

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

IN RE:)
)
OLEN E. HUTCHISON)

No. M 1991-00018-SC-DPE-DD

Filed September 19, 2003

**RESPONSE OPPOSING MOTION TO SET EXECUTION DATE AND
REQUEST FOR TEMPORARY AND PARTIAL RELIEF FROM THE REQUIREMENTS
OF TENN. S. CT. RULE 12.4(A) OR, ALTERNATIVELY,
REQUEST FOR AN EXTENSION OF TIME**

Mike Whalen, BPR # 018955
905 Locust Street
Knoxville, TN 37902
(865) 525-1393

Dana C. Hansen BPR# 19098
Counsel of Record
Assistant Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
530 S. Gay St., Suite 900
Knoxville, TN 37902
(865) 637-7979

TABLE OF CONTENTS

Introduction {1}

I. AN EXECUTION DATE SHOULD NOT AND CANNOT BE SET {2}

A. The State’s Request For An Execution Date Violates This Court’s Rules {3}

 1. Mr. Hutchison’s case was pending in the Sixth Circuit at the time the state’s motion was filed {3}

 2. Mr. Hutchison’s case is pending in the federal district court {4}

B. The State’s Request For An Execution Date Violates Federal Court Orders {6}

C. The State’s Request For An Execution Date Serves Only To Harass and/or Intimidate Mr. Hutchison {7}

II. REQUEST FOR TEMPORARY AND PARTIAL RELIEF FROM THE REQUIREMENTS OF TENN. S. CT. RULE 12.4(A) {7}

III. ALTERNATIVE REQUEST FOR AN EXTENSION OF TIME {8}

Conclusion {8}

CERTIFICATE OF SERVICE {9}

prison. Five, including the individuals who actually committed the murder, were given sentences ranging from 17 years to life in prison. Of the five, three are now free. The remaining two received life sentences with eventual eligibility for parole. Olen Hutchison is the only one the state seeks to execute.

This striking example of sentencing disparity and unequal justice can be explained, in part, by the fact that the state prosecutor withheld critical information and evidence from Mr. Hutchison and from the jury. This evidence verified that the other defendants were the major figures in the killing of Hugh Huddleston and would have corroborated Mr. Hutchison's defense at trial.

The prosecution failed to disclose this evidence until it was too late for Mr. Hutchison to receive state court review of his claim. This technicality of timing has kept Mr. Hutchison on death row since 1991 while the major participants in the murder have either gone free or will be eligible for parole.

Mr. Hutchison has appealed his case, fighting against the technicality of timing that has prevented him from ever receiving a court hearing where his case could be reviewed in light of all the evidence. Importantly, Mr. Hutchison's appeals are not final. His fight for a court hearing and the application of equal justice to his case continues.

I. AN EXECUTION DATE SHOULD NOT AND CANNOT BE SET

Simply put, the motion filed by Attorney General Paul Summers and Solicitor General Michael Moore to set an execution date is without legal basis. The request by Generals Summers and Moore violates the rules of this Court and the orders of the federal court. Accordingly, the motion should be denied.

A. The State's Request For An Execution Date Violates This Court's Rules

A request of this Court to set an execution date is patently improper if filed before the conclusion of the appeals process. Tenn. S. Ct. R. 12.4(A) requires that such a request “shall be considered premature” unless the Attorney General demonstrates that “the standard three-tier appeals process” is completed. Because the federal court appeals process is ongoing there is no legal basis for the state’s request for an execution date.

1. Mr. Hutchison’s case was pending in the Sixth Circuit at the time the state’s motion was filed

Although the Attorney General’s motion states that Mr. Hutchison “has completed the standard three-tier appeals process, making the setting of an execution date appropriate” (state’s motion at p. 2 ¶ 5) the federal habeas corpus proceedings are not yet finished. What the Attorney General failed to inform this Court is that the Sixth Circuit Court of Appeals had not issued the mandate in *Hutchison v. Bell*, 303 F.3d 720 (6th Cir. 2002) and proceedings were continuing in front of that court.

