

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

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APPELLATE COURT CLERK
NASHVILLE

IN RE:
BILLY RAY IRICK

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)

KNOX COUNTY
Supreme Court No. 180

RESPONSE TO MOTION TO RECONSIDER DENIAL
OF MOTION TO VACATE EXECUTION DATE

The State of Tennessee (“State”) submits this Response to Billy Ray Irick’s (“Irick”) Motion to Reconsider Denial of Motion to Vacate Execution or, in the Alternative, to Reschedule Competency Hearing Set for August 16, 2010. Irick once again approaches this Court for a stay of execution based on his doings in a federal district court. His motion should be denied for the same reasons that his first one was.

On August 6, 2010, the United States District Court for the Eastern District of Tennessee entered an order allowing Irick to file an amended motion for relief from judgment. (Mot. Ex. 1, at 6.) Briefing on that motion is to be completed by September 24, 2010. (*Id.*) Following briefing, the district court “will consider” four claims raised by Irick. (*Id.* at 5-6.) Although Irick neglects to mention it, he filed a motion for a stay of state-court proceedings in the federal court on August 9, 2010. (Ex. A.) The State has opposed the motion. *Irick v. Bell*, No. 3:98-cv-666 (E.D. Tenn. Aug. 10, 2010) (docket no. 198). The district court has yet to rule.

As this Court has already recognized (and in this case), a “request for a stay of execution in order to litigate claims in a federal court is more appropriately addressed to that court.” *Coe v. State*, 17 S.W.3d 251, 251 (Tenn. 2000). Irick has filed such a request in the appropriate federal court. His duplicative motion before this Court—with its assertions that “federal *habeas* proceedings will continue for some indefinite period of time” and that competency proceedings presently underway in the state courts “will be for naught”—asks this Court to divine how matters will transpire in the federal courts. Given that the district court has allowed itself more than two months before Irick’s scheduled execution date of December 7, 2010, to consider his claims, Irick’s assertions are doubtful. But the point, of course, is that if any federal court feels that it needs additional time to address Irick’s claims, that court can itself issue a stay.

In the end, Irick can only make the startling assertion that a federal stay is presently in effect. (Mot. at 2.) He contends that the district court’s August 6 ruling caused a new stay to spring fully armed from the head of a 1998 order providing that a stay of execution automatically would be extended pending resolution of Irick’s not-yet-filed habeas petition. (*See* Mot. Ex. 2, at 2.) If the district court intended that result, it did not say so, and Irick’s filing of a new motion for a stay with that court only two days ago certainly calls the soundness of his contention into question. At any rate, Irick is simply mistaken. The district court’s last stay order issued on April 23, 2001—after the dismissal of his petition—providing that “the stay of execution

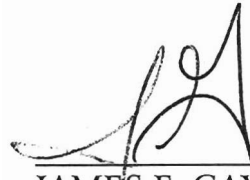
previously entered in this matter shall remain in effect for forty-five (45) days after the date of entry of this Order, pending the filing of a notice of appeal” (Ex. B); *see also* 28 U.S.C. § 2251(a)(1) (providing that federal judges have authority to issue a stay only in “pending matters”, including habeas corpus proceedings pending appeal). That stay has long since expired. No other has been granted.

Irick’s motion, like his first, is addressed to the wrong court. It should be denied.

Respectfully submitted,

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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 11th day of August, 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

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

BILLY IRICK

Petitioner

vs.

RICKY BELL,

Warden

* USDC Number: 3:98-cv-666

*

*

* Judge Curtis L. Collier/

*

* DEATH PENALTY

*

*

*

**MOTION FOR IMMEDIATE STAY OF EXECUTION AND
STAY OF STATE COMPETENCY PROCEEDINGS
AND FOR AN EXPEDITED RULING AND/OR HEARING**

Comes the petitioner, and respectfully moves this court, pursuant to 28 U.S.C. §2251(A)(1), LR 9:4, and his due process rights as guaranteed through the Fourteenth Amendment to the United States Constitution, and an immediate stay of his execution and competency proceedings in the Criminal Court of Knox County, Division I, No. 24527, including the competency hearing currently scheduled for **Monday, August 16, 2010**. As grounds therefore, defendant states that in light of this court's order of August 6, 2010 reopening his federal *habeas* proceedings that state competency hearings are premature; interfere with petitioner's ongoing federal *habeas* proceedings; and violate his Eighth Amendment right to a competency hearing, if one is necessary, which is, in fact, close in time to his execution.

