

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2007 MAY 14 AM 9:51

IN RE: EDWARD JEROME HARBISON) HAMILTON COUNTY
) ORIGINAL APPEAL NO. 76
) (Nos. 15361-62 Below)
) M1986-0093-SC-OT-DD

RESPONSE TO MOTION TO SET EXECUTION DATE

Comes now Edward Jerome Harbison, through undersigned counsel and pursuant to TENN.S.CT.RULE 12.4(A), and submits this response to the State's motion requesting this Court to set a date for Mr. Harbison to be executed. The State's motion should be denied because Mr. Harbison's conviction and death sentence are still being considered by the federal courts.

A condition precedent to scheduling the execution of Mr. Harbison is the conclusion of "at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas proceedings." TENN.S.CT.RULE 12.4(A). Notably, this rule does not mandate that an execution date be scheduled now. It does mandate that there be *at least one* round of full appeals. Accordingly, the rule allows this Court to consider the status of Mr. Harbison's appeals. As set forth below, Mr. Harbison's first federal habeas appeal is not completed. In addition, the federal courts are deciding whether he is entitled to counsel for the state clemency process and whether the lethal injection procedure as applied to Mr. Harbison will violate his civil rights and the Eighth and Fourteenth Amendments to the United States Constitution. Therefore, before an execution date is scheduled, Mr. Harbison

should be provided the time required to complete the pending federal proceedings.

Those proceedings are:

- Case Number 06-6539 (6th Cir.) - The federal district court recently reopened the original habeas case and re-examined its judgment in light of the recent state court hearing and resulting state court appellate decision (Case No. 1:97-cv-52, R.151 p.5-7 (E.D.Tenn. 2006)). The district court issued a denial on the merits which is currently under review by the court of appeals. Thus, the third tier of the three-tier appellate system has yet to be finalized.
- Case Number 06-6474 (6th Cir.) - The federal district court transferred a portion of Mr. Harbison's case to the court of appeals (Case No. 1:97-cv-52, R.151 p.11-12, 14 (E.D.Tenn. 2006)). The appellate issue is whether the district court properly characterized a portion of Mr. Harbison's case as a "second or successive" habeas petition. Pending, is Mr. Harbison's motion to re-transfer or remand the case to the district court.
- Case Number 07-5059 (6th Cir.) - The federal court of appeals is considering whether Mr. Harbison should receive appointed counsel to represent him in the state clemency proceeding. Executive clemency is considered the "'fail safe' in our criminal justice system."¹ A system which included capital punishment but did not provide a meaningful opportunity for executive clemency would be "totally alien to our notions of criminal justice."² While on July 17, 2006 this Court

¹*Herrera v. Collins*, 506 U.S. 390, 415 (1993).

²*Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (opinion of Justices Stewart,

appointed the Post-Conviction Defender to represent Mr. Harbison in further actions in state court in this matter, in an order entered in *State v. Donnie Johnson*, M1987-00072-SC-DPE-DD, on October 6, 2006, it made clear that the Post-Conviction Defender's appointment in this matter was limited, noting, "Furthermore, this Court's Order in Harbison specifically limited the appointment of counsel to 'the instant case No. M1986-00093-SC-OT-DD' and did not extend the appointment of counsel to clemency proceedings." Since, the appointment of the Post-Conviction Defender in this matter the office has lost two staff attorneys and is less capable to represent Mr. Harbison in a clemency proceeding than it was in 2006. (See, August 8, 2006, Motion to Withdraw as Counsel.) It is in Tennessee's interest to provide a meaningful opportunity for clemency. Thus, an execution date should not be scheduled until the issue regarding clemency counsel for Mr. Harbison is resolved.

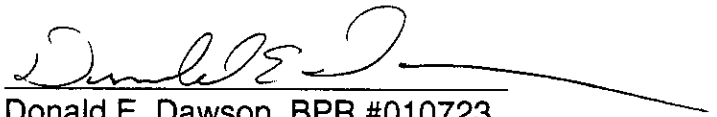
- Case Number 3:06-cv-01206 (M.D.Tenn) - pending in the federal district court is Mr. Harbison's civil rights suit alleging that Tennessee's lethal injection procedure which the State intends to use to execute him unnecessarily, wantonly and with deliberate indifference creates an unjustifiable risk of extreme pain and prolonged death in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Harbison brought this suit at such a time as to allow consideration of the merits before his previous execution date. In fact, an evidentiary hearing had been scheduled. But, before that hearing could take

Powell, and Stevens).

place, the State revoked all lethal injection protocols and imposed a 90-day moratorium on executions until new protocols could be issued. The State agreed to an abeyance of Mr. Harbison's lawsuit until May 2, 2007, stating, "[a]t that time plaintiff's counsel can review the protocols. If they feel that the protocols are constitutionally deficient, they may file an amended complaint setting forth those deficiencies." *Harbison v. Little*, No. 3:06-cv-01206, R.41 p.7 (M.D.Tenn. 2/27/07). An execution date should not be scheduled until this lawsuit is adjudicated.

WHEREFORE, for the above-stated reasons, it is respectfully requested that the State's motion to re-set execution date be denied.

Respectfully submitted,



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Pursuant to TENN.S.CT.R. 12.4(B), I further certify that I prefer to be notified by telephone of orders or opinions or the Court.

CERTIFICATE OF SERVICE

I, Donald E. Dawson, hereby certify that a true and correct copy of the foregoing was sent via U.S. Mail to Gordon W. Smith, Associate Solicitor General, Office of the Attorney General, P.O. Box 20207, Nashville, TN 37202-0207, and via facsimile, (615) 741-2009, on this the 18th day of May, 2007.


Donald E. Dawson