

FILED  
MAY 17 9 17 AM '11  
 IN THE CRIMINAL COURT OF TENNESSEE  
 FOR THE 30TH JUDICIAL DISTRICT AT MEMPHIS  
 DIVISION 3

ROBERT GLEN COE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

Violations of the  
BY *B. Oruse*

No. P-3577, 6594, 14345

POST-CONVICTION

Death Sentence

MOTION TO REOPEN POST-CONVICTION PETITION

This motion to reopen post-conviction petition is being filed by Robert Coe, Riverhead Maximum Security Institution, 7475 Coakrill Bend Industrial Road, Nashville, Tennessee 37269. Following a plea of not guilty, Petitioner was convicted of first-degree murder, aggravated kidnaping, and aggravated rape in the Criminal Court of Shelby County, Tennessee, *State v. Robert Coe*, Nos. B-73812, 73813, 73814. He was convicted on February 28, 1981, and his motion for new trial was denied April 10, 1981. He was sentenced to death on the murder charge, and life on the kidnaping and rape convictions.

He has previously filed three post-conviction petitions in the Criminal Court of Shelby County, Tennessee: Nos. P-3577, 6594, 14345. In those petitions, Robert Coe has raised numerous grounds for relief. He was granted a hearing on his first post-conviction petition, which was denied by the trial court and affirmed on appeal by the Court of Criminal Appeals.<sup>1</sup>

As to his second petition, P-6594, he was not granted a hearing and denied relief, which was again upheld on appeal.<sup>2</sup> Similarly, Petition P-14345 was denied by the trial court without a hearing and the denial of relief was affirmed on appeal.<sup>3</sup> He respectfully

<sup>1</sup> His claims included claims of ineffective assistance of counsel.

<sup>2</sup> Claims raised in that petition included violations of *Beck v. Maryland*, 402 U.S. 496 (1987); unconstitutionally overbroad instructions on the "subconscious" aggravating factor; the death sentencing statute is unconstitutional because it requires mitigating circumstances to outweigh aggravating circumstances; the death sentencing statute did not give the jury discretion to impose a life sentence; jurors were not allowed to consider sympathy when imposing sentence; ineffective assistance of post-conviction counsel; unconstitutional malice instructions; violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); failure to properly instruct on non-statutory mitigating circumstances.

<sup>3</sup> Included in that petition were the following claims: i. Is Petitioner entitled to a hearing and post-conviction relief on his claim that the prosecution withheld material exculpatory evidence in

Incorporates by reference and asks that the court take judicial notice of all the transcripts, filings and pleadings contained in the trial, direct appeal, and post-conviction and appeal files.

violation of Brady v. Maryland, 373 U.S. 83, 87 (1963), where his claims are based upon Tennessee Bureau of Investigation (T.B.I.) documents and other documents withheld from him?

2. Was there a violation of State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)?

3. Do instructions on "reasonable doubt" violate Casey v. Louisiana, 498 U.S. 39 (1991) and Victor v. Nebraska, 511 U.S. 114 S.Ct. 1239 (1994)?

4. Was Petitioner denied the effective assistance of counsel under the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments, where counsel failed to investigate and present evidence that Petitioner was not guilty of first-degree murder and/or did not deserve to be sentenced to death, and/or failing to properly present claims on appeal or to perfect post-conviction proceedings? Do claims based upon evidence sought or obtained through expert or investigative funds under Cornas v. State, 908 S.W.2d 923 (Tenn. 1995) fall within the exception to the post-conviction statute of limitations contained in Barford v. State, 845 S.W.2d 304 (Tenn. 1992)? Is Petitioner entitled to funds for expert assistance to investigate and present his ineffectiveness claims to the Tennessee courts?

5. At the sentencing phase of Petitioner's trial, was the jury entitled under the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to an instruction about Petitioner's ineligibility for parole until age 13 in the event the jury sentenced him to life imprisonment?

6. Where Petitioner was forced to sit behind and away from counsel throughout his entire trial, and was denied the full opportunity to consult with counsel as a result, was Petitioner denied the right to counsel and the assistance of counsel under the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments?

