

Tennessee District Attorney General's Conference, an attorney actively engaged in federal habeas corpus litigation on behalf of condemned inmates, a representative from the Tennessee Bar Association (TBA), and representative from the Tennessee Association of Criminal Defense Lawyers (TACDL).

II. INTEREST OF THE FEDERAL PUBLIC DEFENDER'S OFFICE

In October, 1995, the Federal Public Defender for the Middle District of Tennessee established a Capital Habeas Unit (CHU).¹ The CHU is comprised of lawyers and professional support staff who devote their careers to the representation of individuals who are under a sentence of death and who are challenging their convictions and sentences in federal court under 28 U.S.C. §2254. Once appointed the attorneys represent their clients until such time as the sentence and/or conviction is carried out, overturned, or commuted. The office currently represents 33 individuals who are under a Tennessee death sentence.² Since April 19, 2000 the State of Tennessee has put to death six individuals, four of whom were represented by the FPD CHU.³ The CHU has also argued successfully on behalf of a number of death row inmates who were subsequently released from prison entirely. As such, the attorneys in the FPD CHU are intimately familiar with this Court's practice in setting execution dates and the circumstances under which such dates have been vacated and/or delayed. The clients of the CHU are stakeholders in this Court's proposed rule change and could be directly impacted by any such change.

¹ Prior to 1995, the office represented a number of individuals who were subject to a state death sentence.

² The Department of Corrections reports that 69 individuals are currently on death row.

<http://www.tn.gov/correction/deathfacts.html>. A recent review of capital cases in the state shows that 193 individuals have been sentenced to death in Tennessee since 1976. 104 of those sentences have been set aside.

³ Robert Coe, Philip Workman, Sedley Alley, and Steve Henley. Daryl Holton was a "volunteer" for execution. Cecil Johnson was represented by private counsel.

III. REASONS WHY THE PROPOSED AMENDMENTS SHOULD BE REJECTED

A. DUE PROCESS AND FUNDAMENTAL FAIRNESS IS THE COURT'S CURRENT GUIDE

This Court has consistently sought to enforce principles of due process in its review of capital cases. As this Court has written, “The fundamental right of due process is, however, an over-arching issue that has been recognized as a concern in post-conviction proceedings.” *Howell v. State*, 151 S.W.3d 450, 461 (Tenn. 2004). The Court in *Howell* reviewed its own jurisprudence and confirmed that certain core principles of due process must be enforced even for capital petitioners who had already been through one round of state post-conviction. Those core principles include “‘an opportunity to be heard at a meaningful time and in a meaningful manner,’ *House v. State*, 911 S.W.2d 705, 711 (Tenn.1995) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).” *Id.* This Court further emphasized, “perhaps most importantly, we recognize that due process ‘embodies the concept of fundamental fairness.’” *Seals*, 23 S.W.3d at 277.” *Id.* The opinion goes on to examine the Court’s history of protecting due process rights of capital defendants:

This Court has previously carved out exceptions to the technical requirements of the Post-Conviction Procedures Act in order to protect petitioners' rights to due process. In *Burford*, we recognized that identification of the precise dictates of due process requires consideration of both the governmental interests involved and the private interests affected by the official action. 845 S.W.2d at 207 (citing *Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975)). We held that the petitioner's interest in attacking his conviction and sentencing on constitutional grounds was greater than the state's interest in preventing litigation of stale or fraudulent claims where the petitioner was forced to wait to bring his post-conviction claim until underlying convictions were declared invalid, at which time the three-year statute of limitations for bringing post-conviction claims had already run. *Id.* at 209. See also *Van Tran*, 66 S.W.3d at 812 (holding that considerations of “fundamental fairness” required that the petitioner have a meaningful opportunity to raise his substantive constitutional claim despite being contrary to the “technical” mandates of the Post-Conviction Procedure Act and Supreme Court Rule 28 governing waiver of issues); *Williams v. State*, 44 S.W.3d 464 (Tenn.2001) (holding that attorney misrepresentation may toll the post-

conviction statute of limitations despite the presence of statutory language stating that the statute of limitations shall not be tolled for any reason); *Seals v. State*, 23 S.W.3d 272 (Tenn.2000) (mental incompetency may toll statute of limitations despite anti-tolling language).

