

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,)	
)	
vs.)	Nos.: 154361 & 154362
)	DEATH PENALTY CASE
EDWARD JEROME HARBISON)	

ORDER ON PRO SE FILINGS

This matter is before the Court on several *pro se* pleadings filed by Edward Jerome Harbison on August 13, 2007. Mr. Harbison is presently scheduled to be executed on September 26, 2007, pursuant to the sentence of death imposed in this case. The undersigned has been designated by the Supreme Court of Tennessee to preside over any case in which the Honorable Barry A. Steelman, Criminal Court Judge for the 11th Judicial District, finds it necessary to recuse himself for any reason. See Order in re: Standing Order for the Determination of a Substitute Judge in the Criminal Court for the 11th Judicial District (Tenn. Nov. 16, 2006), attached hereto as Exhibit A.

Procedural Background

A Hamilton County jury found Mr. Harbison guilty of premeditated first degree murder in this case for an offense that occurred in 1983. Based upon a finding of one aggravating circumstance,¹ the jury determined that Mr. Harbison should receive a sentence of death for the first degree murder offense. Both the conviction and sentence of death were affirmed by the Tennessee Supreme Court on direct appeal. See State v. Harbison, 704 S.W.2d 314 (Tenn.), cert denied, 476 U.S. 1153 (1986).

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¹The murder was committed while Mr. Harbison was engaged in committing a burglary. See Tenn. Code Ann. § 39-2-203(i)(7) (1982).

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Mr. Harbison timely filed a Petition for Post-Conviction Relief in 1991 attacking both his conviction and resulting sentence of death on a number of grounds. Following a hearing, the post-conviction court declined to grant relief, disposing of some claims on grounds of waiver and/or previous determination and others on the merits. The Tennessee Court of Criminal Appeals affirmed the denial of relief, and the Supreme Court of Tennessee denied permission for further review. See Harbison v. State, No. 03C01-9204-CR-00125, 1996 WL 266114 (Tenn. Crim. App. May 20, 1996), per. app. denied (Tenn. Nov. 12, 1996).

In 1997, Mr. Harbison, through federally-appointed counsel, filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, challenging his first degree murder conviction and resulting death sentence on numerous grounds. In 2002, the federal district court denied Mr. Harbison's federal habeas petition. The United States Court of Appeals for the Sixth Circuit affirmed the denial of federal habeas relief in April of 2005. See Harbison v. Bell, 408 F.3d 823 (6th Cir. 2005), cert. denied, 547 U.S. 1101 (2006), reh'g denied, — U.S. —, 126 S.Ct. 2886 (2006).

Meanwhile, Mr. Harbison, through federally-appointed counsel, had filed a motion to re-open his state post-conviction proceedings asserting, among other things, a violation of Brady v. Maryland, 373 U.S. 83 (1963), based on newly discovered evidence obtained only after the conclusion of the original proceedings on his state court petition for post-conviction relief. Upon request of Mr. Harbison's counsel, the post-conviction court converted the motion to re-open to a petition for writ of error coram vobis. The post-conviction court then denied the motion to re-open/coram vobis petition, the Tennessee Court of Criminal Appeals upheld that denial of relief, and the Supreme Court of Tennessee denied an application for further review. See Harbison v. State,

No. E2004-00885-CCA-R28-PD, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005), per. app. denied (Tenn. Dec. 19, 2005).

On June 13, 2006, the State filed a Motion to Set Execution Date with the Supreme Court of Tennessee asserting that Mr. Harbison had completed the standard three-tier review process available in a capital case and that an execution date should therefore be set.² In the response to the motion, Mr. Harbison's federally-appointed counsel asked that counsel be appointed to represent Mr. Harbison, for purposes of any additional state court proceedings and any requests for clemency, in the event an execution date was set.

On July 17, 2006, the Supreme Court of Tennessee granted the State's motion, set an execution date in Mr. Harbison's case, and appointed the Office of the Post-Conviction Defender (PCD) to represent Mr. Harbison in any further state court proceedings arising out of his conviction and death sentence in this case. A copy of that order is attached hereto as Exhibit B. The PCD quickly filed a Motion to Withdraw as Counsel, which was denied by the Supreme Court of Tennessee on August 15, 2006. A copy of that order is attached hereto as Exhibit C. The execution date set in the order dated July 17, 2006, was subsequently re-set to February 22, 2007. Meanwhile, Mr. Harbison's federally-appointed counsel litigated several post-judgment motions in the federal district court. See Harbison v. Bell, No. 1:97-CV-52, 2006 WL 3421845 (E.D. Tenn. Nov. 28, 2006); Harbison v. Bell, No. 1:97-CV-52, 2007 WL 128954 (E.D. Tenn. Jan. 16, 2007).

