

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: ) KNOX COUNTY  
BILLY RAY IRICK ) Supreme Court No. 180  
)

---

RESPONSE TO MOTION TO VACATE EXECUTION DATE

---

The State of Tennessee (“State”) submits this Response to Billy Ray Irick’s (“Irick”) Motion to Vacate Execution Date. In his Motion, Irick contends that, because he has a pending motion for relief from judgment in a federal habeas proceeding—which he supposes will be granted—this Court should vacate his execution date. Irick is wrong.

Tenn. Sup. Ct. R. 12.4 provides in pertinent part:

After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner’s conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that this Court set an execution date.

Tenn. Sup. Ct. R. 12.4(A).

The State possesses a final judgment against Irick in federal habeas proceedings. His petition for a writ of habeas corpus was dismissed by the United States District Court for the Eastern District of Tennessee on March 30, 2001. *Irick*

*v. Bell*, No. 3:98-666 (E.D. Tenn. Mar. 30, 2001). The United States Court of Appeals for the Sixth Circuit affirmed on May 12, 2009. *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009). The United States Supreme Court denied Irick’s petition for a writ of certiorari on February 22, 2010, *Irick v. Bell*, 130 S.Ct. 1504 (Feb. 22, 2010), and denied a petition for rehearing on April 19, 2010, *Irick v. Bell*, 130 S.Ct. 2142 (Apr. 19, 2010). Irick “has pursued at least one unsuccessful challenge” to his conviction and sentence through federal habeas corpus proceedings, making this Court’s setting of an execution date proper. Tenn. Sup. Ct. R. 12.4(A).

Irick nevertheless argues that his federal habeas proceedings “have not concluded” because he has filed a motion for relief from judgment in the district court pursuant to Fed. R. Civ. P. 60. (Mot. at 3.) The federal mechanism that Irick invokes, however, specifically provides that the filing of the “motion does not affect the judgment’s finality or suspend its operation.” Fed. R. Civ. P. 60(c)(2). Irick filed his Rule 60 motion in 2001. (Mot. Ex. 2.) The motion was transferred to the Sixth Circuit as a successive habeas petition on January 25, 2002. *Irick v. Bell*, No. 3:98-666 (E.D. Tenn. Jan. 25, 2002). The Court of Appeals held the case in abeyance pending resolution of *Abdur’Rahman v. Bell*. See *Irick v. Bell*, No. 02-5105 (6th Cir. Apr. 3, 2006). Although *Abdur’Rahman* was decided in 2008 (Mot. Ex.1), Irick did nothing to advance his motion—indeed, he failed to raise the matter before this Court in response to the State’s motion to set an execution date. Irick’s lack of

diligence aside, the pendency of his Rule 60 motion does nothing to affect the finality of the judgment dismissing his habeas petition. *See* Fed. R. Civ. P. 60(c)(2).

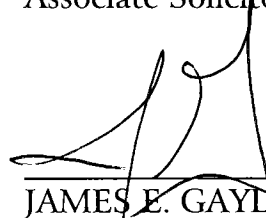
In view of the express provisions of Fed. R. Civ. P. 60, Irick is relegated to arguing that re-opening of his habeas proceeding is “imminent” because it is based on this Court’s promulgation of Tenn. Sup. Ct. R. 39 and the Sixth Circuit’s decision in *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2009), holding that Rule 39 is an “extraordinary circumstance” for purposes of Fed. R. Civ. P. 60(b)(6). (Mot. at 6.) That prospect is altogether questionable. It may well be that the district court will find that Irick’s motion is barred by a lack of diligence, that his claims do not sound under Tenn. Sup. Ct. R. 39 because they were never presented to the Tennessee Court of Criminal Appeals in the first instance, that the claims have already been resolved by virtue of the district court’s making alternative rulings on the merits, or that the motion is meritless for any of a host of other reasons. But this Court need not engage in speculation as to what the district court may or may not do. A request for a stay of execution in order to litigate claims in federal court is not properly addressed to this tribunal. *Coe v. State*, 17 S.W.3d 251, 251 (Tenn. 2000).

Irick’s motion to vacate his execution date, in short, has no basis in the facts or in the law. It should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.  
Attorney General & Reporter

GORDON W. SMITH  
Associate Solicitor General

A handwritten signature in black ink, appearing to read 'James E. Gaylord', is written over a horizontal line. The signature is stylized and cursive.

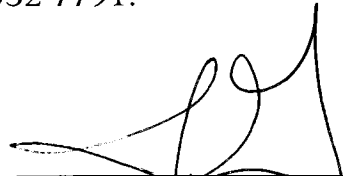
---

JAMES E. GAYLORD  
Assistant Attorney General  
*Attorney of Record*  
425 Fifth Avenue North  
P.O. Box 20207  
Nashville, Tennessee 37202-0207  
Jim.Gaylord@ag.tn.gov  
Phone: (615) 532-7356  
Fax: (615) 532-7791

## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded via Facsimile and First-Class U.S. mail, postage prepaid on this the 26th day of July, 2010 to: Howell G. Clements, Clements & Cross, 1010 Market Street, Suite 401, Chattanooga, TN 37402 and C. Eugene Shiles, Spears, Moore, Rebman, & Williams, P.O. Box 1749, Chattanooga, TN 37401.

The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by Facsimile at (615) 532-7791.



---

JAMES E. GAYLORD  
Assistant Attorney General