

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. EDWARD JEROME HARBISON

No. M1986-00093-SC-OT-DD - Filed: September 25, 2007

WILLIAM C. KOCH, JR., J., dissenting.

The State of Tennessee has requested this Court to vacate its May 22, 2007 order setting Edward Jerome Harbison's execution for September 26, 2007. As grounds for this motion, the State asserts that the Commissioner of Correction has stated that "additional time is needed to determine what course of action the Department will take in response to the injunction in *Harbison v. Little*" and that because of that injunction, "the Department will not be in a position to go forward with the execution of Mr. Harbison on September 26, 2007." Mr. Harbison, through his attorneys, has responded that he has no objection to the State's motion.

The Court has carefully considered the State's motion and has decided to delay Mr. Harbison's execution for a third time. I respectfully disagree with the Court's decision because I have concluded that the State has presented an insufficient factual and legal basis to support its request.

The General Assembly of Tennessee foresaw this precise circumstance in 1998¹ and again in 2000² when it determined that if execution by lethal injection was found to be unconstitutional for any reason, execution by electrocution would remain in full force and effect. Thus, Tenn. Code Ann. § 40-23-114(d) (2006) states: "In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution." The import of this sentence is unavoidable. If execution by lethal injection is declared unconstitutional, the execution may proceed by electrocution. The United States District Court for the Middle District of Tennessee recognized this conclusion when it declined to grant a stay of execution in *Harbison v. Little*.

The State is not without remedy in this case. Notwithstanding Tenn. Code Ann. § 40-23-114(d), the Governor of Tennessee may grant a temporary reprieve to allow the State time to determine the course of action it should take. Tenn. Const. art. III, § 6; Tenn. Code Ann. § 40-

¹ See Act of Apr. 29, 1998, ch. 982 § 4, 1998 Tenn. Pub. Acts 757.

² See Act of Mar. 29, 2000, ch. 614, § 5, 2000 Tenn. Pub. Acts 1854.

27-101 (2006). However, we judges must adhere to the otherwise valid statutes passed by the General Assembly. While postponing the execution date might be appropriate to enable the parties to address the application of Tenn. Code Ann. § 40-23-114(d), not requiring the parties to address Tenn. Code Ann. § 40-23-114(d)'s application to this case does a disservice to the General Assembly.

WILLIAM C. KOCH, JR., J.