7. Does proof of any first-degree murder under Tenn. Code §§9-2-402 (1979) require a jury finding of "malice," where §§9-2-401 defines "murder" as "killing with malice"?

8. Does it violate the Sixth, Eighth, and Fourteenth Amendments to inform a jury that it must return a unanimous sentencing verdict while failing to inform the jury of its failure to agree as to the proper sentence? Did the jury instructions violate the Sixth, Eighth, and Fourteenth Amendments by precluding the jury from considering mitigating circumstances except those unanimously agreed upon by all twelve jurors?

9. Where the jury in a first-degree murder case is instructed on the elements of both felony-murder and premeditated murder in a first-degree murder prosecution and then returns a general verdict of "guilty," has the defendant been denied his constitutional right to a unanimous jury verdict under the Tennessee and United States Constitutions and Tennessee law?

10. Where a defendant presents expert testimony, is he denied a fair trial under the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments through an instruction which informs the jury that expert testimony is a "field of speculation" and "does with theories and conjectures"?

11. Where a defendant presents an insanity defense, is it unconstitutional under the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to inform the jurors that, if acquitted, he may be released, perhaps quickly, from a state mental institution?

12. Is it unconstitutional under the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to provide jury instructions which require the jury to consider the defendant's guilt of first-degree murder before considering the definitive evidence of insanity?

13. Was Petitioner denied an effective review of his death sentence, under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and Tennessee law, where the Tennessee Supreme Court failed to address whether the sentence was imposed in any arbitrary fashion, failed to consider the weight of aggravating and mitigating circumstances, and made no findings about specific aggravating factors, and where this Court did not conduct any meaningful proportionality analysis?

14. Does electrocution constitute cruel and unusual punishment under the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments?

15. Is the right to life a fundamental constitutional right? Does the death sentence violate the fundamental right to life under the Tennessee Constitution and the due process and equal protection clauses of the United States Constitution?

16. Was Petitioner unconstitutionally arrested, and should the fruits of such arrest have been suppressed under the Tennessee Constitution and the Fourth, Fifth, Sixth, and Fourteenth Amendments?

17. Was Petitioner denied a fair trial as a result of the errors at his trial, in violation of the Tennessee Constitution and the Fourteenth Amendment?

This motion to reopen is filed pursuant to the inherent rights contained in the due process clause of the Fourteenth Amendment, Article VI §2 of the United States Constitution, TENN. CODE ANN. § 40-30-217, TN. CONST. Art. II, § 1; Art. I §§ 6 (trial by jury), 8 (due process), 9 (impartial jury), 14 (habeas corpus), 16 (cruel and unusual punishment), 17 (access to the courts), 32 (humane treatment of prisoners); Art. XI, § 16 (Bill of rights to remain inviolate) and Burford v. State, 845 S.W.2d 204 (Tenn. 1992). Petitioner respectfully notes that he is entitled to relief on the claims raised in this petition for all the reasons stated herein, and the denial of relief would constitute a denial of fundamental rights, the right to due process of law, and all of the rights alleged to have been violated by this motion.

In particular, Petitioner is entitled to relief directly under the constitutional provisions cited herein, and he asks for relief directly under all such provisions. He is also entitled to post-conviction relief under 40-30-217 because he is relying on rules of law not previously recognized by the courts of Tennessee which are fully applicable here. In particular, he raises claims that satisfy the standards of §40-30-217 under Burford and/or the Tennessee and United States Constitutions.

As more fully explained in his accompanying memorandum of law, Petitioner respectfully raises the following claims that entitle him to relief either under 40-30-217, the Tennessee Constitution, or the United States Constitution:

