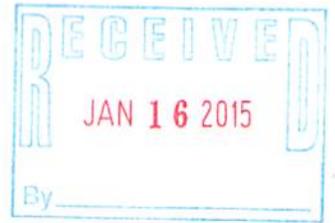


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: RULE 12, SECTION 4

No. ADM2014-02063



COMMENT OF THE OFFICE OF THE POST-CONVICTION DEFENDER

The Office of the Post-Conviction Defender (“OPCD”) files these comments in respect to the above matter.

INTRODUCTION

The OPCD serves as the presumptive legal counsel in post-conviction and other state collateral proceedings for all indigent Tennessee inmates under a sentence of death. Our mission is to provide timely and high-quality legal representation, making sure that each client’s case complies with federal and state constitutional mandates, as well as national capital litigation standards.

COMMENT

The proposed amendments to Rule 12, Section 4 create a substantial risk of unjust and unwarranted executions because they deny inmates the opportunity to present evidence relevant to collateral claims for relief. Determining whether an inmate should receive a stay of execution without the benefit of a fully-developed record would not meet the heightened standards of due process applicable in capital cases. Accordingly, the OPCD submits this comment in opposition.

The proposed amendments to Rule 12, Section 4 would prohibit this Court from denying the State's motion to set an execution date or granting a stay of execution after the completion of the standard three-tier appeals process, unless collateral litigation is pending in state court and an inmate can show that it has a significant possibility of success.¹ Various avenues of relief would be prejudicially curtailed by the proposed amendments, including: 1) a petition for a writ of error *coram nobis*; 2) a motion to reopen post-conviction proceedings; 3) collateral challenges related to the sole aggravator in a capital case; 4) a petition to request forensic DNA analysis of evidence; and, 5) constitutional challenges to the method of execution. All of these proceedings involve new evidence not previously presented during the post-conviction or federal habeas litigation and could very well result in a finding which classifies the inmate as ineligible to be executed, deserving of a new trial, or actually innocent.

However, if the State decides to request an execution date in the midst of such litigation, the inmate would be required to immediately prove to this Court a significant possibility of success in the court below. The result would be the same if the inmate already has a scheduled execution date, but subsequently files a collateral action. In both situations, the inmate would be forced to prove his case to this Court without the opportunity to first fully present the very evidence which supports it in the court below.

¹ The amendment also prohibits a stay of execution based on pending federal court litigation; however, the present comment addresses only the portion dealing with state collateral proceedings.

In addition to not being able to develop the relevant evidence in the original court, the inmate could not introduce it in this Court. Because this Court has appellate jurisdiction only, it cannot consider matters outside of the record created during the proceedings below. Tenn. Const. Art. VI, §2. As no record would exist until the collateral litigation is complete, this Court could not consider all the evidence supporting the collateral claims and thus adequately judge the possibility of their success. In essence, the inmate would be placed in a procedural catch-22 of having to meet the high standard of significant possibility of success, but without being allowed to present the evidence supporting it.

Such a result simply cannot comport with Tennessee's commitment to heightened due process in capital cases. The Tennessee Supreme Court has long recognized that "a sentence of death is final, irrevocable, and 'qualitatively different' than any other form or level of punishment." *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn. 2001). It is this acknowledgment of the "gravity of the ultimate penalty in capital cases," that necessitates an application of a heightened standard of due process in litigation relative to a death sentence. *Smith v. State*, 357 S.W.3d 322, 346 (Tenn. 2011) (citing *State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994)); *see also State v. Terry*, 813 S.W.2d 420, 425 (Tenn. 1991) ("Now it is settled law that the penalty of death is qualitatively different from any other sentence, and that *this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed*") (emphasis in original) (internal quotation marks and citations omitted). Requiring an inmate to show a significant

possibility of success of a collateral matter, without allowing him to first fully develop the evidence in support, does not meet this standard.

