

No. _____

**In the
Supreme Court of the United States**

EX PARTE BILLIE WAYNE COBLE,
Applicant.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

MOTION FOR STAY OF EXECUTION

**BILLIE WAYNE COBLE IS SCHEDULED
TO BE EXECUTED ON THURSDAY, FEBRUARY 28, 2019**

TO THE HONORABLE JUDGES OF THIS COURT:

Billie Wayne Coble was convicted of capital murder and is facing an execution date of February 28, 2019.¹ As detailed in his accompanying petition for a writ of habeas corpus, this petition is based on a claim having to do with his trial counsel's overriding of his Sixth Amendment right to determine the objective of his defense in his first trial in 1990.

Mr. Coble was convicted in 1990 for killing his wife's parents and brother. Several months before trial, his lawyers filed a notice of intent to raise an insanity defense. In jury selection, defense counsel questioned prospective jurors about how they might respond to evidence tied to that defense. Then, after the State rested in the guilt phase, defense counsel

¹ The trial court order setting the execution date is included herein as an appendix.

abruptly changed course. They called no expert witnesses or lay witnesses. Instead, the entire guilt-phase presentation consisted of a defense investigator playing silent archival footage that depicted scenes from the Vietnam War—a war in which Mr. Coble fought extensively as a member of the Marine Corps some decades earlier. In closing arguments—they did not make an opening statement—they conceded Mr. Coble’s guilt. Nobody expected defense counsel to proceed in this feeble manner. The move stunned the prosecution, the media, and, most importantly, the defendant himself.

Mr. Coble did not agree with his lawyers’ decision to drop altogether any semblance of a defense at the guilt phase. The day before his lawyers rested their case, the lead attorney, Ken Ables, requested that the jail medicate his client for anxiety. The defendant came to court the next day under the influence of Vistaril. At the behest of defense counsel, the court proceeded to question Mr. Coble about whether his lawyers had discussed their plans with him. On the back of this exchange, counsel called no additional witnesses and rested its case. The jury returned a guilty verdict on the capital charge.

While defense counsel has the role and duty of making “strategic choices about how to best *achieve* a client’s objectives,” the client has the autonomy to decide what those objectives are. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (emphasis in original). Here, Mr. Coble’s objective was to present a defense in the guilt phase and to not concede guilt for the crimes. Defense counsel overrode that objective—and their client’s will—by instead presenting to the jury no defense at all and conceding his guilt.

In *McCoy*, this Court recently held that “it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense.” *Id.* at 1505. This new declaration about the scope and nature of the defendant’s Sixth Amendment rights provides the basis for this petition. The Constitution protects Mr. Coble’s right to insist on a defense and object to the lawyers’ “proposal to concede [defendant] committed these murders.” *Id.* at 1509. “[I]t was not open to [defense counsel] to override [his] objection.” *Id.* at 1509. For that reason, Mr. Coble is entitled to a new trial.

This petition presents two important questions that have arisen in the wake of *McCoy*. First, courts across the country have reached contrary conclusions about when and to whom the defendant must object to raise a possible *McCoy* violation—to the court or just to his attorneys? Second, this Court should also make clear that *McCoy* also protects a defendant’s Sixth Amendment right even if he insists upon a defense that is not a declaration of outright innocence.

A stay of execution will give this Court the opportunity to examine the record and rule on the application of *McCoy* to Mr. Coble’s case without the time-pressure of an impending execution. As the Supreme Court has stated, “execution is the most irremediable and unfathomable of penalties.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).²

² *Barefoot v. Estelle*, 463 U.S. 849, 888, 889, 893 n.4 (1983), the leading authority on post-petition habeas corpus stays recognizes that a stay of execution is required whenever at least one claim is “not frivolous” or “colorable,” the claim is “debatable among jurists of reason and a court *could* resolve the claim favorably to the petitioner.” *See also McFarland v. Scott*, 512 U.S. 849, 860 (1994)(O’Connor, J. Concurring in the judgment in part and dissenting in part).

