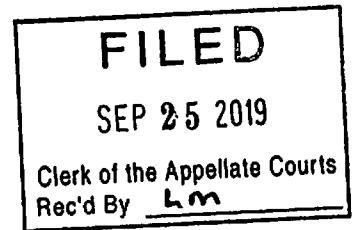


IN THE TENNESSEE SUPREME COURT
AT NASHVILLE



STATE OF TENNESSEE,)
)
Movant,)
)
v.) Case No. M1988-00096-SC-DPE-DD
)
PERVIS T. PAYNE,) CAPITAL CASE
)
Respondent.)

MOTION FOR EXTENSION OF TIME TO FILE RESPONSE
TO MOTION TO SET EXECUTION DATE

Pervis Payne, by counsel, moves this Court for a ninety-day extension of time to file his response in opposition to the State Attorney General's motion to set an execution date. He asks to be given until December 12, 2019 to file his response. In support of his motion, Mr. Payne states the following:

1. The State Attorney General filed nine motions to set execution dates, pursuant to Tenn. Sup. Ct. Rule 12. Mr. Payne is the subject of one of these motions. The motions were served by mail Friday, September 20.¹ They were not received until late in the day on Monday, September 23. No advanced notice was given to counsel.² Because the State failed to include

¹ In capital cases, it is accepted practice to serve motions regarding the setting of execution dates by email. Indeed, the rule requires the State to email the request to the Court in Adobe .pdf format. Tenn.Sup.Ct.Rule 12.4(C). It appears that this rule and the accepted procedure were not followed.

² The State Attorney General's Office tweeted a press release and the notice of appeal it filed in another capital case on September 20, 2019.
https://mobile.twitter.com/TNattvgen?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eaut hor (last checked September 25, 2019).

the case number in the caption, the request was not docketed until September 24, 2019, though the motion is file-stamped Sept. 20, 2019.

2. Rule 12.4(A) provides a ten-day timeframe to file a response to the request for execution date. Ten days from September 20, 2019 would be October 1, 2019.
3. Rule 12.4(A) requires the respondent to set forth in any motion in opposition to the request for an execution date “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, including a claim that the prisoner is not competent to be executed...; or a request for a certificate of commutation pursuant to Tenn. Code Ann. § 40-27-106.”
4. Undersigned counsel is counsel of record for seven of the nine defendants for whom the state is seeking an execution date.
5. Counsel requires additional time in which to prepare the response in opposition. Because the authority to request such dates rests solely with the Attorney General, counsel is unable to anticipatorily prepare for the pleadings required in response to this motion; the timing of the issues is, rather, thrust upon counsel. In each of these matters, counsel anticipates filing a lengthy response in opposition with supporting documentation, which will attempt to address “any and all legal and/or factual grounds.” In each case, counsel will have to evaluate – among other issues –

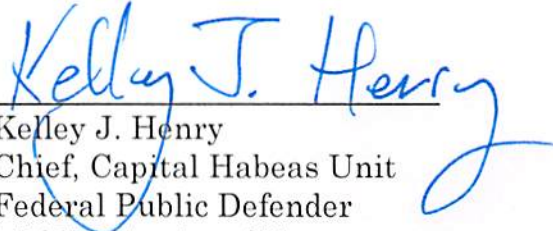
whether the client's competency to be executed should be raised. As the Court knows, competency is dynamic and in cases of individuals with severe mental illness competency often deteriorates in response to stress. Issues such as competency to be executed are not ripe until an execution date is requested and cannot be evaluated prior to the notice provided by the Attorney General. *See, Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Counsel wishes to prepare helpful and concise briefing for the court, clearly illuminating the issues that require adjudication; doing such work requires careful evaluation, research and drafting.

