tenn. Code Ann. § 40-30-217 (1997). He alleges that his petition should be reopened for review of the following questions: (1) whether his constitutional rights have been abridged because women have been systematically excluded from the position of foreperson of the grand jury which indicted him,² and (2) whether his 19-year incarceration on death row constitutes cruel and unusual punishment. The state has filed its response to the application, and the matter is before the court for disposition.

As relevant to the matter at bar, the Post-Conviction Procedure Act of 1995 provides for reopening if

(t)he claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the

It appears that the post-conviction defender filed the application without having been appointed to represent Timothy Morris.

In his statement of the issues and argument seeking grant of the application, Morris complains only of the systematic exclusion of women. In his factual statement and in the motion to reopen filed in the trial court, Morris alleges the systematic exclusion of black persons.

ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial

Tenn. Code Ann. § 40-30-217(a)(1) (1997); see also Tenn. Code Ann. §40-30-202(b)(1) (1997). There is no appeal as of right from the trial court's denial of a motion to reopen; rather, the petitioner must file an application for permission to appeal, which this court must decline to grant unless it appears that the trial court abused its discretion. Tenn. Code Ann. § 40-30-217(c) (1997). Only if such an abuse is found will this court remand the matter for further proceedings. *Id.*

First, Morris seeks a determination that his constitutional rights have been violated by the systematic exclusion of women from the position of foreperson of the grand jury which indicted him.³ In support of his efforts to reopen the previous post-conviction action on this point, he alleges that while Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419 (1998), did not set forth "any new rule of federal law, [it] established for Tennessee a new rule of law, viz. that a man had standing to allege a violation of his rights arising from discrimination in grand jury selection against any group to which he does not belong, including women."⁴ As evidence of the rule in Tennessee prior to

³ It appears that this is Morris' first attempt to bring this issue before any state appellate court. See generally State v. Morris, 841 S.W.2d 883 (Tenn. 1982) (direct appeal); Timothy Eugene Morris v. State, No. 03C01-9708-CR-00351 (Tenn. Crim. App., Knoxville, July 14, 1998) (post-conviction); Timothy Eugene Morris v. State, no number (Tenn. Crim. App., Knoxville, Sept. 11, 1989) (post-conviction).

⁴ Morris alleges that the systematic exclusion of women as the foreperson of the grand jury violated his rights to due process and equal protection under the Fourteenth Amendment, to a grand jury selected from a fair cross-section of the community under the Fifth and Sixth Amendments, the Eighth Amendment, and the Ninth Amendment of the United States Constitution, as well as Article I, sections 6, 8, 9, 14 and 16 of the Tennessee Constitution. However, Campbell addresses only equal protection and due process concerns. Thus, if Campbell does indeed announce a new rule requiring retrospective application, see Tenn. Code Ann. § 40-30-217(a) (1997), that rule implicates only equal protection and due process. Morris has cited no authority that demonstrates the creation of a new rule with respect to the remaining constitutional provisions cited.

Campbell, he points to the Tennessee Supreme Court's decision in State v. Coe, 855 S.W.2d 903, 910 (Tenn. 1983), which held that men do not have standing to challenge the under representation of women on the grand jury.

First, it is relevant that our supreme court's 1983 decision in Coe was based upon United States Supreme Court precedent; that is to say, the decision was one based upon federal constitutional law. Coe is silent on the protections afforded a criminal defendant with respect to the gender makeup of

the grand jury as a matter of Tennessee constitutional law. Thus, we are at a loss to see how Campbell could, as the petitioner suggests, announce a new rule as a matter of state law while not breaking new ground in the area of federal law.

Moreover, the equal protection aspect of Campbell was based upon the Supreme Court's prior decision in Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364 (1991). Powers' holding was given retroactive effect long before Campbell was decided. State v. Ellison, 841 S.W.2d 824 (Tenn. 1992); accord Coe v. Bell, 161 F.3d 320 (6th Cir. 1998) (recognizing cases which have applied Powers retroactively), pet. for cert. filed, (U.S. May 24, 1999). As such, the decision in Powers marks the date upon which Morris' time commenced for filing a motion to reopen his post-conviction petition. See Tenn. Code Ann. § 40-30-202(b)(1), -217(a)(1) (1997).

Similarly, Campbell's due process holding is based upon two prior Supreme Court decisions, Peters v. K'f, 407 U.S. 493, 92 S. Ct. 2163 (1972) and Hobby v. United States, 468 U.S. 339, 104 S. Ct. 3093 (1984). See

⁵ Campbell dealt with a white defendant's challenge to the systematic exclusion of black persons from the position of foreperson of the grand jury.

Campbell, 523 U.S. at ---, 118 S. Ct. at 1424-25; accord Coe, 161 F.3d at 353-54. Peters and Hobby were available to Morris at the time of his previous post-conviction actions. See Timothy Eugene Morris v. State, No. 03C01-9708-CR-00351 (Tenn. Crim. App., Knoxville, July 14, 1998); Timothy Eugene Morris v. State, no number (Tenn. Crim. App., Knoxville, Sept. 11, 1985). His attempt to avail himself of them now is an apparent attempt to repackage Peters and Hobby in the wrappings of Campbell in order to defeat the time-bar and waiver

provisions of the post-conviction act.

The trial court did not abuse its discretion in denying Morris's motion to reopen his post-conviction action to litigate under the auspices of Camobell.

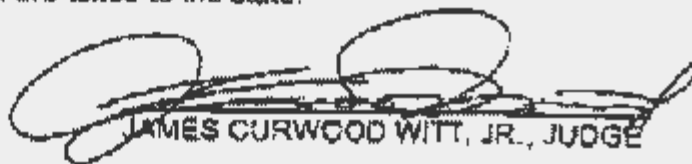
II

Second, the petitioner alleges his 19-year incarceration on death row constitutes cruel and unusual punishment. He acknowledges that Tennessee courts have never recognized such a claim, but he argues that federal precedent dictates otherwise. However, the authority he cites includes a case decided by the Judicial Committee of the Privy Council of the United Kingdom and separate minority opinions of United States Supreme Court justices in two cases raising the issue of cruel and unusual punishment due to lengthy incarceration on death row. See Eledge v. Florida, — U.S. —, 119 S. Ct. 366 (1998) (denial petition for writ of certiorari) (Breyer, J., dissenting); Larkey v. Texas, 514 U.S. 1045, 115 S. Ct. 1421 (1995) (denial of petition for writ of certiorari) (Stevens and Breyer, JJ., commenting that the issue is not without foundation and that it will benefit from further consideration in the lower courts); Praff v. Attorney General of Jamaica, 2 App. Cas. 1, 33 I.L.M. 364 (Privy Council 1993).

Nevertheless, the petitioner urges us to grant the application, hold

that the principles of Eledge, Lackey and Pratt constitute a new rule of law in Tennessee, and grant relief. This argument is flawed because Morris has shown no final ruling of an appellate court establishing a newly recognized right. See Tenn. Code Ann. § 40-30-217(a)(1) (1997). None of the cases cited by the petitioner create a new rule of law in Tennessee. Neither the lords of the Judicial Committee of the Privy Council nor a minority of the justices of the United States Supreme Court have the ability to change the law of this state.

In conclusion, we find no abuse of discretion by the trial court in denying the motion to reopen. Accordingly, it is hereby ORDERED that the application for permission to appeal is DENIED. If appearing the petitioner is indigent, the costs of this action are taxed to the state.


JAMES CURWOOD WITT, JR., JUDGE

CONCUR:


GARY R. WADE, PRESIDING JUDGE


JOSEPH M. TIPTON, JUDGE

