

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

IN RE: EDWARD JEROME HARBISON) HAMILTON COUNTY
) ORIGINAL APPEAL NO. 76
) (Nos. 15361-62 Below)
) M1986-0083-SC-OT-DD

RESPONSE TO MOTION TO SET EXECUTION DATE

Comes now Edward Jerome Harbison, through undersigned counsel and pursuant to TENN.S.CT.RULE 12.4(A), and submits this response to the State’s motion requesting this Court to set a date for Mr. Harbison to be executed. The State’s motion should be denied.

There are four reasons an execution date should not be scheduled.¹ First, Mr. Harbison has not yet completed at least one full round of the three-tier appellate process. Second, a certificate for commutation should issue pursuant to TENN. CODE ANN. § 40-27-106 because the jury convicted Mr. Harbison without hearing evidence that another person committed the crime. Third, a certificate for commutation should issue because, having found Mr. Harbison guilty, the jury sentenced him to death without hearing evidence establishing that the punishment of death is excessive and, instead, a life sentence is the appropriate punishment for Mr. Harbison. Fourth, the Court should certify to the Governor that justice is served by a commutation of the death sentence because this is a case for mercy.

¹The Court was recently presented with the evidence supporting reasons two and three. *Harbison v. State*, No. E2004-00885-SC-R11-PD (2005).

1. THE FEDERAL COURT IS STILL CONSIDERING MR. HARBISON'S CASE

A condition precedent to scheduling the execution of Mr. Harbison is the conclusion of "at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas proceedings." TENN.S.CT.RULE 12.4(A). This condition is not satisfied because Mr. Harbison's federal appeal is not completed. Mr. Harbison's habeas petition is currently pending in the federal trial court in the Eastern District of Tennessee. *Harbison v. Bell*, no. 1:97-cv-52. The State has answered the habeas petition and Mr. Harbison has filed a reply to that answer. The petition is now under the court's consideration. Therefore, it is premature to order Mr. Harbison's execution before the courts have fully reviewed his case.

2. EVIDENCE THAT ANOTHER PERSON, NOT MR. HARBISON, COMMITTED THE CRIME WAS WITHHELD FROM THE DEFENSE, THE JURY AND THE JUDGE

A certificate for commutation should issue because, although Mr. Harbison requested a copy of the police file on this case no less than six times, the file containing proof that someone else committed the crime and containing facts explaining why it was Mr. Harbison who was, instead, singled out as the suspect was not released for fourteen years. Because the file was released so many years after Mr. Harbison's trial, the courts have refused to consider the exculpatory information contained within it. There is no judicial avenue of redress for this wrong which was committed before trial and continued through the conclusion of state court proceedings. Therefore, executive review is proper.

The 206 documents disclosed by the Chattanooga Police Department in 1997

provide ample support for Harbison's alibi defense and assertions of innocence at his 1983 trial. They show that contrary to the State's theory at trial, Ray Harrison, not E.J. Harbison, was involved in the crime. Harrison had a motive and admitted to his wife that he was in the victim's house at the time of the crime. Witnesses placed him across the street from the victim's house immediately before the time of the crime. The jacket Harrison wore at the time was missing and witnesses observed he was scared to death after the killing.

Police records show the only person who implicated Mr. Harbison in the crime, David Clarence Schreane, told another person that he was going to "pin the crime" on Mr. Harbison. Co-defendant Schreane initially told police another person, not Mr. Harbison, accompanied him at the crime scene. But Schreane later implicated Mr. Harbison out of jealousy and revenge and to deflect primary responsibility for the murder from himself. Schreane's strategy worked. Schreane admitted he killed the victim, received a sentence of 20 years and was released after 8 years. Schreane has since been convicted for another murder and is currently in federal prison serving a life sentence.