6. Given counsel's professional commitments in other capital cases and the substantial effort required to provide a thoughtful, thorough, and helpful response in opposition, the response in one case simply cannot be drafted within ten days, let alone responses in seven cases.
7. Opposing counsel states the Attorney General opposes the motion.
8. This Court has granted similar requests in past cases. *See Attachments A-F.*
9. At present executions are already scheduled for Lee Hall on December 5, 2019, and Nicholas Todd Sutton on February 20, 2020.
10. In light of the currently scheduled executions, and in recognition of this Court's customary practice of setting executions on a schedule that is manageable for the Tennessee Department of Corrections, granting a 90-

day extension until December 12, 2019, would not delay scheduled execution(s) that this Court believed should go forward.

WHEREFORE, given the gravity and complexity of the issue at hand, this Court should grant Mr. Payne a ninety-day extension of time in which to file his response in opposition to the request to set execution date.

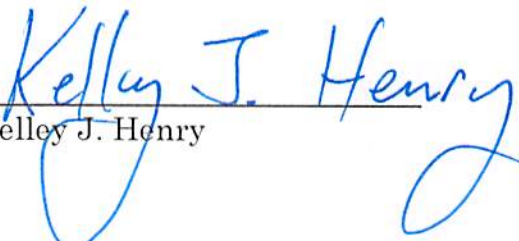
Respectfully submitted this 25th day of September, 2019.



Kelley J. Henry
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CERTIFICATE OF SERVICE

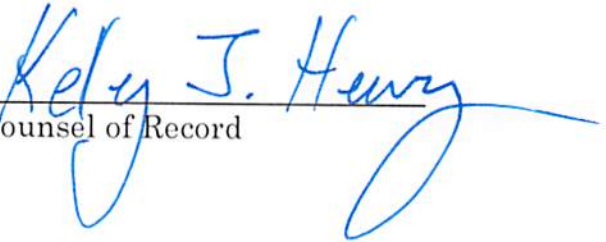
I, Kelley J. Henry, certify that a true and correct copy of the foregoing Unopposed Motion for Extension of Time to File Response in Opposition to Request to Set Execution Date was served via email and United States Mail to opposing counsel, Amy Tarkington, Associate Solicitor General, P.O. Box 20207, Nashville, Tennessee, 37202.



Kelley J. Henry

DESIGNATION OF COUNSEL OF RECORD

Kelley J. Henry is counsel of record for this matter. Counsel prefers to be notified via email: kelley_henry@fd.org.



Counsel of Record

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. EDMUND ZAGORSKI

No. M1996-00110-SC-DPE-DD - Filed: July 13, 2010

ORDER

On July 6, 2010, the State filed a Motion to Set Execution Date for Edmund Zagorski. The motion stated that Mr. Zagorski had completed the standard three-tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court Rule 12.4(A). Under Rule 12.4(A) Mr. Zagorski had ten (10) days, until Friday, July 16, 2010, to file a response to such motion.

On July 12, 2010, Mr. Zagorski filed an Unopposed Motion for Extension of Time to File Response to Motion to Set Execution Date. Because of his counsel's workload in two other capital cases and need to attend to various personal matters, Mr. Zagorski requested an extension of thirty days to file a response to the State's Motion. The Motion notes that the thirtieth day falls on Sunday, August 15, 2010, and indicates that counsel for the State does not object to the extension.

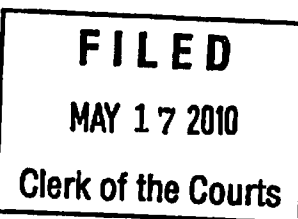
Upon due consideration of the Motion for Extension of Time, it is hereby ORDERED that the Motion is GRANTED. Edmund Zagorski shall have until Monday, August 16, 2010, to file a response to the State's Motion to Set Execution Date.

PER CURIAM

Attachment A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. BILLY RAY IRICK



No. M1987-00131-SC-DPE-DD - Filed: May 17, 2010

ORDER

On May 10, 2010, the State filed a Motion to Set Execution Date for Billy Ray Irick. The motion stated that Mr. Irick had completed the standard three-tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court Rule 12.4(A). Under Rule 12.4(A) Mr. Irick has until Thursday, May 20, 2010, to file a response to such motion.