Id. The opinion in *Howell* is consistent with this Court's treatment of the Philip Workman case. In 2001, this Court stayed Workman's execution minutes before it was to be carried out because of serious questions surrounding Mr. Workman's innocence. That opinion, entered well after Mr. Workman had exhausted the standard three-tier process and had unsuccessfully sought executive clemency, emphasized the importance of due process and this Court's obligation to ensure that due process is served before executing a citizen. The Court wrote, "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." *Workman*, 41 S.W.3d at 103 (Tenn. 2001). The *Workman* court, like the *Howell* court, was concerned with the fact that no court in the state had taken evidence on the serious constitutional claims presented. Neither *Workman* or *Howell*, or others heretofore, required to prove their claims prior to a hearing. Indeed as discussed below, such a standard is impossible to meet: How does an inmate prove the merits of his claim if he hasn't had the opportunity to present evidence?

Moreover, central to the analysis in *Workman*, but absent from the proposed rule, is a balance of the equities which is familiar to Courts and litigants when addressing whether to stay an execution.

B. THE PROPOSED RULE CHANGE WOULD UPEND THIS COURT'S CURRENT APPROACH AND RISK SIGNIFICANT INJUSTICE

1. STATISTICALLY WE KNOW THAT CAPITAL CASES IN THIS STATE AND NATIONALLY HAVE BEEN FOUND TO CONTAIN SIGNIFICANT ERRORS

A recently conducted private review of capital cases⁴ in Tennessee reveals that in the years since *Furman v. Georgia*, more than 50% of capital sentences have been set aside due to error. Specifically, 193 inmates have been sentenced to death. Of those 193, 101 have had their sentences set aside by either a state or federal court. Three have received executive clemency.

In July of 2001, former award-winning Tennessean reporter John Shiffman wrote a five-part series, *Who Gets Death*, detailing the significant, systemic problems with capital litigation in Tennessee. Part Two of the series found a 50% error rate in Tennessee capital cases. John Shiffman, *Half of Death Sentences Overturned on Appeal*, Tennessean, July 23, 2001, at A1.

A previously published review of capital cases nationwide from 1972-1995 revealed an error rate of 68%. James S. Liebman *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000) available at <http://www2.law.columbia.edu/instructionalservices/liebman/> (last visited January 20, 2015).

Since 1973, 150 Death Row Inmates have been exonerated. <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited January 20, 2015). The Death Penalty Information Center lists ten inmates who have been executed but are possibly innocent. <http://www.deathpenaltyinfo.org/executed-possibly-innocent#also> (last visited January 20, 2015).

In Tennessee, doubts linger about the execution of Sedley Alley without allowing DNA testing. http://www.innocenceproject.org/Content/Scheck_calls_for_reforms_in_Tennessee.php (last visited January 20, 2014)(Alley case a defense lawyers' "worst nightmare).

2. IT IS UNFORTUNATELY THE CASE THAT OFTEN TIMES SIGNIFICANT ERRORS DO NOT COME TO LIGHT UNTIL THE CASE HAS COMPLETED THE STANDARD THREE-TIER APPROACH

⁴ This data was collected and analyzed by volunteer attorney, Ed Miller. The data is being used with Mr. Miller's permission and is current as of January 20, 2015..

Ricky Jackson spent 39 of his 57 years in an Ohio prison for a murder he did not commit before being released on November 21, 2014. Jackson was originally sentenced to death.

<http://www.reuters.com/article/2014/11/21/us-usa-ohio-exoneration-idUSKCN0J523F20141121>

(last visited January 20, 2014).

Paul House spent 22 years on death row in Tennessee before finally being freed from prison. <http://www.tennessean.com/story/news/local/2014/05/03/death-row-to-freedom-paul-house/8577781/> (last visited January 20, 2014).

