

FILED
AUG 09 2010
Clerk of the Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: * KNOX COUNTY
*
BILLY RAY IRICK * SUPREME COURT NO. 180
*
* DEATH PENALTY

**MOTION TO RECONSIDER DENIAL OF MOTION TO VACATE EXECUTION
OR, IN THE ALTERNATIVE, TO RESCHEDULE COMPETENCY HEARING SET
FOR AUGUST 16, 2010**

Comes the defendant, and respectfully urges this court to reconsider its denial of his motion to vacate his execution. In the alternative, he moves this court, pursuant to Tenn.S.Ct.R. 12.4(a) and Van Tran v. State, 6 S.W.3d 257, 267 (Tenn. 1999), to pass indefinitely the competency hearing currently set to begin on Monday, August 16, 2010 in the Knox County Criminal Court, Division I, and/or to set a new scheduling order.

In its previous order of August 4, 2010, this court stated that requests for stays of execution to allow for ongoing federal proceedings should be filed with the relevant federal court. However, there has been a change of circumstances in that the United States District Court for the Eastern District of Tennessee issued a Memorandum and Order on August 6, 2010 reopening defendant's first *habeas corpus* proceedings. (See Exhibit 1). Furthermore, this court may pass or reschedule the competency hearing without necessarily entering a stay of petitioner's execution. The basis for seeking to pass or reschedule the competency hearing is the necessity of avoiding an unnecessary hearing which, if held as currently scheduled, will not be proximate to an imminent execution date because of the ongoing *habeas* proceedings which include opportunities to obtain a certificate of appealability to the Sixth Circuit Court of Appeals and application of writ of *certiorari* to the United

States Supreme Court in the event of adverse rulings. Defendant further states that passing the competency hearing will not be prejudicial to the state in light of the above.

BRIEF PROCEDURAL HISTORY

On May 10, 2010, the state of Tennessee filed a motion to set defendant's execution. On May 27, 2010, defendant filed his response opposing his execution and raising competency to be executed as a defense. On July 19, 2010, this court set an execution date of December 7, 2010. In addition, this court remanded the issue of competency to the trial court in Knox County. On July 22, 2010, defendant moved to vacate his execution date based on the imminent reopening of his federal *habeas* case in the Eastern District of Tennessee based on the Sixth Circuit's remand of petitioner's Rule 60(b) motion to the district court. On July 30, 2010, the Criminal Court for Knox County granted a hearing on the competency issue and set a hearing date of Monday, August 16, 2010. On August 4, 2010, this court denied defendant's motion to vacate. On August 6, 2010, the federal district court reopened defendant's federal *habeas* proceedings.

DISCUSSION

By granting defendant's Fed.R.Civ.P. 60(b) motion, the federal district court has reopened his *habeas* proceeding. All orders entered in that proceeding have today the same effect as they did when the district court entered them, including the district court's order staying defendant's execution. (Exhibit 2, p. 2). The district court's stay order provides that it remains in effect "pending resolution of any petition filed by Petitioner...." As a result of the district court's order granting Irick's Rule 60(b) motion, his *habeas* proceeding is once again pending, and the district court's stay order is once again in effect. Federal law renders void any state actions moving an execution forward when, as here, a federal stay is in effect. See 28 U.S.C. §2251(b). Thus, this court must rescind its order setting Irick's

execution and retract its orders setting proceedings related to that date. In addition, and in support thereof, petitioner argues that Article I, Section 6 and Article XI, Section 8. of the Tennessee Constitution guarantee his rights to have the benefits of Tenn.S.Ct.Rule 12.4 applied to him - that is, to complete the three-tiered process before an execution date is set.

With the federal court having reopened his federal *habeas* case, it is now clear that federal *habeas* proceedings will continue for some indefinite period of time. As set out in the district court's order, defendant has until Friday, August 20, 2010 in which to file his amended motion for relief from judgment and supporting memorandum. The state of Tennessee will have until Friday, September 10, 2010 in which to reply. Additionally, defendant has the opportunity to file a reply on or before Friday, September 24, 2010. (See Exhibit 1, p. 6). Even should the federal district court deny defendant relief, defendant will have a right to seek an appeal and/or a certificate of appealability with the Sixth Circuit Court of Appeals. Thompson v. Bell, 580 F.3d 423, 433 (6th Cir. 2009) and 28 U.S.C. §2253(c).