In addition, the significant possibility of success standard is unnecessarily stringent. It appears to parallel the standard used by federal courts when addressing motions for a stay of execution once the original habeas proceedings are complete. *See, e.g., Hill v. McDonough*, 547 U.S. 573 (2006). However, the burden of proof in this test is borne of the federal courts' deference to "the State's strong interest in enforcing its criminal judgments without undue influence from the federal courts." *Hill*, 547 U.S. at 574, citing *Nelson v. Campbell*, 541 U.S. 637 (2004). Federalism concerns are absent in state court litigation. Thus, there is no need to employ such a strict standard since the burden of proof should reflect the importance of a particular decision and a "judgment about how the risk of error should be distributed between the litigants." *See Santosky v. Kramer*, 455 U.S. 745, 755 (1982).² The focus should be on making sure all relevant evidence is considered by Tennessee courts prior to allowing an execution to take place.

In *State v. Workman*, 41 S.W.3d 100 (Tenn. 2001), this Court granted a stay of execution pending adjudication of a petition for writ of error coram nobis which had been denied by the lower courts. As this Court emphasized in *Workman*, the condemned man's ability to have collateral claims adjudicated on the merits outweighed the State's interests in executing the death sentence:

² In a capital case, "the State proposes to take drastic action against an individual." *See Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996). An erroneous execution can never be cured. A temporarily delayed execution can.

The private interest involved here is the petitioner's opportunity to have a hearing on the grounds of newly discovered evidence which may have resulted in a different verdict if heard by the jury at trial. If the procedural time bar is applied, Workman will be put to death without being given any opportunity to have the merits of his claim evaluated by a court of this State.

....

Workman's interest in obtaining a hearing to present newly discovered evidence that may establish actual innocence of a capital offense far outweighs any governmental interest in preventing the litigation [of] stale claims.

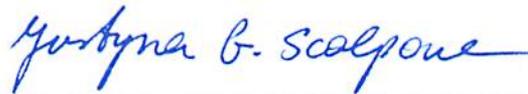
41 S.W.3d at 103. This Court has also upheld these principles in the context of collateral litigation involving the method of execution. *See State v. Stephen Michael West*, No. M1987-130-S-DPE-DD (Tenn. Nov. 29, 2010) (Order), at 3:

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.

See also State v. Stephen Michael West, No. M1987-00130-SC-DPE-DD (Tenn. Nov. 26, 2014) (Order); *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn. October 22, 2014) (Order); *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Sept. 25, 2014) (Order); *Donald Wayne Strouth v. State*, No. E1997-00348-SC-DDT-DD (Tenn. April 8, 2014) (Order); *Stephen Michael West v. Ray*, No. M2010-02275-SC-R11-CV (Tenn. Nov. 6, 2010) (Order), at p. 2 ("Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing.").

The OPCD submits that the Court's current approach best reflects our justice system's commitment to fundamental fairness and due process. The Court should continue to honor the critical need to develop and adjudicate collateral claims in an adversarial setting rather than making life and death decisions in the absence of tested evidence. This Court should reject the proposed amendments, which call for conjecture rather than certainty in the execution of death sentences.

Respectfully submitted,



JUSTYNA G. SCALPONE, BPR #30992
Post-Conviction Defender
Office of the Post-Conviction Defender
P. O. Box 198068
Nashville, Tennessee 37219-8068
(615) 741-9331 / FAX (615) 741-9430
scalponej@tnpcdo.net

JAN 14 2015

**FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INCORPORATED**

800 S. Gay Street, Suite 2400
Knoxville, Tennessee 37929-9714

Elizabeth B. Ford
Federal Community Defender

Telephone 865-637-7979
Fax 865-637-7999

January 12, 2015

James Hiver, Clerk
Re: Rule 12, Section 4
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

**COMMENTS BY FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC.
TO PROPOSED CHANGES TO TSC RULE 12.4. No. ADM2014-02063.**

Federal Defender Services of Eastern Tennessee, Inc., (FDSET), is a non-profit organization established under the Criminal Justice Act in 1992 to provide legal services to indigent criminal defendants. In 1997, FDSET began representing death row inmates with convictions from Eastern Tennessee. In FY2014, FDSET represented nineteen prisoners on Tennessee's death row.