On May 14, 2010, Mr. Irick filed an Unopposed Motion for Additional Time to File Response to State's Motion to Set Execution Date, in which he requested an additional fourteen (14) days in which to file a response to the State's Motion. As grounds for the extension, Mr. Irick stated that his case is complicated and that he will assert that he is presently incompetent to be executed and that "extenuating circumstances" support a certificate of commutation pursuant to Tennessee Code Annotated section 40-27-106. The State does not object to the extension.

Upon due consideration of the Motion for Additional Time, it is hereby ORDERED that the Motion is GRANTED. Billy Ray Irick shall have until Thursday, June 3, 2010, to file a response to the State's Motion to Set Execution Date.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. STEPHEN MICHAEL WEST

No. M1987-00130-SC-DPE-DD - Filed: May 6, 2010

ORDER

On April 30, 2010, the State filed a Motion to Set Execution Date for Stephen Michael West. The motion stated that Mr. West had completed the standard three-tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court Rule 12.4(A). Under Rule 12.4(A) Mr. West had ten (10) days, until Monday, May 10, 2010, to file a response to such motion.

On May 4, 2010, Stephen Michael West filed a Motion for Extension of Time to Respond to State's Motion to Set Execution Date. Because of pre-existing responsibilities on the part of both counsel and difficulties occasioned by the recent flooding in Nashville, Mr. West requested an extension of two weeks to file a response to the State's Motion. The State does not object to the extension.

Upon due consideration of the Motion for Extension of Time, it is hereby ORDERED that the Motion is GRANTED. Stephen Michael West shall have until Monday, May 24, 2010, to file a response to the State's Motion to Set Execution Date.

PER CURIAM

Attachment C

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. GAILE K. OWENS

No. M1981-000125-SC-DPE-DD - Filed: December 15, 2009

ORDER

On December 8, 2009, the State filed a Motion to Set Execution Date for Gaile K. Owens. The motion stated that Owens had completed the standard three-tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court Rule 12.4(A). Under Rule 12.4(A) Gaile K. Owens had ten (10) days until Friday, December 18, 2009, to file a response to such motion.

On December 14, 2009, Gaile K. Owens filed a Motion for Extension of Time to Respond to Motion to Set Execution Date. Because of pre-existing responsibilities on the part of both counsel that cannot be rescheduled, the motion requested an extension of time to February 5, 2010, to file a response to the State's Motion.

Upon due consideration of the Motion for Extension of Time, it is hereby ORDERED that the Motion is GRANTED. Gaile K. Owens shall have until Friday, February 5, 2010, to file a response to the State's Motion to Set Execution Date.

PER CURIAM

Attachment D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. STEVE HENLEY

No. M1987-00116-SC-DPE-DD - Filed: September 22, 2008

ORDER

Steve Henley has filed a motion by and through counsel seeking a fourteen-day extension of time within which to file his response to the State's Motion to Set Execution Date. The State does not oppose the requested extension. For good cause shown, the motion is granted. Defendant's response to the Motion to Set Execution Date shall be filed no later than October 6, 2008.

It is so ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. DONNIE JOHNSON

No. M1987-00072-SC-DPE-DD - Filed: May 12, 2006

ORDER

On May 5, 2006, the State of Tennessee filed a motion asking this Court to reset an execution date for death-row inmate Donnie E. Johnson. On May 11, 2006, Johnson filed a motion requesting that this Court allow him until May 30, 2006, to file a response to the State's motion. As grounds supporting his motion, Johnson alleges that his attorney is currently "involved in litigation respecting Sedley Alley, a condemned inmate who has a May 17, 2006, 1:00 a.m. execution date" and that, as a result of counsel's involvement in the Alley litigation, "counsel does not have the time necessary to appropriately respond to the State's motion."

Upon due consideration of the request, and for good cause shown, the motion is GRANTED. Johnson's response shall be filed in accordance with Tennessee Supreme Court Rule 12.4(C) no later than May 30, 2006.

IT IS SO ORDERED.

PER CURIAM