PRAYER FOR RELIEF

For the reasons above and for those stated in his accompanying Petition for Writ of Habeas Corpus, Mr. Coble respectfully requests that this Court:

1. Grant a stay of execution , currently scheduled for February 28, 2019;
2. Grant his petition for writ of certiorari and remand the matter for a hearing on his compelling claims.
3. Mr. Coble further requests any other relief that law or justice may require.

Dated: February 21, 2019.

Respectfully submitted,

s/s A. Richard Ellis

A. RICHARD ELLIS *
Texas Bar No. 06560400
75 Magee Drive
Mill Valley, CA94941
(415) 389-6771
FAX: (415) 389-0251

* Counsel of Record

APPENDIX

CAUSE NUMBER 1989-1036-C2

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	54 TH JUDICIAL DISTRICT
	§	
BILLIE WAYNE COBLE	§	MCLENNAN COUNTY, TEXAS

ORDER SETTING DATE FOR EXECUTION

On this the 17th day of October, 2018, the above-entitled and numbered cause was called for the purpose of setting a date for the execution of the sentence of death against BILLIE WAYNE COBLE, the defendant, in accordance with the verdicts, judgment and sentence of death heretofore rendered against him on or about April 12, 1990, and September 4, 2008.

From Judgment entered April 12, 1990, the defendant appealed to the Texas Court of Criminal Appeals, and in a decision rendered November 23, 1993, the said judgment was in all things AFFIRMED. *Billie Wayne Coble vs. State*, 871 S.W.2d 192 (Tex.Cr.App. 1993), *reh.den.* 1/26/94. The decision of the Court of Criminal Appeals is final, and the Court's mandate has been received by the Trial Court, both of which are on file among the papers of this Cause.

Certiorari in this cause was DENIED by the United States Supreme Court on October 3, 1994, a copy of which order is on file among the papers of this Cause. *Billie Wayne Coble v. Texas*, 513 U.S. 829, 115 S.Ct. 101, 130 L.Ed.2d 50 (1994).

Defendant thereafter sought appointed counsel for the purpose of filing an application under TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1981), but said request was denied under then existing law. On November 2, 1994, the Trial Court set a date for execution.

On March 1st, 1995, Defendant filed a petition in the United States District Court seeking federal habeas corpus relief. *Billie Wayne Coble v. Wayne Scott, Director*, Civil Action No. W-94-CA-338 (USDC - Waco Div. 1995). After granting a stay of execution, Judge Walter Smith dismissed

the petition without prejudice on June 2, 1995, for failure to exhaust State remedies.

Thereafter, pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon 1981), appointed counsel filed an initial State Application for Habeas Corpus relief, and on September 3rd and 4th, 1998, a hearing was held thereon. On February 17, 1999, the Texas Court of Criminal Appeals DENIED all relief requested. *Ex parte Billie Wayne Coble*, No. 39,707-01, *Per curiam; Not Designated for Publication*. The Trial Court then set Coble's execution for June 9, 1999.

In May of 1999 Defendant again filed a petition in the United States District Court seeking federal habeas corpus relief. *Billie Wayne Coble v. Janie Cockrell, Director*, Civil Action No. W-99-CA-080 (USDC - Waco Div. 1999). After granting a stay of execution, Judge Walter Smith granted a partial COA on the issue of ineffective assistance of counsel. The United States Court of Appeals for the Fifth Circuit granted COA on the issue of whether the "special issue" interrogatories in the Texas capital sentencing instruction precluded effective consideration of Coble's mitigating evidence in violation of the mandates of *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("Penry I"), and *Penry v. Johnson*, 532 U.S. 782 (2001) ("Penry II"). *Coble v. Cockrell*, 80 Fed. Appx. 301 (5th Cir. 2003). The United States Court of Appeals for the Fifth Circuit GRANTED habeas relief. *Billie Wayne Coble v. Nathaniel Quarterman, Director*, 496 F.3d 430 (5th Cir. 2007).