FDSET's interest in the proposed changes to TSC Rule 12.4 arises from its representation of Tennessee death row inmates in what has been termed the third tier of the appellate process including execution. FDSET has seventeen years of experience with, and observation of, the legal process immediately preceding a Tennessee death row inmate's execution, including the operation of Rule 12.4.

FDSET opposes the proposed amendment to Rule 12.4 and offers the following comments regarding the proposed changes.

I. A rule change is not necessary

The current version of Rule 12.4 does not restrain the Tennessee Supreme Court's ability to control the scheduling of execution dates. Rule 12.4(A) indicates when a motion to set an execution date is ripe. No.

ADM2014-02063, Appendix ll.5-12. It allows a condemned prisoner ten days to respond with any and all reasons why a date should be delayed, not set, or why no execution should occur. No. ADM2014-02063, Appendix ll.13-16. The Court then determines whether and when to schedule an execution date.

The proposed amendment restricts the reasons a prisoner can proffer to delay or not set an execution date. It addresses circumstances where a condemned prisoner is in the process of litigating issues in court at the time the State requests an execution date under Rule 12.4. If the litigation is in federal court, the proposed amendment removes all discretion from the Tennessee Supreme Court to delay *setting* an execution date until the litigation is resolved. No. ADM2014-02063, Appendix ll.20-21. If the litigation is in state court, the Court's ability to delay *setting* an execution date is limited to one scenario: where the prisoner can prove a significant possibility of success on the merits in that litigation. No. ADM2014-02063, Appendix ll. 21-23.

A. The Tennessee Supreme Court has, without delay, scheduled execution dates when requested by the State.

In recent history, the State Attorney General has moved the Tennessee Supreme Court under Rule 12.4 to set execution dates for twenty-four death row inmates. In response, the Court scheduled dates for all twenty-four prisoners: from Robert Coe, who was executed in 2000, to the most recently scheduled execution date for Lee Hall.¹

Although within its discretion to do so, the Court has never denied nor delayed *setting* an execution date. This includes cases where litigation is pending in a state or federal court. With respect to the latter, the Court has found little merit to arguments that an execution date should not be set

¹ In the case of Philip Workman, the Tennessee Supreme Court remarked that even if the Court were to recommend that the Governor issue a commutation, there remained "no legal basis why an execution date should not be set." *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000). The Court also granted the State's motions to set execution dates for Paul House, who was later exonerated, and for three other condemned inmates who were thereafter granted clemency: Mika'eel Abdullah Abdus-Samad, Gaile Owens, and Edward Harbison.

because of ongoing federal litigation. *Coe v. State* 17 S.W.3d 251 (Tenn. 2000).

B. Even if a condemned prisoner has ongoing litigation, the Tennessee Supreme Court has scheduled execution dates when requested by the State.

When the State requests an execution date in a case despite the existence of pending litigation, the Tennessee Supreme Court's practice is to set an execution date and provide guidance for the lower courts to expediently resolve the case before the execution date.

For example, the Court has said that asserting the Eighth Amendment issue regarding incompetence for execution will not constitute grounds for denying a motion to set an execution date. *Van Tran v. State*, 6 S.W.3d 257, 267 (Tenn. 1999); *Coe v. State*, 17 S.W.3d 191, 192 (Tenn. 1999) (execution date set despite a competency claim pending in state & federal courts). Instead, the Court will schedule an execution date and set a time-frame for completion of the state court litigation. This same course of action has been applied where pending litigation involves DNA issues and Eighth Amendment method-of-execution issues. *See e.g., State v. Alley*, 2004 Tenn. LEXIS 1290 (Tenn. Jan. 16, 2004) (execution date set despite pending federal court action); *State v. Alley*, 2006 Tenn. LEXIS 683 (Tenn. June 2, 2006) (execution date re-set despite pending appeal in state court action); *West v. Schofield*, 380 S.W.3d 105, 109 (Tenn. Ct. App. 2012) (execution date set 21 days out and lower court directed to hold a hearing); *State v. Hutchison*, No. M1991-000180SC-DPE-DD (Tenn. Dec. 17, 2013) (execution date set and noting the lower court's litigation schedule).