BRIEF PROCEDURAL HISTORY

On May 10, 2010, the state of Tennessee moved to set an execution date with the Tennessee Supreme Court subsequent to the United States Supreme Court denying petitioner's application for writ of *certiorari*. On May 27, 2010, petitioner filed a response opposing the setting of an execution date and raised, as an issue, his incompetency to be executed. On July 19, 2010, the Tennessee

Supreme Court denied petitioner a certificate of commutation, set an execution date of December 7, 2010, and remanded the issue of incompetency to be executed to the Knox County court. (Exhibit 1). On July 20, 2010, the Sixth Circuit Court of Appeals remanded petitioner's Rule 60(b) motion for relief from judgment to this court. Subsequently, on July 22, 2010, petitioner filed a motion to vacate his execution date given the imminent reopening of federal *habeas* proceedings. On August 4, 2010, the Tennessee Supreme Court denied petitioner's motion to vacate, stating, in part, that "[a] request for a stay of execution to litigate claims in federal court should not be address to this Court but is more properly addressed to the federal court. See Coe v. State, 17 S.W.3d, 251, 251 (Tenn. 2000)." (Exhibit 2, p. 2). Finally, on August 6, 2010, this court entered a Memorandum and Order which reopened petitioner's federal *habeas* proceedings.

DISCUSSION

Given the posture of the federal *habeas* proceedings, petitioner moves for an immediate stay of his execution as well as a stay of state competency proceedings. Federal law and the United States Constitution guarantee petitioner's right to seek redress through federal *habeas corpus* proceedings. However, under the circumstances faced by this petitioner, the state of Tennessee is interfering with those rights by continuing proceedings to have him executed before his first federal *habeas* has been completed. In the ongoing federal *habeas* proceedings, petitioner may succeed in obtaining relief. Furthermore, even should the petitioner be denied relief by this Honorable court, he will, pursuant to 28 U.S.C. §2253 and Thompson v. Bell, 580 F.3d 423 (6th Cir. 2009), have an opportunity to seek a certificate of appealability before the Sixth Circuit Court of Appeals and, if necessary, an application for writ of *certiorari* to the United States Supreme Court. All of these proceedings will take time and will necessarily require the vacating of and/or rescheduling of petitioner's execution date.

Therefore, petitioner should not be required to simultaneously litigate both his federal *habeas* case as well as his competency to be executed case.

CONCLUSION

Based on the foregoing, petitioner respectfully prays: (1) that this court enter an immediate stay of his execution as well as competency proceedings, including the hearing presently scheduled for August 16, 2010; (2) in the alternative, petitioner prays for an expedited hearing during which petitioner may present arguments for the entering of an immediate stay as described above.

SPEARS, MOORE, REBMAN & WILLIAMS

By: /s/ C. Eugene Shiles, Jr.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010, a copy of the foregoing **motion for immediate stay of execution and stay of state competency proceedings and for an expedited ruling and/or hearing** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

/s/ C. Eugene Shiles, Jr.

EXHIBIT

1

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. BILLY RAY IRICK

Criminal Court for Knox County
No. 24527**FILED**
JUL 19 2010
Clerk of the Courts

No. M1987-00131-SC-DPE-DD - Filed: July 19, 2010

ORDER

On May 10, 2010, the State filed a motion to set an execution date for Billy Ray Irick. The State alleges that Mr. Irick has completed the standard three-tier appeals process and that an execution date should therefore be set in accordance with Tenn. S. Ct. R. 12.4(A).

On May 27, 2010, Mr. Irick filed a response opposing the State's motion. The response includes a request that this Court issue a certificate of commutation on Mr. Irick's behalf under Tenn. Code Ann. § 40-27-106 (2006). As grounds for issuance of a certificate, Mr. Irick asserts that information received since his trial and affidavits recently obtained from mental health professionals constitute new scientific evidence demonstrating his actual innocence of the crime. He also contends that flawed state and federal proceedings have denied him a full and fair hearing as to the issue of his sanity. Finally, he alleges that his "longstanding and severe mental illness" should exclude him from execution under evolving standards of decency.

After careful review of the motion, the response, and the documentation submitted with the response, the Court concludes that under the principles announced in Workman v. State, 22 S.W.3d 807 (Tenn. 2000), Mr. Irick has presented no extenuating circumstances warranting issuance of a certificate of commutation. It is therefore ordered that the request for a certificate of commutation is denied.

