IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: GREGORY THOMPSON	**)**	**COFFEE COUNTY**
	)	**ORIGINAL APPEAL NO.**
	)	**M1987-00067-SC-DPE-DD**
		Filed October 6, 2005

RESPONSE OF THE STATE OF TENNESSEE TO "MOTION FOR STAY OF EXECUTION, PETITION FOR RECONSIDERATION OF THE ORDER SCHEDULING EXECUTION DATE, NOTICE OF CHANGE IN MENTAL HEALTH STATUS, INSANITY AND INCOMPETENCY TO BE EXECUTED AND REQUEST FOR CERTIFICATE OF COMMUTATION"

INTRODUCTION

On February 12, 2004, this Court set an execution date for Gregory Thompson under Tenn. Sup. Ct. R. 12.4 and remanded the case to the Coffee County Circuit Court for proceedings to determine Thompson's competency under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).[1] (Attachment A) On remand, the trial court dismissed Thompson's petition without an evidentiary hearing, concluding that his evidentiary submissions demonstrated that "[Thompson] presently is aware both of the fact that he has been sentenced to death for the murder of Brenda Lane and of the fact of his impending execution" and did not warrant an evidentiary hearing on the issue of

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[1]Gregory Thompson was convicted for the first-degree murder of Brenda Blanton Lane in the Coffee County Circuit Court in 1985 and was sentenced to death. This Court affirmed his conviction and sentence on direct appeal, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and the United States Supreme Court denied certiorari. *Thompson v. Tennessee*, 497 U.S. 1031 (1990). Thompson's conviction and sentence were upheld by the trial court on post-conviction and were affirmed by the Tennessee Court of Criminal Appeals. *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied Oct. 20, 1997).

competence. *Thompson v. State*, 134 S.W.3d 168, 171 (Tenn. 2004). This Court affirmed, concluding that Thompson is competent to be executed under *Van Tran* — "The reports of Thompson's mental health experts show that, despite any delusions, Thompson understands that he is going to be executed for murdering Brenda Lane." *Thompson*, 134 S.W.3d at 183.[2]

Thompson's execution date was subsequently stayed by the United States District Court for the Eastern District of Tennessee pending disposition of a federal habeas petition under 28 U.S.C. § 2254 challenging this Court's competency determination and by the United States Court of Appeals for the Sixth Circuit through the *sua sponte* withdrawal of its previous decision affirming the denial of federal habeas relief. After both stays were lifted — in the district court by order of the court entered September 27, 2005, and in the Sixth Circuit by operation of the June 27, 2005, judgment of reversal of the United States Supreme Court — this Court re-set Thompson's execution date for February 7, 2006. *See* Tenn. Sup. Ct. R. 12.4(E) ("Where the date set by the Court for execution has passed by reason of a stay or reprieve, this Court shall *sua sponte* set a new date of execution when the stay or reprieve is lifted or dissolved, and the State shall not be required to file a new motion to set an execution date.").

Thompson has now filed a motion requesting a stay of execution, citing a "substantial change in [his] mental health status." He also requests, for the second time, that this Court issue a certification of commutation pursuant to Tenn. Code Ann. § 40-27-106. Because Thompson's motion fails to establish any "substantial change" in Thompson's mental status — and, in fact, merely rehashes the same type of delusional beliefs concerning his upcoming execution that have

[2]The Court also unanimously denied Thompson's request for issuance of a certificate of commutation to the governor under Tenn. Code Ann. § 40-27-106, finding that Thompson had presented no extenuating circumstances warranting issuance of a certificate in this case.

been previously rejected as a basis for an evidentiary hearing — this Court should deny both requests.

ARGUMENT

I. THOMPSON'S CURRENT ALLEGATIONS, EVEN TAKEN AS TRUE, FAIL TO DEMONSTRATE A "SUBSTANTIAL CHANGE" IN HIS MENTAL STATUS SINCE THIS COURT'S PREVIOUS COMPETENCY DETERMINATION AND PROVIDE NO JUSTIFICATION FOR A STAY OF EXECUTION UNDER *VAN TRAN*.