The police records support Mr. Harbison's coerced confession defense. Mr. Harbison, whose mental limitations made him particularly susceptible to police interrogation tactics, maintained the police obtained his confession using threats to arrest his girlfriend and place her children in foster care. The records show the police twice commented about the children of Mr. Harbison's girlfriend. The police noted the children appeared neglected because they were left alone.

The later-disclosed police records also reveal that Rodney Strong, Mr. Harbison's

attorney at the motion for new trial, imposition of sentence, and direct appeal, had a significant conflict of interest because he previously represented prime suspect, Ray Harrison, on the exact same crime. Strong did not use proof of Harrison's involvement to support the claim that trial counsel failed to adequately investigate Mr. Harbison's case. Nor did Strong use the proof of Harrison's involvement to support Mr. Harbison's innocence.

A federal circuit judge would have granted relief to Mr. Harbison based on this new evidence, but was outnumbered by a vote of 2-1. *Harbison v. Bell*, 408 F.3d 823, 846 (6th Cir. 2005) (Clay, J., dissenting). The other two judges said Mr. Harbison raised this evidence too late. Because one federal judge found the new evidence would have made a difference in Mr. Harbison's trial it is likely that at least one juror out of twelve who judged the trial also would have found this information important enough to cast a vote of not-guilty.

The jury didn't have all of the information about this crime at the time it convicted Mr. Harbison. Therefore, it is appropriate for the Governor to review this information and issue a commutation.

3. WHEN THE JURY WAS FACED WITH CHOOSING WHETHER TO PUNISH MR. HARBISON WITH A LIFE SENTENCE OR WITH DEATH IT DID NOT HEAR EVIDENCE PROVING A LIFE SENTENCE WAS SUFFICIENT PUNISHMENT

A certificate of commutation should issue because justice is served by imposition of a life sentence. The tragedy present in all murder cases is the death of another person. When a jury returns a guilty verdict and a suspect is convicted of murder he is, at that point, held accountable for the death of another. The question of punishment

involves the moral culpability of the person convicted and what degree of sentence appropriately punishes the person. Here, no weapon was taken to the then-empty house where a burglary was to occur. There was no plan to kill the victim. Instead, she was hit over the head with a vase when, upon returning to her house, she interrupted the perpetrators during the burglary. The victim died within minutes.

The jury convicted Mr. Harbison of the killing. He was 23 years old. He had no criminal record. He has now spent more of his life isolated in a prison cell than was spent in the free world. While in the free world, Mr. Harbison worked with his father who was a handyman. He cared for his girlfriend's young children while she attended school and church.

Mr. Harbison entered the free world impoverished, starved of food, neglected and abused by his violent and alcoholic parents. Juvenile court records describe his home life as "horrible in all areas imaginable." The Harbison family lived in run down, dirty shacks without running water or electricity. The children wore ragged and dirty secondhand clothes that were given to them by their grandmother and others. As a child, Mr. Harbison's mother taught him and his siblings to scavenge for scrap metal and shoplift necessities, such as socks. Although his father was employed, he drank away his paycheck leaving the family without adequate food. Mr. Harbison and his siblings picked "poke" salad and mixed flour and water to make "milk." The Harbison children were constantly picked on by others because of their living conditions. The children grew up not understanding how times were so tough that they had to go without eating but there was always alcohol in the house for their parents to drink. All the siblings started drinking at an early age, in part to overcome hunger pains. They

replaced the alcohol they drank from their parents' plentiful supply with water. When their parents noticed the watered-down alcohol they would become enraged, not because the children were drinking, but because there was less alcohol for them to drink.

Their parents drank and fought viciously, injuring each other with irons, broken bottles, knives and even shooting each other. Court records describe the parents' pattern of "stealing, aggressiveness, murder and attempting to do bodily harm." Mr. Harbison and his siblings did not escape the wrath of drunken violence. Neighbors knew that yelling and screaming would be heard if they walked past the Harbison house, and they knew the Harbison children were beaten. Neighborhood children made up a song about the Harbisons, "Cathie shot Hobb in the bathroom window – bang, bang, bang!" Some of the worst injuries inflicted upon Mr. Harbison came from a power drill, gun fire and being set on fire. Mr. Harbison's sisters were subjected to sexual abuse. Neighbors heard about incest at the Harbison house. Their father watched the girls bathe and was said to have impregnated one sister.