Thereafter Judgment from the second trial, being limited to the punishment phase, in this Cause was affirmed on direct appeal to the Court of Criminal Appeals on October 13, 2010, rehearing denied January 12, 2011. *Billie Wayne Coble v. State*, 330 S.W. 3d 253 (Tex. Crim. App. 2010). The decision of the Court of Criminal Appeals is final, and the Court's mandate has been received by the Trial Court, both of which are on file among the papers of this Cause. Mandate being issued on February 22, 2011. Application for Writ of Certiorari was denied on June 20, 2011. *Coble v. Texas*, 564 U.S. 1020 (2010).

Habeas relief from the second trial was denied by the Court of Criminal Appeals in Cause Number 1989-1036-C2B on February 8, 2012. *Ex parte Coble*, WR-39,707-03, 2012 WL 405481 (Tex. Crim. App. Feb. 8, 2012).

Thereafter federal habeas relief from the second trial was denied on September 30, 2015. *Billie Wayne Coble v. Stephens*, W-12-CV-039, 2015 WL 57377707 (W.D. Tex., Sep. 30, 2015). Denial of federal habeas relief was affirmed on April 3, 2018. *Billie Wayne Coble v. Davis*, 728 F. App'x 297 (5th Cir. 2018). Application for Writ of Certiorari was denied on October 9, 2018. *Billie Wayne Coble v. Davis*, No. 18-5546, 2018 U.S. LEXIS 6028 (2018).

The trial court finds that there are currently no stays in effect, thus the trial court sets a date not earlier than the 91st day after the date the convicting court enters this order setting the execution date. Therefore:

"IT IS THE ORDER OF THE COURT THAT THE DEFENDANT, BILLIE WAYNE COBLE, WHO HAS BEEN ADJUDGED TO BE GUILTY OF THE OFFENSE OF CAPITAL MURDER AND WHOSE PUNISHMENT HAS BEEN ASSESSED IN ACCORDANCE WITH LAW AT DEATH, AND SENTENCED TO DEATH BASED UPON THE FINDINGS AND THE VERDICT OF THE JURY, SHALL AT ANY TIME AFTER THE HOUR OF 6:00 P.M. ON THE 28TH DAY OF FEBRUARY, 2019, WHICH SAID DATE IS NOT EARLIER THAN THE 91ST DATE AFTER THE DATE THIS ORDER IS ENTERED, AT THE LOCATION DESIGNATED BY THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE. AT THE STATE PENITENTIARY AT HUNTSVILLE, TEXAS, IN A ROOM ARRANGED FOR THAT PURPOSE, THEN AND THERE TO BE CAUSED TO DIE BY INTRAVENOUS INJECTION OF A SUBSTANCE OR SUBSTANCES IN A LETHAL QUANTITY SUFFICIENT TO CAUSE DEATH AND UNTIL HE, BILLIE WAYNE COBLE, IS DEAD, SUCH EXECUTION PROCEDURE TO BE DETERMINED AND SUPERVISED BY THE DIRECTOR OF THE DEPARTMENT OF CRIMINAL JUSTICE."

IT IS THE FURTHER ORDER OF THE COURT that within ten days hereof the Clerk of this Court shall issue a Warrant of Execution under seal of the Court for the execution of this sentence of death, which said Warrant shall recite the fact of conviction, setting forth specifically the offense, the judgment of the Court, the time fixed for execution, and directed to the Director of the Department of Criminal Justice - Institutional Division at Huntsville, Texas, commanding him to proceed, at the time and place named in this order of execution, to carry the same into execution, as provided by law, and the Clerk of this Court shall deliver such Warrant to the Sheriff of McLennan County, Texas, to be by him delivered to the said Director of the Department of Criminal Justice - Institutional Division, together with the said BILLIE WAYNE COBLE, if not previously so delivered.

