

**FILED**

**MAR 09 2018**

Clerk of the Appellate Court  
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**IN THE SUPREME COURT OF TENNESSEE**

**AT NASHVILLE**

**STATE OF TENNESSEE,**

**Movant,**

**v.**

**DONNIE JOHNSON,**

**Defendant.**

**No. M1987-00072-SC-DPE-DD**

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**RESPONSE IN OPPOSITION TO  
MOTION OF TENNESSEE ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS AND INDIVIDUAL TENNESSEE ATTORNEYS  
FOR LEAVE TO FILE BRIEFS AMICUS CURIAE**

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The Tennessee Association of Criminal Defense Lawyers (TACDL) and individual Tennessee attorneys have moved for leave to file a brief amicus curiae in opposition to the State's pending motion to set execution dates in the above case. The Court should deny the motion because the proposed amicus brief provides no assistance to the Court in ruling on the motion before it and advances an incorrect legal standard for the stay or delay of executions.

The role of an amicus is to provide "timely and useful information" that will "assist the court in reaching the proper resolution of the issues it is being called upon to decide." *State ex rel. Com'r of Transp. V. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001) (citations omitted). *See also* Tenn. R. App. P. 31(a) ("A motion for leave [to file a

brief amicus curiae] shall identify the interest of the applicant and shall state how a brief of an amicus curiae will assist the appellate court.”).

But the process for setting an execution date after a death-sentenced inmate has completed the standard three-tier appeals process is outlined clearly in this Court’s own rules, and proper application of those rules requires no assistance from amici. When, as in this case, an execution date has passed by reason of a stay or reprieve, the Court “shall” set a new date for execution when that stay or reprieve is lifted or dissolved for a date not less than seven days from the date of the order. *See* Tenn. Sup. Ct. R. 12.4(E). Indeed, in *West v. Schofield*, 468 S.W.3d 482, 494 (Tenn. 2015), this Court reaffirmed its declared “intent sua sponte to schedule new execution dates” for this inmate upon final disposition of his then-pending challenge to the lethal injection protocol. Final disposition of that litigation has been achieved. *See* State’s Notice, filed January 11, 2018. Clearly, under the circumstances, proper application of Rule 12.4(E) requires no assistance from TACDL and a conglomeration of Tennessee attorneys as amici.

The proposed brief amicus curiae also advances an incorrect legal standard for the stay or delay of execution. Would-be amici urge this Court to delay the setting of an execution date to allow the defendant’s legal challenge to the State’s lethal injection protocol to proceed to a “full trial on the merits.” To do otherwise, they contend, would deprive the defendant of due process. It is not surprising that the movants cite no relevant authority for that proposition. They rely instead on a series of cases addressing procedural due process within the context of the Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 *et seq.* But even in the post-conviction context, this Court has recognized that defendants are held to “more stringent” and

“progressively higher standards” as they “proceed further along in the [post-conviction] process.” *Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004).

It is well established that the opportunity to collaterally attack constitutional violations occurring during the criminal conviction process is not a fundamental right that deserves heightened due process protection. *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000). And, the civil lawsuit now pending in the Davidson County Chancery Court is even more attenuated from the criminal process because it does not implicate the legality of the defendant’s death sentence. *See Hill v. McDonough*, 547 U.S. 573 (2006) (execution protocol challenge does not undermine the lawfulness of the sentence itself). In fact, two federal circuit courts have concluded that death row inmates have no due process right to review and challenge execution protocol changes. *See Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013), *Beaty v. Brewer*, 791 F. Supp. 2d 678 (D. Ariz. May 25, 2011) *aff’d*, *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir. 2011).

Rather, any stay or delay in the execution of the defendant’s lawful criminal sentences is a purely equitable remedy. *Hill*, 547 U.S. at 584. And, the rules of this Court define the requirements for a stay in this instance. Specifically, after an execution date is set at the conclusion of the standard three-tier appeals process, the Court will not *stay or delay* an execution date pending the resolution of collateral litigation in state court “unless the prisoner can prove a likelihood of success on the merits in that litigation.” Tenn. Sup. Ct. R. 12.4(E).<sup>1</sup>

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<sup>1</sup> In their proposed brief, amici draw heavily from earlier orders of this Court staying or delaying execution dates during the pendency of proceedings challenging previous execution protocols. *See, e.g. West v. Ray*, No. M2010-02275-SC-R11-CV (Order, Tenn. Nov. 6, 2010); *State v. West*, No. M1987-000130-SC-DPE-DD (Order, Tenn., Nov. 29, 2010). But those orders pre-date the Court’s 2015 order

TACDL and the individual attorney movants, who are not parties to the state court litigation, are in no better position to advise this Court on the defendant's likely success in that matter than the defendant himself. This is particularly so given that appellate courts have uniformly rejected Eighth Amendment challenges to lethal injection protocols that use midazolam as the first drug in a three-drug combination. *See Glossip v. Gross*, 135 S.Ct. 2726, 2739-40 (2015) ("numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from the administration of the paralytic agent and potassium chloride").

Rule 31(a) of the Tennessee Rules of Appellate Procedure requires leave of court before an amicus brief may be filed. That provision ensures that amicus briefs provide "objective assistance" to the court rather than function as a type of "adversary intervention." *See* Tenn. R. App. P. 31(a), Advisory Commission Comment. The proposed brief amicus curiae of TACDL and individual Tennessee attorneys plainly falls within the latter category and should be disallowed.

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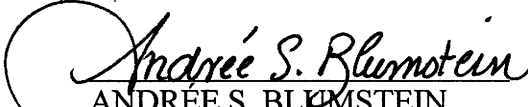
amending Sup. Ct. R. 12.4(E), which clarified the standard for granting a prisoner's motion for stay or delay of execution for pending state or federal court litigation of collateral issues.

## CONCLUSION

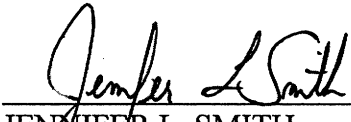
The Court should deny the motion of TACDL and individual Tennessee attorneys for leave to file a brief as amici curiae.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion was forwarded by United States mail, first-class postage prepaid, and by email on the 9/2 day of March, 2018, to the following:

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