Therefore, petitioner may yet obtain relief through his federal *habeas* proceedings and, therefore, any competency hearing should be suspended until such time as his federal *habeas* proceedings, including any appeal or application for *certiorari*, have been concluded. See Van Tran v. State, 6 S.W.3d at 267.

Therefore, under the current circumstances, the competency hearing scheduled for August 16, 2010 will be for naught and will result in a waste of precious time and resources and will also prejudice the defendant, should he seek to have a competency hearing closer in time to any execution date. On the other hand, even if the execution date remains December 7, 2010, a delay of six to eight weeks will not cause prejudice to any party.

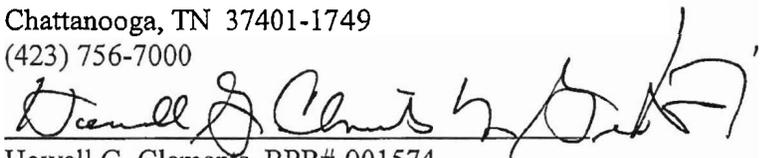
CONCLUSION

Petitioner asserts that he is entitled to have his execution date vacated for the reasons stated above and believes that it would be the best procedure for rescheduling, if necessary, a competency hearing. Nevertheless, should this Honorable court choose not to vacate his execution date, then petitioner would request that this court simply pass and/or reschedule the competency hearing for a later date to give the federal *habeas* proceedings time to resolve.

SPEARS, MOORE, REBMAN & WILLIAMS

By: 

C. Eugene Shiles, Jr., BPR #011678
P. O. Box 1749
Chattanooga, TN 37401-1749
(423) 756-7000


Howell G. Clements, BPR# 001574
1010 Market Street, Suite 404
Chattanooga, TN 37402
(423) 757-5003

Attorneys for Petitioner

CERTIFICATE OF SERVICE

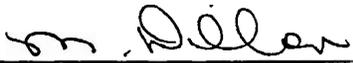
The undersigned hereby certifies that a true and exact copy of this pleading has been served on counsel for all parties at interest in this cause via facsimile or U.S. Mail addressed as follows:

615/532-7791
James E. Gaylord
Assistant Attorney General
P.O. Box 20207
Nashville, TN 37202

865-215-4253
Randall Eugene Nichols
District Attorney General
400 Main St. Suite 168
P.O. Box 1468
Knoxville, TN 37901-1468

This 9th day of August, 2010.

SPEARS, MOORE, REBMAN & WILLIAMS

By: 

EXHIBIT

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felony murder aggravating circumstance claim on federal constitutional grounds; (2) flight instruction claim; (3) prejudice or sympathy instruction; and (4) section (l) and (m) of his *Brady* claim, with the exception of that portion of item (l) addressing Ms. Jeffers's statement about Petitioner's intoxication and that portion of item (m) addressing Mr. Jeffers's suspicion Petitioner was having an affair with Ms. Jeffers (Court File No. 146). In addition, the Court concluded Petitioner's claims that trial counsel had failed to investigate and present evidence and failed to present a mental health defense were procedurally defaulted during his state post-conviction proceedings because Petitioner had submitted these two claims to the Supreme Court of Tennessee but not to the Court of Criminal Appeals of Tennessee. Petitioner disagreed with the disposition of his habeas petition and appealed to the Sixth Circuit (Court File Nos. 154, 155).