IT IS THE FURTHER ORDER OF THIS COURT that a copy of this Order shall immediately be mailed by the Clerk of the Court, certified mail, return receipt requested, dispatched via email and facsimile to defendant's attorney on the State and Federal applications for habeas corpus relief:

A. Richard Ellis

75 Magee Avenue

Mill Valley, CA 94941

Email: a.r.ellis@att.net

Fax: 415-389-0251

IT IS THE FURTHER ORDER OF THIS COURT that a copy of this Order shall immediately be mailed by the Clerk of the Court, certified mail, return receipt requested, dispatched via email and facsimile to:

The Office of Capital & Forensic Writs

Attention: Benjamin Wolff, Director

Stephen F. Austin Building

1700 N. Congress Avenue, Suite 460

Austin, Texas 78701,

Email: Benjamin.Wolff@ocfw.texas.gov

Fax: 512-463-8590

IT IS THE FURTHER ORDER OF THIS COURT that a copy of this Order shall be immediately mailed by the Clerk of the Court to the following:

Hon. Greg Abbott
Governor of the State of Texas
P.O. Box 12428
Austin, TX 78711-2428

Mr. Ken Paxton, Attorney General of the State of Texas
Office of the Attorney General
PO Box 12548
Austin, TX 78711-2548

Gwendolyn Suzanne Vindell, Assistant Attorney General
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Mr. Sterling Harmon, Assistant Criminal District Attorney
Office of the Criminal District Attorney
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Mr. Russell Hunt, Jr., Defense Counsel
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Bryan Collier, Executive Director
Texas Department of Criminal Justice, Institutional Division
P.O. Box 99
Huntsville, TX 77342-0099

Mr. Kelly Strong, Sr. Warden
O.B. Ellis Unit, TDCJ-ID
1697 FM 980
Huntsville, TX 77343

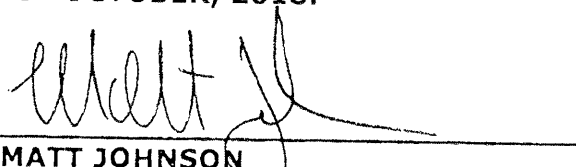
Todd Harris, Sr. Warden
Polunsky Unit, TDCJ-ID
3872 F. M. 350 South
Livingston, TX 77351

Travis Turner, Chairperson
Classification and Records, TDCJ-ID
PO Box 99
Huntsville, TX 77342-0099

Joni White, Assistant Director
Classifications & Records Division, TDCJ-ID
P.O. Box 99
Huntsville, TX 77342-0099
Fax (936) 437-6276

Ms. Monica Washington, Death Penalty Clerk
5th Circuit Court of Appeals
600 Camp Street
New Orleans, LA 70130

ENTERED THIS THE 17th DAY OF OCTOBER, 2018.


MATT JOHNSON
DISTRICT JUDGE
54th District Court

Handwritten notes and stamps, including a circular seal of the District Clerk of McLennan County, Texas.

THE STATE OF TEXAS

COUNTY OF McLENNAN

I, JON R. GIMBLE, Clerk, District Courts in and for McLennan County, Texas, do hereby certify that the above and foregoing are true and correct copies of the following instruments, to-wit:

1. **JUDGMENT & SENTENCE, April 12, 1990**
2. **JUDGMENT & SENTENCE, September 4, 2008**
3. **ORDER SETTING DATE FOR EXECUTION**

in Cause Number 1989-1036-C2 in the 54th Judicial District Court of McLennan County, Texas, styled:

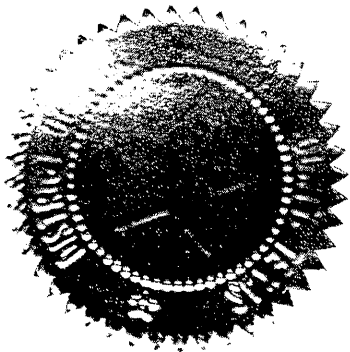
THE STATE OF TEXAS

VS.