While the appeals from the federal district court's denials of Mr. Harbison's post-judgment

²All pleadings referenced in this Order as having been filed in the Supreme Court of Tennessee, as well as the supreme court's orders resulting from those pleadings and Executive Order No. 43, are matters of public record and the undersigned hereby takes judicial notice of these documents for purposes of these proceedings.

motions were pending in the Sixth Circuit, Governor Phil Bredesen issued Executive Order No. 43, staying all executions in the State of Tennessee, including Mr. Harbison's, until May 2, 2007, in order to facilitate a comprehensive review of the manner in which death sentences are administered in Tennessee, and allow time for the adoption of new protocols for the administration of death sentences in Tennessee. At the conclusion of this brief moratorium, the State filed in the Supreme Court of Tennessee a Motion to Re-Set the Execution Date in Mr. Harbison's case. The PCD, on behalf of Mr. Harbison, responded to the State's motion.

By order issued May 22, 2007, the Tennessee Supreme Court granted the State's motion and re-set the execution date in Mr. Harbison's case to September 26, 2007. Mr. Harbison then filed in this Court on August 13, 2007, various *pro se* pleadings, with voluminous attachments, purporting to challenge his first degree murder conviction and resulting sentence of death on various grounds, all of which have already been fully litigated in both his state and federal post-conviction proceedings. At no point in any of his *pro se* pleadings does Mr. Harbison express dissatisfaction with the representation currently being provided by the PCD, or indicate that he wishes the PCD removed as his court-appointed state post-conviction counsel.

Analysis

It is well-settled that a criminal defendant has no constitutional right to represent himself and at the same time be represented by counsel. See State v. Burkhardt, 541 S.W.2d 365, 371 (Tenn. 1976); see also State v. Berry, 141 S.W.3d 549, 573-74 (Tenn. 2004) (appendix); Smith v. State, 757 S.W.2d 14, 16 (Tenn. Crim. App. 1988). As recently explained in Berry,

The right to self-representation and the right to counsel have been construed to be alternative ones; that is, one has a right *either* to be represented by counsel *or* to represent himself

Berry, 141 S.W.3d at 573-74 (emphasis added).

As a result, a trial court judge may refuse to consider *pro se* pleadings filed by a criminal defendant when that defendant is still represented by counsel. See Wallace v. State, 121 S.W.3d 652, 655 & n. 2 (Tenn. 2003) (noting trial court's refusal to consider timely *pro se* motion for new trial because trial counsel had failed to withdraw prior to filing of *pro se* motion, and citing to Burkhart as support for trial court's actions). Because the *pro se* pleadings filed by Mr. Harbison on August 13, 2007, have not been signed or adopted by the PCD, do not in any way express dissatisfaction with the representation currently being provided by the PCD, or indicate that Mr. Harbison wishes the PCD removed as his court-appointed state post-conviction counsel, the undersigned has determined that they need not be considered and should be stricken from the record. Moreover, as stated above, all of the challenges to his conviction and death sentence raised by Mr. Harbison in his *pro se* filings have already been fully litigated in both his state and federal post-conviction proceedings.

It is therefore ORDERED, ADJUDGED and DECREED that:


(1) the following *pro se* pleadings, filed by Mr. Harbison on August 13, 2007, are hereby stricken as they were neither signed nor adopted by the PCD, do not in any way express dissatisfaction with the representation currently being provided by the PCD, or indicate that Mr. Harbison wishes the PCD removed as his court-appointed state post-conviction counsel:

- (a) Notice of Filing;
- (b) Motion 60(b)(6) and Pursuant to Article III for Fraud Upon the Court;
- (c) Motion Pursuant to Rule 24 of the Tennessee Rules of Appellant [sic] Procedure;
- (d) Motion for Tennessee Rules of Criminal Procedures Rules 4 and 41;
- (e) Motion for Failure to Obey Trial Court Order for Disclosure of Favorable Exculpatory Evidence and Impeachment Material to the Defense;

- (f) Notice of Claim of Exemption from Garnishment;
- (g) Leave to Proceed as a Poor Person

(2) the Clerk of this Court is directed to provide copies of the stricken *pro se* pleadings to the PCD, along with a copy of this Order.