School records describe Mr. Harbison as a quiet, well-behaved and withdrawn child. He was excessively timid, insecure and described as "emotionally out of it." The school found him to be borderline mentally retarded, slow in all subject areas and recommended that he be placed in "educably mentally retarded" classes.

Mr. Harbison witnessed his fourteen-year-old sister shoot her 26-day-old son and her 16-month-old daughter. His sister was placed in a mental institution where she hung herself. Mr. Harbison watched his other sister's mental health decompensate to the point where she received frequent treatments at a local mental health facility. He

was often left responsible for caring for this sister who is unable to care for herself. Mr. Harbison also watched as his brother committed crimes and spent increasing amounts of time in jail.

The psychological and emotional impairment as a result of his traumatic history and developmental history is profound. Mr. Harbison's mental impairments cause problems with interpersonal relations, making decisions and understanding the consequences of his actions. He appears his chronological age but experiences the world at the emotional intellectual equivalent of an adolescent. Mr. Harbison's impaired mental state reduces his moral culpability.

Despite his traumatic upbringing and resulting limitations, as a young adult, Mr. Harbison remained loyal to his family. He worked with his father. He cared for his mentally ill sister. He assumed a parental role with his girlfriend's children and cared for them. It was the brother of Mr. Harbison's girlfriend who pinned this crime on him.

The jury did not hear these facts weighing in favor of a life sentence. Mr. Harbison's counsel did not present this evidence. As a result, when this Court conducted its proportionality review on direct appeal it likewise did not have any of this evidence. Under these circumstances, a certificate for commutation should issue.

4. THIS CASE IS NOT ANY DIFFERENT FROM MOST OTHER MURDER CASES AND BECAUSE THE DEATH PENALTY IS RESERVED FOR THE WORST OF THE WORST MURDERERS IT IS EXCESSIVE

In this case, a certificate for commutation should issue because justice is served by imposition of a life sentence. This is a felony murder case where the only fact used to justify the death penalty was that the killing occurred during a burglary. There is nothing extraordinary about this case which legitimately separates it from other cases

and places it in the category of crimes worthy of the death penalty. There is nothing about Mr. Harbison that imposes a higher moral culpability upon him. There is nothing about Mr. Harbison that makes a punishment of life imprisonment unsuitable.

What is present in this case is a series of unacceptable errors and events which have resulted in the case being now placed before this Court with a request by the State for a date certain to execute Mr. Harbison. The police or the prosecution were inefficient, ineffective or worse when they failed for fourteen years to release evidence of Mr. Harbison's innocence. Trial counsel failed to present evidence weighing in favor of a life sentence. Mr. Harbison's case is most likely the first and only case where a two-judge panel of the Court of Criminal Appeals issued a *per curiam* decision and one of the first cases where this Court did not allow a discretionary appeal. When Mr. Harbison attempted to show the courts the newly released evidence of his innocence, and another person's guilt, he was told it was too late. At each stage of the case, from the prosecutor's decision to seek the death penalty to the court's unwillingness to consider the very evidence which Mr. Harbison sought to present at trial but which was withheld from him, the system has not worked justice.

When Mr. Harbison's case was reviewed by this Court in 1986, Chief Justice Brock entered a dissent with respect to the death penalty.² Chief Justice Brock warned that "[t]he utter finality of the death penalty may cruelly frustrate the cause of justice" because:

[o]nce the prisoner has been put to death by the state there can be no

²*State v. Harbison*, 704 S.W.2d 314, 320 (Tenn. 1986) *relying upon State v. Dicks*, 615 S.W.2d 126, 132 (Tenn. 1981) (Brock, C.J., *dissenting opinion*)

relief granted although later developments in the evidence of the case ... may show, conclusively, that the penalty was mistakenly inflicted.³

This warning rings true in Mr. Harbison's case. The saving grace is that evidence showing the penalty was mistakenly imposed has come to light before the day of "finality of death" has been determined. Tragically, the courts have told Mr. Harbison it is too late to consider the evidence.

