

IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE

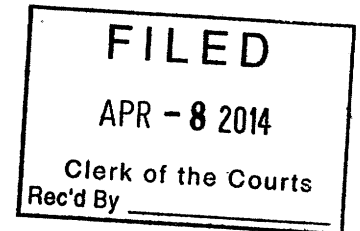
**DONALD WAYNE STROUTH v. STATE OF TENNESSEE**

Circuit Court Court for Sullivan County  
No. S35, 090, 12548K, 12572BL

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No. E1997-00348-SC-DDT-DD

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**ORDER**

On December 18, 2013, the State filed a Motion to Set Execution Date for Donald Strouth. The motion stated that Mr. Strouth had completed the standard three-tier appeals process and requested that pursuant to Tennessee Supreme Court Rule 12.4(A), this Court set an execution date.

On February 11, 2014, Mr. Strouth filed a Response in Opposition to Motion to Set Execution Date and Motion for Certificate of Commutation. The response alleged that: (1) this Court has never conducted the statutorily mandated proportionality review of his capital sentence; (2) his capital sentence is arbitrary and capricious because he suffers from severe brain damage and mental illness; (3) his capital sentence is arbitrary and capricious because Tennessee courts have vacated death sentences in cases similar to his; (4) his capital sentence is arbitrary and capricious because this Court's post-conviction determination that the jury would have imposed the death sentence based on the single (i)(5) aggravating circumstance did not consider his cognitive impairments and relied on evidence in aggravation that was unlawfully admitted at the sentencing phase of trial; (5) his capital sentence is arbitrary and capricious because developments in the law since his case came to this Court on direct appeal and post-conviction warrant have improved the due process accorded capital defendants and he should benefit from those developments; (6) there is a Federal Rule of Civil Procedure 60(b) motion pending in the federal courts; and (7) there is an ongoing challenge in state court to the Department of Correction's newly adopted one-drug lethal injection protocol. Mr. Strouth also requested that this Court issue a certificate of commutation to the Governor.

On March 24, 2014, at the Court's request, the State filed a Reply addressing Mr. Strouth's Issues 1 & 2. On April 2, 2014, Mr. Strouth filed a "Surreply" in response to the

State's Reply.

Mr. Strouth asserts that the Court failed on direct appeal to address the statutorily mandated proportionality review. The appellate record, however, contains a "Report of Trial Judge: Capital Cases," filed under then Supreme Court Rule 47 (now Rule 12), file stamped as received by the Clerk of the Supreme Court on January 19, 1979, and which was included as a part of the technical record considered by the Court. Furthermore, while the practice of the Court at the time was to not engage in an express analysis of comparative proportionality in its opinions, it did specifically reference its consideration of the mandatory review provisions in its opinion on direct appeal. *See State v. Strouth*, 620 S.W.2d 467, 470 (Tenn. 1981), *cert. denied*, 455 U.S. 983 (1982). After review of the record and the opinion on direct appeal, it is apparent that the Court engaged in the statutory review mandated by Tenn. Code Ann. § 39-2406 (1978 Supp.), including a comparative proportionality review, and determined that under the facts of this case, Mr. Strouth's sentence was neither arbitrary nor capricious.

Mr. Strouth raises belated claims of mental illness and brain damage, and complains about his inability to pursue such claims in his post-conviction petition to show ineffective assistance of counsel during the penalty phase of his trial. We note that the expert witness for which funding was sought at the post-conviction hearing was requested for the purpose of showing that the pretrial mental evaluation was "insufficient"—a fact that went only to his competency to stand trial and/or sanity at the time of the offense. There was no offer of proof submitted to show what an evaluation deemed "sufficient" might have turned up in the way of mitigation that could have affected the outcome of the sentencing hearing. Mr. Strouth thus failed to show that at the time of trial, his mental health was likely to have been a significant factor in his defense under the precepts of *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985). Accordingly, he was not prejudiced by trial counsel's failure to pursue such evidence. We agree with the statement made by the United States Court of Appeals for the Sixth Circuit that "recent mental evaluations offer little insight into Strouth's state of mind twenty-five-plus years ago." *Strouth v. Colson*, 680 F.3d 596, 603 (6<sup>th</sup> Cir. 2012).

Mr. Strouth asserts that this Court should delay setting an execution date until pending federal litigation is concluded. In the past, this Court has found little merit in arguments that an execution date should not be set because of ongoing federal litigation. Instead, the Court has consistently held that a request for a stay of execution pending litigation of claims in federal court is more appropriately addressed to the federal courts. *See Coe v. State*, 17 S.W.3d 251, 251 (Tenn. 2000).

Insofar as the pending declaratory judgment action, the Court notes the complaint alleges that (1) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it creates a risk of unnecessary pain when carried out in the manner

prescribed; (2) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it requires the use of compounded Pentobarbital from non-FDA-approved sources, and compounded Pentobarbital has the potential to be contaminated or sub-potent, presenting a substantial risk of pain and suffering when administered according to the protocol; (3) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it fails to provide for the adequate qualification and training of personnel, presenting the substantial risk of unnecessary pain and suffering during the execution process; (4) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it fails to conform to those accepted medical practices necessary to minimize the known risks involved in execution by lethal injection, presenting a substantial risk of unnecessary pain and suffering; (5) the new lethal injection protocol violates Article VI, section 2 of the United States Constitution and Article 1, section 8 of the Tennessee Constitution (the federal and state supremacy clauses) because its provisions violate various federal and state drug laws; and (6) the secrecy provisions of Tennessee Code Annotated section 10-7-504(h)(1), which shield from disclosure the identity of persons or entities involved in the process of executing a sentence of death, violate Article VI of the United States Constitution, the First and Fourteenth Amendments to the United States Constitution, Article 1, sections 8 and 17 of the Tennessee Constitution, and Article 2, section 2 of the Tennessee Constitution, because they deny death-sentenced inmates access to the courts, deny death-sentenced inmates due process, violate the federal and state supremacy clauses, and violate the constitutional provisions for separation of powers.

Previously, this Court has recognized that

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

State v. Stephen Michael West, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010) (Order). Mr. Strouth is correct that currently, there is no controlling law in Tennessee on the constitutionality of the use of the single drug, Pentobarbital, to execute a death row inmate, or on the legality of using compounded drugs from a non-FDA approved source to do so. Accordingly, the Court will set Mr. Strouth's execution for a future date that will allow plenty of time for resolution of the declaratory judgment action in the state courts.

Having considered the Motion to Set Execution Date, the Response, the State's Reply, and the "Surreply," this Court finds that Mr. Strouth has presented no legal basis for denying the State's Motion to Set Execution Date. Therefore, the State's Motion is GRANTED. Mr. Strouth has failed to allege sufficient extenuating circumstances that would merit a certificate of commutation. Accordingly, Mr. Strouth's request for a certificate of commutation is DENIED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the 15th day of March, 2016, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. Strouth 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