In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), this Court established both the standard for competence to be executed in Tennessee and the procedures afforded state prisoners asserting claims of incompetency. Consistent with that decision, Thompson was previously afforded counsel, funding for multiple mental health experts, and an opportunity to be heard in the Coffee County Circuit Court on his competency claim. Both the trial court and this Court concluded that Thompson failed to make a threshold showing of incompetence sufficient to warrant an evidentiary hearing on the issue. *Thompson*, 134 S.W.3d at 184-85 ("The trial court and this Court on de novo review have properly applied [the *Van Tran*] standard in concluding that Thompson failed to establish a genuine issue regarding his competency . . . ."). Because Thompson has been found to be competent, any subsequent competency claims should be disallowed unless he "provides this Court with an affidavit from a mental health professional showing that there has been a substantial change in [his] mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed." *Van Tran*, 6 S.W.3d at 272. The affidavit of Faye Sultan, Ph.D., submitted with the present motion, falls far short of meeting that high burden.[3]

[3]Dr. Sultan also evaluated Thompson in connection with his initial competency proceeding. A summary of her observations and opinion is contained in this Court's opinion on the competency issue.

The only portions of Dr. Sultan's current affidavit pertinent to the present inquiry are those describing her interview with Thompson since this Court's previous competency determination, *i.e.*, the July 28, 2005 interview. (Motion for Stay, Attachment B, ¶¶ 2, 5 and 6) Dr. Sultan reports that during her July 28th interview, Thompson's "psychiatric condition had *deteriorated somewhat* from the time of my last visit with him." (*Id.* at ¶ 2) (emphasis added)

> [Thompson's] delusional system regarding the possibility of his execution has expanded to include a new set of irrational beliefs. Mr. Thompson now believes that all of the events in his life, *including his involvement in the murder of Brenda Lane,* were "predestined." He reported that these "predetermined facts" are inscribed on a note that has been "stored" and which is "buried at the church." It is Mr. Thompson's current belief that *sometime prior to his execution date* this note will be revealed by his attorney's [sic] in a "paper." "If I go to the paper with that note, I think it will save my life. It shows that your life is already prepared for you. You can't change it." *The existence of this "paper" signified to Mr. Thompson that no execution would take place.*
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> [Thompson] was louder and more expansive in his thoughts. His behavior was more erratic and impulsive. He reported experiencing some recent hallucinations and some severe suicidal thoughts. Mr. Thompson had recently requested additional medication to assist him in coping with these hallucinations and depressive thoughts. According to the medical records, additional medication had, in fact, been provided to Mr. Thompson in response to his request.
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> *[Thompson] insists that he will not die in an execution because "the appropriate situation is not in place."*

(*Id*. at ¶¶ 5-7) (emphasis added)

Just as did his previous submissions to the trial court, the current Sultan affidavit confirms Thompson's awareness of his impending execution and the reason for it — the only two requirements for a finding of competence to be executed under *Van Tran*. Moreover, this Court has already held that Thompson's delusional beliefs about his personal identity, about the State's ability

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Thompson, 134 S.W.3d at 182.

to carry out his death sentence and/or the likelihood that his execution will occur do not require a finding of incompetence where they do not impede the prisoner's ability to understand the *fact* of the impending execution and the *reason* for it. *Thompson*, 134 S.W.3d at 193.

In short, Thompson has failed to demonstrate a change in his mental status of any material significance since this Court's previous determination of competence (his condition has "deteriorated somewhat," he holds a "new set of irrational beliefs," he is "louder and more expansive in his thoughts"), let alone the "substantial change" required to obtain further judicial proceedings on the issue. His current allegations are of the same general nature, if not the same substance, as those previously rejected by this Court. *See, e.g., Thompson,* 134 S.W.3d at 180 nn. 12, 13 ("According to Dr. Rabun's report, Thompson believes that even though the murder happened within the State of Tennessee, he is 'federal property' due to his 'officer' status in the Navy, and the State cannot execute him. . . . [H]is military record with the 'Secretary of the Navy' as a 'lieutenant' will allow for a 'mistrial' and [] he will be 'discharged' and can return to live in Hawaii.").[4]

Moreover, Thompson's suggestion that he need only make a *prima facie* showing of incompetence to gain additional judicial proceedings is incorrect. (*See* Motion for Stay, p. 5 — "[A]fter receiving Mr. Thompson's current prison records and the opinions of the other two mental health professionals, Mr. Thompson will have additional facts to support his *prima facie* showing.")