Although the proposed amendment to Rule 12.4 might be seen as codification of the Court's past and present practices regarding setting execution dates, the Court's practices should instead dictate that the proposed amendment is not needed. Moreover, it would be inappropriate to classify the proposed amendment as a mere codification of practice. The proposed amendment implements a radical change by stripping the Court of discretion it has possessed since its inception. It will prevent the Court from acting in a manner consistent with equitable and due process principles, it will remove discretion of the Court to control its docket and will impede the Court's inherent supervisory authority over the lower courts.

II. The proposed amendment removes, but for a narrow exception, the Tennessee Supreme Court’s role in and discretion to stay or delay a scheduled execution date.

The proposed amendment removes all discretion from the Tennessee Supreme Court to *stay or delay* a scheduled execution date pending resolution of collateral litigation in federal court. No. ADM2014-02063, Appendix ll. 62-63. The proposed amendment further restricts the Court’s ability to *stay or delay* an execution date pending resolution of collateral litigation in state court to one scenario: where the prisoner can prove a significant possibility of success on the merits in that litigation. No. ADM2014-02063, Appendix ll. 63-66. Use of the language “will not” in the proposed amendment dispossesses the Court of any authority to fairly administer execution dates.

The proposed rule is out of line with the Court’s unwavering respect for due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I Section 8 of the Tennessee Constitution. The Court has declared 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.

State v. West, No. M1987-130-SC-DPE-DD, Order p. 3 (Tenn. Nov. 29, 2010)

In practice, the Court has enforced due process principles when determining whether to stay or delay a scheduled execution. The proposed amendment, however, would divest the Court of its role in protecting those principles.

A. The proposed amendment can result in a denial of due process and conflicts with the Court’s long-standing jurisprudence.

Due process under the state and federal constitutions requires that a prisoner be afforded a meaningful opportunity to present his claims. In *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992), the Court held that due process may prevent strict application of a procedural bar. This is so because

a prisoner's interest in vindicating his constitutional rights can outweigh the State of Tennessee's interests in finality. *Id.* at 209. *See also Sands v. State*, 903 S.W.2d 297 (Tenn. 1995) (elaborating upon *Burford's* due process principles and noting the diligent prisoner is entitled to have his claim properly heard); *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000) (due process violation where the prisoner's mental incompetence prevented timely presentation of his claim). "The importance of correctly resolving constitutional issues suggests that constitutional issues should rarely be foreclosed by procedural technicalities." *Van Tran v. State*, 66 S.W.3d 790, 799 (Tenn. 2001). "[F]undamental fairness dictates that" the prisoner have "the opportunity to litigate" his claim. *Id.* at 812.

"Circumstances beyond a [prisoner's] control" may prevent claims from being adjudicated in the standard three-tier review process. *Smith v. State*, 357 S.W.3d 322, 358 (Tenn. 2011). Yet, a diligent prisoner with a later-arising claim is entitled to the same due process as prisoners whose claims may be properly reviewed during the standard appellate process. *Smith, supra*. The proposed amendment to Rule 12.4 runs contrary to this settled precedent. It does not account for cases where a previously unavailable claim is timely brought forth after the completion of standard appellate review.

Consider, for example, a case where – the day after an execution date is scheduled – the condemned prisoner discovers previously unavailable physical evidence from the crime that could be subjected to scientific testing. The prisoner files a motion in state court to perform the testing and to have his conviction reviewed in light of the results. If the testing exonerates the prisoner, the evidence would be insufficient to uphold the conviction. Because the prisoner can show a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through such testing, the requested testing is ordered pursuant to Tenn. Code Ann. § 40-30-304. The testing procedure, however, requires more time to complete than remains before the prisoner's scheduled execution date. Under the proposed amendment to Rule 12.4, the prisoner cannot prove a significant possibility of success and the Court cannot stay or delay the execution date.