BILLIE WAYNE COBLE

as same appear from original instruments now on file in this office of which I have legal custody.

TO CERTIFY WHICH WITNESS MY HAND AND SEAL OF SAID COURT, at my office, in the City of Waco, County of McLennan, Texas this the 17TH day of OCTOBER, 2018.



JON R. GIMBLE

Clerk, District Courts

McLennan County, Texas

A handwritten signature in dark ink, appearing to read "Jon R. Gimble", is written over a horizontal line.

DEATH WARRANT

Cause No. 1989-1036-C2

STATE OF TEXAS

v.

BILLIE WAYNE COBLE

§
§
§
§
§

IN THE 54TH DISTRICT COURT

MCLENNAN COUNTY, TEXAS

TO THE DIRECTOR OF THE CORRECTIONAL INSTITUTIONS DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE AND TO THE SHERIFF OF MCLENNAN COUNTY, TEXAS:

On the 12th day of April 1990, the above-named defendant, in the above-styled and numbered cause, was convicted of the offense of capital murder. On retrial of sentence, and on the 4th day of September 2008, the Court sentenced the above-named defendant to death in accordance with the findings of the jury, pursuant to the Texas Code of Criminal Procedure.

The Court, having received the Court of Criminal Appeals's mandate affirming the above-named defendant's conviction for capital murder and having received notice of the Court of Criminal Appeals's denial of the defendant's initial application for writ of habeas corpus, sentenced the above-named defendant to death for the offense of capital murder and ORDERS that the execution be had on Thursday, the 28th day of February 2019, at any time after the hour of 6:00 p.m. at the Correctional Institutions Division of the Texas Department of Criminal Justice at Huntsville, Texas.

The Sheriff of McLennan County, Texas, is hereby commanded to transport the defendant to the Correctional Institutions Division of the Texas Department of Criminal Justice and deliver the defendant, if not previously delivered, and this warrant to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice for the purpose of executing this warrant, and to take from the Director the proper receipt for the defendant, if not previously delivered, and the sheriff will return the receipt to the office of the District Clerk of McLennan County, Texas.

The Director of the Correctional Institutions Division of the Texas Department of Criminal Justice is hereby commanded to receive from the Sheriff the defendant, if not previously delivered, and this warrant, and to give his receipt to the Sheriff, and to safely keep the defendant and to execute the sentence of death at any time after the hour of 6:00 p.m. on the day and date specified in paragraph two of this warrant, by causing a substance or substances in a lethal quantity to be

intravenously injected into the body of the defendant sufficient to cause death, and the injection of the substance or substances into the body of the defendant to continue until the defendant is deceased, obeying all laws of the State of Texas with reference to such execution.

Witness my hand and seal of the 54th District Court of McLennan County, Texas, at my office in the City of Waco, Texas, on the 17th day of October, 2018.

JON GIMBLE, DISTRICT CLERK
MCLENNAN COUNTY, TEXAS



DISTRICT CLERK

RETURN

The Sheriff of McLennan County, Texas, received this writ on the _____ day of _____, 2018, at _____ M. and executed the same by delivering the within-named defendant, if not previously delivered, in person and this warrant to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice on the _____ day of _____, 2018, and by taking his receipts for the said defendant, if not previously delivered, and this warrant, which receipts are hereto attached do here now make my return on this writ this _____ day of _____, 2018.

PARNELL MCNAMARA, SHERIFF
MCLENNAN COUNTY, TEXAS

DEPUTY

On this the _____ day of _____, 2018, the following papers related to cause number 1989-1036-C2, styled THE STATE OF TEXAS v. BILLIE WAYNE COBLE, were received from the Sheriff of McLennan County, Texas.

1. One original of **DEATH WARRANT** to be delivered to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.
2. One certified Execution Order.

SIGNATURE OF TDCJ OFFICIAL