Mr. Hutchison’s Sixth Circuit Appeal is part of the “three-tier appeals process” and, contrary to the state’s allegation, it was not final when the state moved for an execution date. On July 18, 2003, the Sixth Circuit entered an order staying issuance of the mandate. (Attachment A, order 7/18/03). On August 22, 2003, Mr. Hutchison filed another motion with the Sixth Circuit court requesting that it maintain its stay order so it could reconsider Mr. Hutchison’s appeal in light of new and intervening Supreme Court law. (Attachment B, motion to maintain stay of mandate 8/22/03). Not until

September 12, 2003, two days after the state requested an execution date, did the Sixth Circuit deny Mr. Hutchison's motion and issue the mandate. (Attachment C, mandate 9/12/03).

2. Mr. Hutchison's case is pending in the federal district court

Additionally, Mr. Hutchison's federal habeas proceedings are ongoing in the federal district court. Attorney General Summers' motion acknowledges that on August 19, 2003 Mr. Hutchison filed a Motion for Relief from Judgment, pursuant to Fed. R. Civ. Pro. Rule 60(b), in the United States District Court for the Eastern District of Tennessee. (Attachment D, motion for relief 8/19/03). This motion requests relief based upon newly revealed fraud or misrepresentation of the opposing party (the state) during the original district court proceedings and upon new mandatory authority which undermines the district court's previous judgment. On September 8, 2003, the state filed a motion requesting permission to file its response out-of-date, as the filing deadline had expired. Mr. Hutchison's response to the state's motion is due to be filed on September 22, 2003. Because habeas litigation is ongoing in the federal district court there is no legal authority for the state's request for an execution date.

The district court proceedings are part of the "three-tier appeals process." First, Rule 60(b) has been part of ordinary federal court litigation since its adoption in 1937. Accordingly, "[a] Rule 60(b) motion is considered a continuation of the original proceedings." *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002). "The general purpose of a Rule 60(b) is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that

justice must be done.” *Id.* at 760 (*citations omitted*).

Mr. Hutchison’s Rule 60(b) motion fits squarely within the regular procedures for fully and completely adjudicating a case according to the demands of our justice system. The motion remains pending, therefore, the state’s request for an execution date is wholly improper.

Second, in an attempt to convince this Court that the pending district court proceedings do not affect the legality of setting an execution date, the state implies that the district court proceeding falls outside the “three-tier appeals process.” In a footnote, the state would have this Court believe that Mr. Hutchison’s 60(b) motion will automatically be characterized as “a second or successive petition” and be forwarded to the Sixth Circuit Court. However, even the single case cited by the state fails to support this position.

The proceedings which will take place in the district court are substantial. See *McQueen v. Scroggy*, 99 F.3d 1302, 1334-1335 (6th Cir. 1996). To begin, only if the state puts forth sufficient proof that there is an issue regarding the nature of Mr. Hutchison’s motion will the district court consider whether it is properly considered a 60(b) motion. Next, if the court finds the motion may not be controlled by Rule 60(b) then Mr. Hutchison has an opportunity to prove that it indeed is governed by the rule. *Id.* This litigation has yet to take place. Importantly, the issue being raised by the state is closely-contested among the federal courts. The *en banc* Sixth Circuit is poised to address the issue in *Abdur’Rahman v. Bell*, Nos. 02-6547/6548. (Attachment E, order in *Caruthers v. Bell*, Nos. 01-5914/5915; 02-5304/5416). Unless or until Mr.

Hutchison's motion is deemed to be outside of Rule 60(b), it is simply a continuation of his original federal habeas proceeding; the "third tier" in the "three-tier appeals process"

The state's request for an execution date should be denied because the federal court appeals process remains pending.

B. The State's Request For An Execution Date Violates Federal Court Orders

The request by Attorney General Paul Summers and Solicitor General Michael Moore asking for an execution date seeks this Court to authorize an act prohibited by the federal district court's stay of execution.