Entered this the 28th day of August, 2007.



 JON KERRY BLACKWOOD, Judge
 Sitting By Designation of Supreme Court

CERTIFICATE OF SERVICE

I, _____, Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record this the _____ day of _____, 2007.

 CLERK

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 GWEN TIDWELL, CLERK
 BY _____ O.C.
 FILM REF. _____

IN THE SUPREME COURT OF TENNESSEE

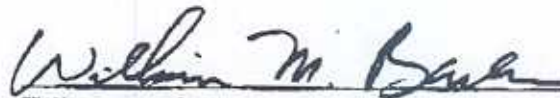
IN RE: Standing Order for the Designation of a Substitute Judge in the Criminal Court for the 11th Judicial District

ORDER

If the Honorable Barry A. Steelman, Criminal Court Judge for the 11th Judicial District, finds it necessary to recuse himself for any reason on any case, then, in the interest of the efficient and orderly administration of justice, the Chief Justice, exercising statutory and inherent powers pursuant to the provisions of Title 17 and Section 16-15-209 of Tennessee Code Annotated, and Rule 11 of the Rules of the Supreme Court, hereby designates and assigns the Honorable Jon Kerry Blackwood, Senior Judge to preside over such case(s).

This order shall remain in effect until revoked or modified by the Chief Justice.

ENTERED this the 16th day of November, 2006.



William M. Barker
Chief Justice

cc: Hon. Barry A. Steelman, 11th Judicial District
Hon. Jon Kerry Blackwood, Senior Judge
Hamilton County Criminal Court Judge
Administrative Office of the Courts

Exhibit A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. EDWARD JEROME HARBISON

No. M1986-00093-SC-OT-DD - Filed: July 17, 2006

ORDER

On June 13, 2006, the State of Tennessee filed a Motion to Set Execution Date in the case of Edward Jerome Harbison. The State alleged that Harbison had completed the standard three-tier appeals process and that this Court should therefore set an execution date. See Tenn.S.Ct.Rule 12.4(A). On June 22, 2006, a Response to Motion to Set Execution Date was filed on behalf of Harbison. The Response contended that an execution date should not be set because Harbison's federal habeas corpus proceedings were not complete. The Response also requested that this Court exercise its authority under Tenn. Code Ann. § 40-27-106 to issue a certificate of commutation to the governor. In support of the request for a certificate of commutation, the Response alleged that police files contained exculpatory information indicating that someone else committed the murder for which Harbison had been convicted. In addition, it was contended that a certificate of commutation should issue because the jury did not hear evidence of Harbison's horrendous childhood and his psychological and mental impairments and because the murder was not sufficiently aggravated to warrant the sentence of death, which allegedly had resulted from a "series of unacceptable errors" by the police, counsel and the courts. The Response, which was filed by the Office of the Assistant Federal Community Defender in Knoxville, Tennessee, also asked that this Court appoint counsel to represent Harbison in this case.

Upon due consideration of the State's Motion to Set Execution Date and the Response to the Motion, the State's Motion is GRANTED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the eleventh day of October, 2006, unless otherwise ordered by this Court or other appropriate authority.

It is further ORDERED that the request for appointment of counsel to represent Edward Jerome Harbison is GRANTED. The Court hereby appoints the Office of the Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee 37243, to represent Harbison in the instant case No. M1986-00093-SC-OT-DD.

Counsel for Edward Jerome Harbison shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM

Exhibit B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. EDWARD JEROME HARBISON

No. M1986-00093-SC-OT-DD - Filed: August 15, 2006

ORDER

On July 17, 2006, this Court set an execution date for Edward Jerome Harbison of October 11, 2006, and appointed the Office of the Post-Conviction Defender (PCD) to represent Harbison in this matter. On August 8, 2006, the PCD filed a Motion to Withdraw as Counsel, in which it alleges that the PCD has never represented Harbison before at any stage of his litigation, that it would require six months to prepare to represent Harbison adequately, and that the PCD "simply does not have enough staff or time to represent Mr. Harbison in the relevant time frame."

Upon due consideration, the Motion is DENIED; however, to afford sufficient time for adequate representation, the execution date for Edward Jerome Harbison is re-set to the twenty-second day of February, 2007.

PER CURIAM

Exhibit C