Next, consider a case where the condemned prisoner obtains a declaratory judgment that the State's method of execution constitutes cruel and unusual punishment. When the prisoner moves the Tennessee Supreme Court to vacate his impending execution date, the State responds by submitting a new execution protocol. Under the proposed amended rule, the

Court could not stay or delay the execution date to provide judicial review of the new change in execution method, as it did in 2010 when these exact circumstances occurred. See *State v. West*, No. M1987-130-SC-DPE-DD (Tenn. Nov. 29, 2010).

Other circumstances beyond prisoners' control, but in complete control of the Executive and Legislative Branches, have resulted in the litigation of Eighth Amendment claims during the pendency of execution dates. In September of 2013, the Tennessee Department of Corrections released another dramatically altered execution protocol; one that had previously been rejected by Tennessee's Protocol Committee. In October of 2013, the State of Tennessee took the unprecedented action of moving the Tennessee Supreme Court to set execution dates for ten death row inmates. Several months later, the Tennessee Legislature enacted legislation making Tennessee the only government in the world to permit involuntary execution by electrocution. Within weeks of the release of the new execution protocol, the condemned prisoners brought suit, raising significant constitutional challenges. Within weeks of enactment of the electrocution statute, the condemned prisoners challenged the same.

The proposed amendment to Rule 12.4 arguably imposes on these diligent prisoners a high burden of proof without a commensurately appropriate opportunity to develop the proof that would be required to obtain a delay in execution. Without doubt, the proposed amended rule removes discretion from the Court to enforce principles of constitutional adjudication and procedural fairness.

B. The proposed amendment removes the discretion of the Tennessee Supreme Court to act when the State agrees an execution date should be stayed or delayed.

Outgoing Attorney General Eric Holder recently remarked, "We have the greatest judicial system in the world, but at the end of the day it's made up of men and women making decisions, tough decisions."² Members of the

² Available at: <https://www.themarshallproject.org/2014/11/17/eric-holder-on-his-legacy-his-regrets-and-his-feelings-about-the-death-penalty>

Tennessee Attorney General's Office decide when to file a motion for an execution date under Rule 12.4. Sometimes, the State's attorneys decide that a scheduled execution date should be delayed.

Very recently, the State has not opposed the delay of three execution dates. In making this determination, the State noted the delay of a similarly situated prisoner's execution date and that the Tennessee Supreme Court had expedited judicial review of the State's appeal of a trial court order in pending litigation and had announced its intent to re-set execution dates at the conclusion of the State's appeal and establish an expedited schedule for the trial court litigation. *See e.g., State v. Zagorski*, M1996-00110-SC-DPE-DD, Response p.2 (Tenn. Oct. 20, 2014). Exercising its discretion, and in conformity with the law of the State and past practice, the Court has briefly delayed three execution dates.

Under the proposed amendment to Rule 12.4, faced with similar circumstances, the Court would not be able to stay or delay a scheduled execution – even if the State agreed it was a prudent course of action. Future circumstances cannot be foreseen, however, Tennessee's recent experience with executions has shown that there are circumstances which warrant the Court's exercise of discretion to stay or delay an execution.

Attorney General Holder's remarks, although made in a different context, illustrate why the Tennessee Supreme Court should retain its role and decision-making ability regarding execution dates.

When you're talking about the ultimate penalty, when you're talking about the state taking someone's life, there has to be a great deal of flexibility within the system to deal with things like deadlines. There is always a need for finality in the system, that is a good thing. But there has to be enough flexibility so that you can look at the substance of a claim, especially when the death penalty is at stake. If you rely on process to deny what could be a substantive claim, I worry about where that will lead us.

The Court should maintain its discretion to ensure flexibility in its administration of executions in this State. Accordingly, the proposed amendment to Tennessee Supreme Court Rule 12.4 should not be adopted.