In 1998, the United States District Court for the Eastern District entered an order staying the execution of Mr. Hutchison pending further orders of the court. (Attachment F, stay order, 9/30/1998). In its order dismissing Mr. Hutchison's habeas petition the district court further ordered, "The **STAY WILL REMAIN IN EFFECT** pending any appeal." (Attachment G, stay order 9/15/00)(emphasis supplied). As explained above, Mr. Hutchison's case remains pending. No order lifting the stay has been issued.

The state's request for an execution date intentionally violates the spirit and intent of the federal court's stay of execution.¹ Even more extraordinary, the state failed to inform this Court that no execution can take place without violating the federal court's stay order.² Accordingly, the state's motion should be denied.

¹Upon receipt of the instant motion counsel contacted the state's attorney to remind them about the district court's order staying execution. At that time, the state proffered the notion that the Sixth Circuit's order staying its mandate somehow lifted the stay of execution. (Attachment H, letter from Kissinger 9/10/03).

²Tenn. S. Ct. Rule 8, Rules of Professional Conduct, Rule 3.3(a)[2] requires candor to the tribunal.

C. The State's Request For An Execution Date Serves Only To Harass and/or Intimidate Mr. Hutchison

The state, by the mere act of filing the motion, is creating undue psychological stress on Mr. Hutchison. Courts have remarked on the cruelty imposed by living under the threat of an impending execution. "The prospect of pending execution exacts a frightful toll[.]" *Furman v. Georgia*, 408 U.S. 238, 288-289 (1972) (Brennan, J., concurring). Some courts "regard it as an inhuman act to keep a man facing the agony of execution[.]" *State v. Richmond*, 180 Ariz. 573, 577, 886 P.2d 1329, 1333 (Ariz. 1994)(citations omitted). "When a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). The effects of the state's motion on Mr. Hutchison were easily-anticipated. Given the fact that the state knows it cannot now conduct an execution, see Attachment I, the only possible effect of the state's motion is to harass and intimidate Mr. Hutchison.³

The state's request for an execution date should be denied.

II. REQUEST FOR TEMPORARY AND PARTIAL RELIEF FROM THE REQUIREMENTS OF TENN. S. CT. RULE 12.4(A)

Rule 12.4(A) requires any response in opposition to a motion to set an execution date to "assert any and all legal and/or factual grounds why the execution date should be delayed, why no execution date should be set, or why no execution should occur..." Mr. Hutchison respectfully requests relief from the provision of the rule requiring him to

³Moreover, requiring counsel and the Court to respond to the state's premature motion places an unnecessary burden on the already strained resources of each office.

enumerate all reasons why a date should be delayed, not set or why no execution should occur. In this case, no date should be set because Mr. Hutchison has yet to complete the standard three tier appeals process and a federal court stay of execution remains in place. Under the circumstances of this case, where the state filed its motion prematurely and contrary to the rules of this Court, requiring Mr. Hutchison to set forth all reasons opposing a date is overly burdensome and prejudicial.

III. ALTERNATIVE REQUEST FOR AN EXTENSION OF TIME

Alternatively, Mr. Hutchison respectfully requests that he be granted an additional thirty (30) days to fully comply with Rule 12.4(A) because he was unfairly surprised by the state's premature motion and because he has several meritorious reasons for this Court to delay or not set an execution date and to ultimately find that no execution should occur.

Conclusion

WHEREFORE based upon the above stated reasons, Mr. Hutchison respectfully requests this Court to deny the motion to set execution date, and grant him temporary and partial relief from Tenn. S. Ct. Rule 12.4.(A), or, in the alternative, grant him an additional thirty (30) days to set forth the reasons why no execution should now be set and why no execution should occur.

Respectfully submitted,

Mike Whalen, BPR # 018955
905 Locust Street
Knoxville, TN 37902
(865) 525-1393

Dana C. Hansen BPR# 19098
Counsel of Record
Assistant Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
530 S. Gay St., Suite 900
Knoxville, TN 37902
(865) 637-7979

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was forwarded to

Alice Lustre, Esquire
Office of Attorney General and Reporter
P. O. Box 20207
Nashville, TN 37202-0207
FAX - (615)532-7791

by Facsimile and U.S. Mail, postage prepaid, this 18th day of September, 2003. The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by Facsimile at (865)-637-7999.