[4]Significantly, Dr. Sultan's affidavit also shows that Thompson currently has the presence of mind to recognize his own hallucinations and depressive thoughts and to request medication to assist him in coping with them. Moreover, Dr. Sultan's review of Thompson's medical records reveals that additional medication has been provided to Thompson in response to his request. (Motion for Stay, Attachment B, ¶ 6) *Compare Thompson,* 134 S.W.3d at 182 ("Dr. Sultan opined that Thompson is not competent to be executed 'in a non-medicated state.' Currently, however, as Dr. Sultan acknowledges, Thompson participates in a regular regimen of medications. Dr. Sultan admits that Thompson knows he has been sentenced to death, but she points out that Thompson holds the delusional beliefs that it is impossible for him to be executed or for the execution to occur. Thompson instead talks about leaving prison and returning to Hawaii or to his family.").

Van Tran contemplates only one opportunity to make that showing. But even assuming, *arguendo*, that Thompson's threshold burden at this stage is so low, this Court's observations in its previous opinion are equally applicable to support rejection of the current ones:

> While Thompson's petition and supporting exhibits establish that he is mentally ill, these filings do not raise a genuine issue regarding Thompson's competency. In fact, the petition and supporting exhibits undercut Thompson's claim that he currently is not competent to be executed. Under *Van Tran* and *Coe*, Thompson need only understand or be aware of the *fact* of his impending execution and the *reason* for it. . . . The reports of Thompson's mental health experts show that, despite any delusions, Thompson understands that he is going to be executed for murdering Brenda Lane. . . . [A] prisoner's delusional or unorthodox beliefs about what may occur upon death or the prisoner's irrational beliefs about the legal processes and/or the ability of the State to carry out the execution are not pertinent to the question of competency because they do not impede the prisoner's ability to understand the *fact* of the impending execution and the *reason* for it.

Thompson, 134 S.W.3d at 183 (emphasis in original).

Because Thompson has failed to show that there has been "a substantial change in [his] mental health" since the previous competency determination, his request for a stay of execution and/or further judicial proceedings on the issue of competency should be denied.

II. THE COURT PROPERLY SET A NEW EXECUTION DATE FOR GREGORY THOMPSON.

Aside from the substantive competency issues, Thompson advances two additional arguments challenging the procedure and timing of this Court's September 29, 2005, order setting the current execution date: (1) that he was "denied an opportunity to respond" to the State's motion before setting a new execution date; and (2) that the Court's action in the instant case is "premature." Neither argument justifies reconsideration of the Court's order.

Citing the procedure set forth in Tenn. Sup. Ct. R. 12.4(A), Thompson first contends that he was denied an opportunity to respond to the State's motion to re-set an execution date before entry

of the Court's order. His reliance on sub-section (A) is misplaced, however, because neither the State's motion nor the Court's order is premised on that provision. Rather, Rule 12.4(E) provides the procedure for cases, such as this one, where "the date set by the Court for execution [under Rule 12.4(A)] has passed by reason of a stay or reprieve," and the stay is subsequently lifted or dissolved. Although a renewed motion by the State to set an execution date is not required, neither is it prohibited. And because the propriety of an execution date has previously been established by the setting of a date under Rule 12.4(A) in February 2004, the only prerequisite for a new date of execution under Rule 12.4(E) is notice that the stay of execution barring execution on the previous date has been lifted or dissolved — whether that be by notice from the Attorney General of the pertinent judicial or executive order, a motion by the State to re-set the execution date, or both. That requirement has plainly been met here by the federal district court's September 16, 2005, order lifting the stay of execution. And, because Thompson's competency for execution has been previously determined by this Court, any subsequent allegations of a "substantial change" in competency are contemplated by way of a motion to stay execution, not a response to a motion to re-set the execution date. *See Van Tran*, 6 S.W.3d at 272 ("If a prisoner is found to be incompetent, subsequent Ford claims will be disallowed unless the prisoner, by way of a motion for stay, provides this Court with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination of competency was made.").