- (1) Exculpatory evidence was destroyed in violation of due process under the Tennessee Constitution and the intervening case of State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), resulting in an unfair guilt and sentencing hearing; See T.C.A. §40-30-217(a)(1);
- (2) The death sentence was tainted by an unconstitutional and improper finding of a "heinousness" aggravating circumstance, in violation of the intervening case of State v. Harris, 989 S.W.2d 307 (Tenn. 1999); See T.C.A. §40-30-217(a)(1);
- (3) Discrimination in the selection of the grand jury foreperson, in violation of the intervening case of Cannell v. Louisiana, 523 U.S. 392 (1998); T.C.A. §40-30-217(a)(1); and
- (4) The death sentence, including subjecting Robert Con to numerous execution dates over a 16 year time period from the date he was first sentenced, constitutes cruel and unusual

punishment in violation of Article I, §§ 16 and 32 of the Tennessee Constitution; the Eighth Amendment to the United States Constitution; Article 7 of the International Covenant On Political And Civil Rights (ICCPR); The Convention Against Torture and Other Cruel, Inhuman, Or Degrading Punishment Or Treatment, Article 16 (1); and Customary International Law, in accordance with Article 5 of the Universal Declaration of Human Rights and Article XXV of the American Declaration of the Rights And Duties of Man; T.C.A. §40-30-217(a)(1);

(5) In violation of the evolving standards of decency in Tennessee, Article I §16 of the Tennessee Constitution, and the Eighth Amendment, the jury was not allowed to consider life without parole as an alternative punishment. §40-30-217(a)(1).

The reasons this Court is required to consider the above-cited claims and to grant relief on the merits is more fully explained in the accompanying memorandum of fact and law filed in support of this motion to reopen, which more fully explains the facts and law in support of his claims for relief. Pursuant to the instructions in Rule 28, App. D., Rules of the Tennessee Supreme Court, additional information concerning claims involving rights not recognized at the time of trial, but which are now required to be recognized and applied to his case, as well as all facts that support his claims and the specific prejudice caused thereby are set out in the attached memorandum.

In addition to those grounds under § 217(a)(1) and (a)(2) previously noted, this Court has a duty, as part of the independent and equal judicial branch of government (TN CONST. Art. II, § 1), to hear and consider all claims set forth in the attached memorandum under its inherent power and to protect rights guaranteed to all persons under Art. 1, §§ 6 (trial by jury), 8 (due process), 9 (indictment-impartial jury), 14 (indictment), 16 (cruel and unusual punishment), 17 (access to the courts), 32 (humane treatment of prisoners); and Art. XI, § 16 (Bill of rights to remain inviolate). Robert Coe is therefore entitled to post-conviction relief.

Prisoner has a proceeding pending in the federal courts concerning his conviction and sentence. He has been previously represented in post-conviction proceedings by attorneys Joel Krach, the Shelby County Public Defender's Office, Mark Ward, and Robert Irby. Robert Glen Coe is currently being represented in matters before the federal courts by


James Walker, Esq., and Henry Martin, Federal Public Defender and Paul Bottel, Assistant Federal Public Defender, Office of the Federal Public Defender for the Middle District of Tennessee, 810 Broadway, Suite 200, Nashville, TN 37203-3830.

Petitioner was sentenced on more than one count of an indictment. He does not have any future sentence to serve upon completion of the sentences imposed under the indictment.

#### CONCLUSION

Wherefore, petitioner prays that the court grant petitioner's motion to reopen the post-conviction proceedings and grant any relief to which petitioner may be entitled in this proceeding. Petitioner also respectfully requests an evidentiary hearing at which he may prove the allegations made in this petition.

Respectfully Submitted,

  
Robert L. Henson  
GLANKLER BROWN  
1700 One Commerce Square  
Memphis, Tennessee 38103  
(901) 525-1322

#### PETITIONER'S VERIFICATION UNDER OATH SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that the foregoing is true and correct.  
Signed on 12-7-99

  
Robert Glen Coe, Petitioner

#### Affidavit of Indigency.

I, Robert Glen Coe, do solemnly swear (or affirm) that because of my poverty, I am not able to bear the expenses of the action which I am about to commence. I further swear (or affirm) that, to the best of my knowledge, I am justly entitled to the relief sought.

  
Robert Glen Coe, Petitioner

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing Motion to Reopen has been delivered to William L. Gibbons, District Attorney General, 3rd Judicial District, 201 Poplar Avenue, Suite 301, Memphis, TN 38103-1947, on this the 7 day of December, 1999.

Robert J. Hunt