Almost three months after the Court denied Petitioner's federal habeas petition, the Tennessee Supreme Court promulgated Rule 39 of the Rules of the Supreme Court of Tennessee, which provides:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

On November 20, 2001, while the appeal of his federal habeas petition was pending, Petitioner filed a Rule 60(b) motion, relying on Tennessee Supreme Court Rule 39, seeking to set aside the Court's dismissal of those claims found to have been procedurally defaulted either because

he failed to raise them in the state supreme court or because he raised them in the highest state court but failed to present them first to the state appellate court (Court File No. 159). Specifically, Petitioner asserted that, under Rule 39, all state remedies have been exhausted with respect to a claim which had been offered either to the Court of Criminal Appeals of Tennessee or the Supreme Court of Tennessee and relief has been denied. Thus, Petitioner insisted he was due a review on the merits of the above described claims because, under Rule 39, those claims were exhausted, not procedurally defaulted. The Court transferred the Rule 60(b) motion, under then-applicable law, to the Sixth Circuit (Court File No. 163). Thereafter, Petitioner filed, in the Sixth Circuit, a motion for a second or successive federal habeas petition in support of his transferred Rule 60(b) motion.

On July 1, 2002, the Sixth Circuit held both the Rule 60(b) motion and the original appeal of Petitioner's habeas case in abeyance. On April 3, 2006, the original appeal was removed from abeyance and a final judgment was issued on May 12, 2009. During that time, *In re Abdur' Rahman*, No. 02-6547/6548 (6th Cir. filed Jan. 18, 2008), was decided. The Sixth Circuit concluded that with those "two obstacles removed[,] the Rule 60(b) motion was ripe for review (Court File No. 193). The Sixth Circuit, citing to *Gonzalez v. Crosby*, 545 U.S. 524 (2005) and noting *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) is no longer applicable, concluded the district court is no longer required to transfer the Rule 60(b) motion and may proceed to rule on the motion in the first instance (Court File No. 193). Accordingly, the Sixth Circuit removed the motion for leave to file a second or successive habeas corpus petition from abeyance, denied it as unnecessary, and remanded the case to this Court to rule on the Rule 60(b) motion. The day before the Court received the remand, Petitioner filed a motion requesting the Court to grant his Rule 60(b) motion and reopen

the habeas proceedings, permit him to amend his Rule 60(b) motion, and permit time for briefing (Court File No. 192).

II. Analysis

The Sixth Circuit has concluded Rule 39 of the Tennessee Supreme Court Rules has made Tennessee Supreme Court review an unnecessary requirement for federal habeas review and that it operates retroactively. *Adams v. Holland*, 330 F.3d398, 403 (6th Cir. 2003). In *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009), *cert. pet. filed*, 78 U.S.L.W. 3689 (U.S. May 10, 2010) (No. 09-1373), the Sixth Circuit concluded a habeas petitioner, who filed a Rule 60(b) motion more than four years after the promulgation of Rule 39, was entitled to re-open his original habeas petition pursuant to Rule 60(b) on the basis of the subsequent enactment of Rule 39 of the Tennessee Supreme Court Rules because he filed the Rule 60(b) motion less than two months after the court issued the mandate in his habeas case, which he had been actively appealing until that time.

The Sixth Circuit has not concluded, however, as argued by Petitioner, that Rule 39 deems a claim exhausted if such claim is omitted from an appeal to the Tennessee Court of Criminal Appeals but subsequently raised Tennessee Supreme Court.¹ Although the second sentence in Rule 39 states, “when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim[.]” the Sixth Circuit, in an unpublished order, concluded Rule 39

¹ The Court observes that at the time of Petitioner’s conviction, the Tennessee statutory scheme provided for an automatic appeal on all death sentences from the trial court directly to the Tennessee Supreme Court. However, the ineffective assistance of counsel claims the Court dismissed as procedurally defaulted were claims Petitioner raised for the first time in the Tennessee Supreme Court after omitting them from appellate review when he appealed the denial of his state post-conviction petition in the Tennessee Court of Criminal Appeals.

has not overturned the Supreme Court's holding in *Castille v. Peoples*, 489 U.S. 346, 351 (1989), which held "that raising a claim for the first time in a petition for review to a state's highest court, where the merits will not be considered absent special circumstances, is insufficient to exhaust state court remedies." *Shabazz v. Mills*, No. 03-6604 (6th Cir. Nov. 3, 2005) (Court File No. 55 in Civil Case Number 2:01-cv-74 (E.D. Tenn. 2003).