Moreover, the fact that this Court's directive concerning post-adjudication competency procedures is contained in but a "single sentence from this Court's opinion in *Van Tran*" (Motion for Stay, p. 3) in no way undermines its force or meaning. Contrary to Thompson's assertion, this

Court was quite clear that the "means to establish the required showing of 'substantial change'" is by way of affidavit of a mental health professional demonstrating a degree of change in mental status sufficient to raise a substantial question about the prisoner's present competency. *Van Tran*, 6 S.W.3d at 272. To the extent any question remains concerning the precise application of that standard, those issues are certainly not implicated here, since, as demonstrated above, Thompson's current allegations are not materially different from those that have already been rejected by this Court.

Thompson's assertion that a new execution date is premature because his "federal court litigation is not completed" is directly contradicted by the district court's order lifting the stay of execution, which unambiguously states, "Thompson's original habeas case has now been concluded." The fact that Thompson has filed an unauthorized and untimely petition for en banc rehearing in the United States Court of Appeals for the Sixth Circuit does not operate to revive his initial federal habeas case, which the United States Supreme Court held never should have been disturbed by the Sixth Circuit in the first place: "[W]e hold that — assuming, *arguendo*, both that [Fed. R. App. P. 41] authorizes a stay of the mandate following the denial of certiorari and also that a court may stay the mandate without entering an order — here the Court of Appeals abused its discretion in doing so." *Bell v. Thompson*, 125 S.Ct. 2825, 2831-32 (2005) (reh. denied Aug. 22, 2005). While it is true that this Court's previous execution date was ultimately delayed by the Sixth Circuit's decision to vacate its original decision (*see* Motion for Stay, pp. 7-8), the Supreme Court made clear on appeal that the Court of Appeals had abused its discretion and improperly interfered with Tennessee's efforts to enforce its lawful judgment. *Thompson*, 125 S.Ct. at 2837 ("By withholding the mandate for months . . . while the State prepared to carry out Thompson's sentence,

the Court of Appeals did not accord the appropriate level of respect to that judgment.").[5] The Supreme Court's judgment order did not provide for any further proceedings in the Sixth Circuit and clearly contemplated none.[6] (Attachment B) Moreover, the appellate mandate of the Sixth Circuit is directed to the federal district court, not the State of Tennessee, and its issuance is not a necessary antecedent to the State's judicial processes.

Because the Sixth Circuit has no discretion to do anything other than to comply with the mandate of the United States Supreme Court, it is necessarily limited on remand to the ministerial function of issuing the mandate to the district court affirming the denial of habeas corpus relief. Thompson's initial federal habeas case is complete and stands as no impediment to a new execution date.

III. A CERTIFICATE OF COMMUTATION SHOULD NOT ISSUE.

Finally, Thompson requests that the Court issue a certificate of commutation pursuant to Tenn. Code Ann. § 40-27-106. This Court has previously declined Thompson's request for a certificate of commutation. (Attachment A) His current "case for commutation," which cites Thompson's "long history" of mental illness and a court-ordered conservatorship long since been terminated at Thompson's own request, is not materially different from the first and fails to justify the relief requested. *See also Workman v. State*, 22 S.W.3d 807, 813-16 (Tenn. 2000) (Barker, J.,

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[5]Thompson's reliance on this Court's refusal to set an execution date in *State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn., Jan. 6, 2005), is misplaced. The Court's decision in that case was not premised on the court of appeals' mandate, but instead on the potential for further review in Alley's case through a timely petition for en banc rehearing and the potential for further federal court rulings in the Rule 60(b) context, neither of which have any application here.

[6]The Supreme Court's intent in this regard is further shown by its return of the original record directly to the federal district court — "In light of the disposal of the above-entitled case by this Court, I am returning the original record and any exhibits to you [United States District Court Clerk]." (Attachment C)

concurring; Drowota, J., concurring) (questioning the constitutionality of Tennessee' statutory provision for certificates of commutation).

CONCLUSION

For these reasons, this Court should deny Thompson's motion for a stay of execution and request for a certificate of commutation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid, on the _____ day of October, 2005, to:

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