Mr. Irick's response also includes a claim of incompetency to be executed, in which he raises the issue of his present competency to be executed and requests a competency hearing under Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999). Upon consideration of the claim and the supporting exhibits, it appears to the Court that Mr. Irick has raised the issue of his present competency to be executed in accord with the procedures adopted by this Court in Van Tran v. State. It is hereby ordered that the issue is remanded to the Criminal Court of Knox County, where Mr. Irick was originally tried and sentenced, for an expeditious

determination of his present competency, including the initial determination of whether he has met the required threshold showing. These proceedings shall be conducted in accord with the procedures and time limits set forth in Van Tran v. State, 6 S.W.2d at 267-73, which provides no more than fifty-five (55) calendar days for the conclusion of the trial court proceedings and the filing of an appeal in this Court.

Upon due consideration, it is, therefore, ordered that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law at 10:00 p.m. on the 7th day of December, 2010, or as soon as possible thereafter within the following twenty-four hours, unless otherwise ordered by the Court or other appropriate authority.

Counsel for Mr. Irick shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM

EXHIBIT

2

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
AUG 04 2010
Clerk of the Courts

STATE OF TENNESSEE V. BILLY RAY IRICK

Criminal Court for Knox County
No. 24527

No. M1987-00131-SC-DPE-DD - Filed: August 4, 2010

ORDER

On May 10, 2010, the State filed a motion to set an execution date for Billy Ray Irick. The State alleged that Mr. Irick had completed the standard three-tier appeals process and that an execution date should therefore be set in accordance with Tennessee Supreme Court Rule 12.4(A). On July 19, 2010, this Court granted the State's motion to set an execution date for Billy Ray Irick and ordered the issue of Mr. Irick's competency remanded to the Criminal Court of Knox County for an expeditious determination of his present competency in accord with the procedures and time limits set forth in Van Tran v. State, 6 S.W.3d 257, 267-73 (Tenn. 1999).

On July 22, 2010, Mr. Irick filed a "Motion to Vacate Execution Date Given Imminent Reopening of Federal Habeas Proceedings and Motion to Vacate Ford Proceedings without Prejudice to Renewal Following Conclusion of Habeas Proceedings." According to this motion and an attached order, see In re Billy Ray Irick, No. 02-5105 (6th Cir. July 20, 2010), after an extended delay the United States Court of Appeals for the Sixth Circuit removed Mr. Irick's motion for leave to file a second or successive habeas corpus petition from abeyance, denied the motion as unnecessary, and remanded the case to the United States District Court for a ruling on Mr. Irick's Rule 60(b) motion. Mr. Irick argues that since the district court will be reopening his initial federal habeas corpus proceedings, he is still in the process of pursuing his first federal habeas challenge to his death sentence and thus has not "pursued at least one unsuccessful challenge to [his] . . . conviction and death sentence" as required by Tennessee Supreme Court Rule 12.4(A) to set an execution date. The motion requests that the Court vacate the execution date currently set, pending the conclusion of the reopened habeas proceedings, and also vacate, without prejudice, the order remanding for hearing the issue of his present competency for execution.

On July 26, 2010, the State filed a response to the motion. The State submits that it possesses a final judgment against Mr. Irick in his federal habeas corpus proceedings, that

Mr. Irick's motion for relief from judgment pursuant to Fed. R. Civ. P. 60 does not affect the judgment's finality or suspend its operation, and that the prerequisites for setting an execution date under Tennessee Supreme Court Rule 12.4(A) have been met. Under the circumstances presented by the motion, this Court has repeatedly held that a request for a stay of execution to litigate claims in federal court should not be addressed to this Court but is more properly addressed to the federal court. See Coe v. State, 17 S.W.3d 251, 251 (Tenn. 2000).

Upon due consideration of the motion to vacate, the attachments to the motion, and the response, the Court concludes that the Motion to Vacate should be denied.

On July 22, 2010, Mr. Irick also filed a "Motion for Additional Time to Prepare and Present Evidentiary Hearing as to Incompetence to be Executed," in which he contends that the time line for his competency proceedings under this Court's order of July 19, 2010, and in accord with Van Tran v. State violates due process and his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 8, 9, 16 and 17 of the Tennessee Constitution by depriving him of sufficient time and resources to determine his competency. On July 26, 2010, the State filed a response, in which it points out that Mr. Irick has not yet made a substantial threshold showing of insanity as required before the basic requirements of due process are implicated under Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007). Additionally, the State contends that the procedure provided by Van Tran v. State is more generous than that mandated by Ford and Panetti, neither of which imposes a particular time frame on procedures for determining a prisoner's competency to be executed. See also Coe v. Bell, 209 F.3d 815, 825 (6th Cir. 2000) (holding Van Tran procedures satisfy the due process requirements of Ford).