Therefore, based on Sixth Circuit law and the chronology of events in this case (i.e., filing of the Rule 60(b) motion based on Rule 39 within five months of its promulgation and while his habeas petition was pending on appeal), Petitioner's Rule 60(b) motion and his motion to reopen his habeas proceedings, amend his Rule 60(b) motion, and set a briefing schedule are **GRANTED IN PART and DENIED IN PART** (Court File Nos. 159, 192).

Petitioner's Rule 60(b) motion and motion to amend is Rule 60 (b) motion are **GRANTED** to the extent that the Court will consider only those claims Petitioner has identified in these two motions which were dismissed on the basis of procedural default for his failure to raise them in the Supreme Court of Tennessee (Court File Nos. 159, 192). The Rule 60(b) motion is **DENIED** as to the two claims that were not raised in the Court of Criminal Appeals of Tennessee, but rather, were raised for the first time in the Supreme Court of Tennessee (i.e., claims that counsel was ineffective for failing to investigate and present evidence, and failing to present a mental health defense) (Court File No. 159).

Thus, Petitioner's motion to amend his Rule 60(b) motion and grant his Rule 60(b) motion and reopen his habeas proceedings is **GRANTED** to the extent the Court will consider the specific claims relating to the felony murder aggravating circumstance; flight instruction; prejudice or sympathy instruction; and that portion of sections (l) and (m) of the *Brady* claims that were deemed

procedurally defaulted (Court File No. 192). Accordingly, Petitioner **SHALL** file his Amended Motion for Relief for Judgement and Supporting Memorandum of Law on or before **Friday, August 20, 2010.**²

Petitioner's motion requesting additional time to submit briefs is **GRANTED** (Court File No. 192). Petitioner **SHALL** file a supplemental brief regarding the felony murder aggravating circumstance claim; flight instruction claim; prejudice or sympathy instruction claim; and those portions of section (l) and (m) of the *Brady* claim dismissed as procedurally defaulted on or before **Friday, August 20, 2010**. Respondent **SHALL** file any response on or before **Friday, September 10, 2010**. Petitioner **SHALL** file any reply on or before **Friday, September 24, 2010** (Court File No. 192).

SO ORDERED.

ENTERED:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

² Petitioner's proposed amended Rule 60(b) motion and brief has only been filed as an exhibit to his motion (Court File No. 192).

EXHIBIT

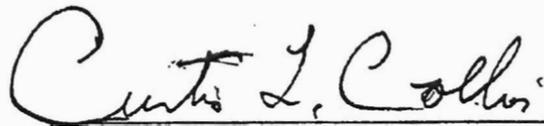
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An initial conference will be held in this case on **Friday, January 22, 1999 at 3:00 p.m.** before the United States District Judge, Room 104 U.S. Courthouse, 900 Georgia Avenue, Chattanooga, Tennessee.

The stay of execution is **EXTENDED** to **Monday, January 25, 1999**. The 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**. Failure to file a petition on or before **Monday, January 25, 1999**, will result in dismissal of Petitioner's case pursuant to FED. R. CIV. P. 41(b). See *Cone v. Bell*, 956 F. Supp. 1401, 1403 (W.D. Tenn. 1997).

SO ORDERED.

ENTER:



CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

janice.rawls@tncourts.gov
Janice Rawls
Office of the Clerk
Tennessee Supreme Court
Supreme Court Building
401 Seventh Ave. North
Nashville, TN 37219-1407

Re: Billy R. Irick - DEATH PENALTY CASE
Supreme Court No. 180

Attached for filing is petitioner's motion to reconsider denial of motion to vacate execution or, in the alternative, to reschedule competency hearing set for August 16, 2010.

C. Eugene Shiles
SPEARS, MOORE, REBMAN & WILLIAMS, PC
ces@smrw.com

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