Chief Justice Brock also dissented from the death penalty in Mr. Harbison's case because it was imposed arbitrarily and not imposed upon only the worst offenders.⁴ This case is a prime example. Mr. Harbison had no criminal history, the killing was not planned, a weapon was not brought to the scene and the co-defendant with a lengthy history of violent crimes received a sentence of 20 years. Mr. Harbison suffered a horrendous upbringing and unspeakable acts of brutality by his family members which permanently impaired his mental abilities. Yet, he remained a loyal, faithful and responsible son and brother. Although it cannot be said that Mr. Harbison is one of the worst offenders, the worst punishment has been imposed upon him.

Throughout the years, two justices have found the death sentence inappropriate for Mr. Harbison.⁵ Two additional judges had enough doubt about this case as to refuse to accept authorship of the court opinion or officially publish the opinion affirming the

³*Dicks*, 615 S.W.2d at 136.

⁴*Id.* at 139-40.

⁵*Harbison v. State*, 408 F.3d 823, 846 (6th Cir. 2005) (Clay, J., *dissenting*); *State v. Harbison*, 704 S.W.2d 314, 320 (Tenn. 1986) (Brock, C.J., *dissenting*)

death sentence.⁶ Clearly, the courts are troubled by this case but have felt constrained from righting the wrongs. This is a case for an exercise of executive mercy.

For all these reasons, the State's motion should be denied and a certificate for commutation is appropriate.

5. REQUEST FOR APPOINTMENT OF COUNSEL

Should this Court decide to schedule a date for Mr. Harbison's execution he requests the appointment of counsel to represent him in his request for clemency before the Board of Probation and Parole and the Governor proceedings which may be had. Mr. Harbison has been an indigent prisoner since 1983 and is without the means to secure counsel of his own.⁷ Mr. Harbison requires the assistance of counsel for future proceedings, including counsel to witness the execution, should it occur.⁸

Furthermore, should this Court decide to schedule a date for Mr. Harbison's execution, it is requested that the scheduling of that date provide adequate time for new counsel to familiarize himself with Mr. Harbison and the case and to investigate and research any remedies remaining open to Mr. Harbison.

WHEREFORE, it is respectfully requested that (1) the State's motion to set an execution date be denied, and (2) the Court issue a certificate for commutation. In the

⁶*Harbison v. State*, 1996 Tenn.Crim.App. LEXIS 307

⁷Undersigned counsel represents Mr. Harbison in the pending federal proceeding. Counsel was served via U.S. Mail on June 15, 2006 with the State's motion to set Mr. Harbison's execution date. This left eight days for Mr. Harbison to meet the ten-day deadline to provide this Court with a response. Undersigned counsel therefore submits this response on Mr. Harbison's behalf.

⁸See TENN. CODE ANN. § 40-23-166.

alternative, it is requested that this Court appoint counsel to represent Mr. Harbison in any further state proceedings and provide counsel adequate time to fulfill the obligations such representation entails.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

By: _____

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Pursuant to TENN.S.CT.R. 12.4(B), I further certify that I prefer to be notified by telephone of orders or opinions or the Court.

CERTIFICATE OF SERVICE

I, Dana C. Hansen Chavis, hereby certify that a true and correct copy of the foregoing was sent via FED-EX to Gordon W. Smith, Associate Solicitor General, Office of the Attorney General, 425 Fifth Avenue North, Nashville, TN 37243, and via facsimile on this the 21st day of June, 2006.

Dana C. Hansen Chavis