After careful review of the motion and the response, the Court concludes that the Motion for Additional Time should be denied.

It is so ORDERED.

PER CURIAM

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

BILLY IRICK
=

Petitioner

vs.

RICKY BELL,

Warden

* USDC Number: 3:98-cv-666

*

*

* Judge Curtis L. Collier/

*

* DEATH PENALTY

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**AMENDED MOTION FOR IMMEDIATE STAY OF EXECUTION AND
STAY OF STATE COMPETENCY PROCEEDINGS
AND FOR AN EXPEDITED RULING AND/OR HEARING**

Comes the petitioner, and respectfully amends his previous motion for immediate stay of execution and stay of state competency proceedings and for an expedited ruling and/or hearing to further argue that the stay originally ordered by this court in its Memorandum and Order of December 7, 1998 [R.2] specifically held, in part, that "[t]he stay will automatically expire on Tuesday, January 26, 1999, provided, however, the stay will automatically be extended pending resolution of any petition filed by petitioner on or before Monday, January 25, 1999." In subsequent orders (see, e.g., R. 10), the court extended that stay and the petitioner timely filed a petition and an amended petition for *habeas corpus*. These *habeas* petitions have not been resolved and, by virtue of the Sixth Circuit's order remanding petitioner's 60(b) motion for relief are still pending and, therefore, this court's stay should still be in effect.

Therefore, petitioner respectfully urges this court to enforce its stay originally entered on December 7, 1998 as well as its explicit injunction that the stay would remain "pending resolution" of petitioner's *habeas* petitions.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010, a copy of the foregoing **amended motion for immediate stay of execution and stay of state competency proceedings and for an expedited ruling and/or hearing** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

/s/ C. Eugene Shiles, Jr.

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EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

FILED

BILLY RAY IRICK,)
=)
Petitioner,)
v.)
RICKY BELL, WARDEN, Riverbend)
Maximum Security Institution)
Respondent.)

No. 3:98-cv-666
Collier/Powers

2001 APR 23 10:15 AM
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY: [Signature]

DEATH
PENALTY
CASE

ORDER

This case is before the Court on the motion of Billy Ray Irick ("Irick") to extend the stay of execution (Court File No. 148), motion to alter or amend judgment pursuant to FED. R. Civ. P. 59 (Court File No. 149), application for certificate of appealability (Court File No. 150), motion to proceed *in forma pauperis* on appeal (Court File No. 151), and the respondent's response in opposition (Court File No. 152). On March 30, 2001, the Court entered a memorandum opinion and order (Court File No. 146 & 147) granting the respondent's motion for summary judgment, and dismissing Irick's petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254.

After careful review, the Court concludes Irick has failed to present any additional information which justifies reconsideration and an order altering or amending judgment. For the reasons expressed in the Court's March 30, 2001, memorandum opinion (Court File No. 146) the motion to alter or amend (Court File No. 149) is **DENIED**.

The motion to extend the stay of execution (Court File No. 148) is **GRANTED** to the extent that the stay of execution previously entered in this matter **SHALL REMAIN IN EFFECT** for forty-five (45) days after the date of entry of this Order, pending the filing of a notice of appeal

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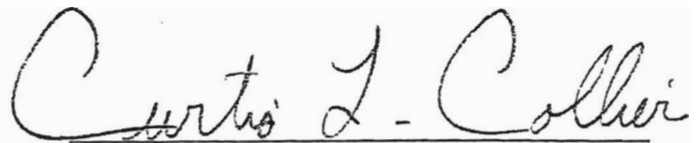
which, to be timely, must be filed within thirty (30) days. FED. R. APP. P. 4(a).

The application for certificate of appealability (Court File No. 150) and the motion to proceed in forma pauperis on appeal (Court File No. 151) are **DENIED** for the reasons expressed in the Court's March 30, 2001, memorandum opinion (Court File No. 146).

Accordingly, it is hereby **ORDERED** that Irick's motion to extend the stay (Court File No. 148) is **GRANTED**. It is further **ORDERED** that the motion alter or amend judgment (Court File No. 149), application for certificate of appealability (Court File No. 150), and motion to proceed *in forma pauperis* on appeal (Court File No. 151) are **DENIED**.

SO ORDERED.

ENTER:



CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE