

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, )

vs. )

EDWARD JEROME HARBISON )

Nos.: 154361 & 154362  
DEATH PENALTY CASE

ORDER STRIKING ADDITIONAL *PRO SE* FILING  
AND DENYING UNAUTHORIZED MOTION FOR STAY

This matter is again before the Court on two *pro se* pleadings filed by Edward Jerome Harbison on September 6, 2007. Mr. Harbison is presently scheduled to be executed on September 26, 2007, pursuant to the sentence of death imposed in this case.

Background

This Court included in its Order dated August 29, 2007, a detailed chronology of Mr. Harbison's various challenges, in both state and federal court, to his convictions and sentences in this case, including the sentence of death. In that prior Order, the Court struck various *pro se* pleadings filed by Mr. Harbison, which purported to challenge his convictions and resulting sentences, including the sentence of death, on grounds that those pleadings had been neither signed nor adopted by the Office of the Post-Conviction Defender (PCD), Mr. Harbison's court-appointed state court postconviction counsel by virtue of an Order of the Supreme Court of Tennessee dated July 17, 2006. Mr. Harbison has now filed a *pro se* pleading entitled "Supplement to Notice of Filing," with attachments, and a *pro se* Motion for Stay of the Proceeding, with an accompanying *pro se* Memorandum detailing why he believes he is entitled to a stay.

In his *pro se* Memorandum, Mr. Harbison appears to be asserting that a stay of his execution should be issued by this Court because: (1) some public officials have questioned the fairness of the

administration of the death penalty in Tennessee; (2) Governor Phil Bredesen previously granted Mr. Harbison a temporary reprieve in order to facilitate a comprehensive review of the manner in which death sentences are administered in Tennessee; (3) there is evidence missing from the official record in his case; and (4) prosecutorial misconduct led to the suppression of evidence by the State that has only come to light now that Mr. Harbison's state and federal collateral proceedings are complete.

#### Analysis

A Tennessee trial court has limited authority to grant a stay of execution in a death penalty case. See Tenn. Code Ann. § 40-30-120 (1995). The statute governing stays of execution in cases involving a sentence of death provides in pertinent part as follows:

- (a) . . . Upon the filing of a petition for post-conviction relief, the court in which the conviction occurred shall issue a stay of the execution date that shall continue in effect for the duration of any appeals or until the post-conviction action is otherwise final. The execution date shall not be stayed prior to the filing of a petition for post-conviction relief except upon a showing by the petitioner of the petitioner's inability to file a petition prior to the execution date and that the inability is justified by extraordinary circumstances beyond the petitioner's control.
- (b) Where the petitioner is under a sentence of death and the petition is not the first petition under this part attacking that judgment, or a motion to reopen has been filed, no court may stay the execution unless a court of competent jurisdiction first finds that a motion to reopen that meets the requirement set out in § 40-30-117 has been granted.
- (c) The mere satisfaction of the requirements of subsection (b) shall not automatically result in a stay. In order to obtain a stay, an applicant must show that upon the court's consideration of the petition there is a significant possibility that the death sentence will be invalidated and that there is a significant possibility that the death sentence will be carried out before consideration of the petition is concluded.

Id. at § 40-30-120(a)-(c) (1995). In other words, a trial court judge is only empowered to grant a stay of execution in a death penalty case if the request for stay is made in conjunction with the filing of an initial petition for post-conviction relief, or a motion to reopen pursuant to the provisions of the Post-Conviction Procedure Act. See id. Even in the context of a proceeding to determine a capital



defendant's competency to be executed, the trial court is not empowered to issue a stay of execution; that authority rests entirely with the Supreme Court of Tennessee. See Van Tran v. State, 6 S.W.3d 257, 272 (Tenn. 1999) ("If a prisoner is found to be incompetent, the execution date previously set by the order of remand will be stayed *by this Court* and a copy of the order staying the execution shall be provided to the prisoner's counsel, the Warden, the Governor, the district attorney general, and the State Attorney General.") (emphasis added).

Mr. Harbison filed his *pro se* Motion for Stay of the Proceeding well after the conclusion of the initial proceedings on his Petition for Post-Conviction Relief, see Harbison v. State, No. 03C01-9204-CR-00125, 1996 WL 266114 (Tenn. Crim. App. May 20, 1996) (affirming denial of petition for post-conviction relief), per. app. denied (Tenn. Nov. 12, 1996), and the conclusion of the proceedings on his motion to reopen, which was converted at the request of the defense to a coram nobis petition. See Harbison v. State, No. E2004-00885-CCA-R28-PD, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005) (affirming denial of motion to reopen/coram nobis petition), per. app. denied (Tenn. Dec. 19, 2005). As a result, this Court would be empowered to entertain Mr. Harbison's *pro se* request for a stay only if one or more of the pleadings he has filed since his execution date was re-set for September 26, 2007, could be considered, either individually or in combination, as another motion to reopen his initial post-conviction proceedings.

This Court declines to consider as a motion to reopen, either individually or collectively, any of the *pro se* pleadings filed by Mr. Harbison since his execution date was re-set for September 26, 2007, because: (1) they do not assert any of the limited grounds for relief appropriately raised in a motion to reopen, see Tenn. Code Ann. § 40-30-117(a)(1)-(3) (1996); (2) none of these *pro se* pleadings were either signed by or adopted by the PCD, Mr. Harbison's court-appointed state court

postconviction counsel, and they do not in any way express dissatisfaction with the representation currently being provided by the PCD;<sup>1</sup> and (3) all of the subject *pro se* pleadings were filed under the case numbers associated with Mr. Harbison's original trial proceedings, not his post-conviction proceedings.


It is therefore ORDERED, ADJUDGED and DECREED that:

(1) the *pro se* Motion for Stay of the Proceeding, dated August 31, 2007, and filed on September 6, 2007, is hereby DENIED;

(2) the *pro se* Supplement to Notice of Filing, with attachments, dated August 31, 2007, and filed on September 6, 2007, is hereby stricken as it was neither signed by nor adopted by the PCD, and does 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; and

(3) the Clerk of this Court is directed to provide copies of the Motion for Stay of the Proceeding, and accompanying Memorandum, as well as the stricken Supplement to Notice of Filing, to the PCD, along with a copy of this Order.

Entered this the 12<sup>th</sup> day of September, 2007.

  
JON KERRY BLACKWOOD, Judge  
Sitting By Designation of Supreme Court

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<sup>1</sup>As this Court pointed out in its Order dated August 29, 2007, "a trial court judge may refuse to consider *pro se* pleadings filed by a criminal defendant when that defendant is still represented by counsel." Order, at 5 (citing Wallace v. State, 121 S.W.3d 652, 655 & n. 2 (Tenn. 2003), citing State v. Burkhardt, 541 S.W.2d 365, 371 (Tenn. 1976)).

CERTIFICATE OF SERVICE

I, MELANIE CLARK CRABTREE, Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record this the 14 day of Sept, 2007.

Melanie Clark Crabtree  
CLERK

FILED IN OFFICE

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GWEN TIDWELL, CLERK

BY \_\_\_\_\_ B.C.

FILM REF: \_\_\_\_\_