Michael McCormick spent fifteen years on death row in Tennessee before being acquitted at a new trial. http://www.nytimes.com/2007/12/06/us/06acquit.html?_r=0 (last visited January 20, 2014).

3. THE PROPOSED RULE CHANGE ENFORCES RIGIDITY WHICH RISKS THE EXECUTION OF INDIVIDUALS WITH CLAIMS WHICH MERIT RELIEF

The proposed change to the rule does not allow the Court to take into consideration due process or other equitable reasons which would justify a stay or delay of an execution date.

- a. THE RULE RISKS THE EXECUTION OF THE INNOCENT AND IS INCONSISTENT WITH *WORKMAN V. STATE* AND POTENTIALLY CONFLICTS WITH *HOUSE V. BELL*, 547 U.S. 518 (2006).

Though a habeas case, *House v. Bell*, 547 U.S. 518 (2006) is instructive. In that Tennessee case, the Supreme Court was guided by the “imperative that correcting a fundamentally unjust incarceration” takes precedence over procedural rules. *Id.* at 536. Workman was driven by a similar imperative. Courts should not be deprived of their jurisdiction to correct fundamental injustice.

- b. THE RULE RISKS THE EXECUTION OF THOSE WITH INTELLECTUAL DISABILITY AND POTENTIALLY CONFLICTS

WITH THE SUPREME COURT'S DECISION IN *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002) AND *HALL V. FLORIDA*, 134 S. Ct. 1986, 1990 (2014).

In 2002, the United States Supreme Court held that the eighth amendment to the United States Constitution prohibits the execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). In the years following *Atkins* courts have struggled to implement the *Atkins* holding due to state statutes which do not meet professional standards. The Supreme Court provided further clarity to its *Atkins* holding last term in *Hall v. Florida*, 134 S.Ct. 1986 (2014). The Court will likely provide even further guidance this term in *Brumfield v. Cain*, No. 13-1433. <http://www.scotusblog.com/case-files/cases/brumfield-v-cain/> (last visited January 20, 2014).

This Court has stated, "We remain committed to the principle that Tennessee has no business executing persons who are intellectually disabled." *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012). The rigidity of the new rule, however, risks that an intellectually disabled inmate who is clearly entitled to relief under *Hall* or under *Brumfield*, may be executed without the opportunity to prove his entitlement to relief in Court.

- c. THE RULES RISKS THE EXECUTION OF THE LEGALLY INSANE AND IS IN CONFLICT WITH THE ESTABLISHED PROCEDURES IN *VAN TRAN V. STATE*, 6 S.W.3D 257 (TENN. 1999). FURTHER THE RULE CHANGE POTENTIALLY RUNS AFOUL OF THE SUPREME COURT'S DECISION IN *PANNETTI V. QUARTERMAN*, 551 U.S. 930 (2007).

The execution of the legally insane is prohibited by the Eighth Amendment. *Ford v. Wainwright*, 477 U.S. 399 (1986). This Court established the procedure for litigating a *Ford* claim in *Van Tran v. State*, 6 S.W.3d 256 (Tenn. 1999). Inmates do not raise a *Ford* claim until after they have completed the standard three-tier process and the State requests an execution date.

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the United States Supreme Court ruled:

Under *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition.

Panetti v. Quarterman, 551 U.S. 930, 934-35 (2007). A preliminary showing is merely a “threshold” showing. *Id.* at 947.

The proposed rule change risks conflict with *Panetti* and runs afoul of the State Court’s duty to adjudicate *Ford* claims in accordance with federal due process principles.

C. THE LANGUAGE USED IN THE PROPOSED RULE CHANGE IS NOVEL TO THE STATE OF TENNESSE AND FAR MORE ONEROUS THAN STANDARDS UTILIZED IN OTHER JURISDICTIONS

The proposed rule would impose a burden on capital petitioners which is novel and unfairly burdensome. Under the proposed change, a capital petitioner with pending collateral litigation must “prove a significant possibility of success on the merits” in order to obtain a stay of execution or to justify delay in the setting of an execution date. It does not include the traditional balance of the equities.

1. Requiring a petitioner to “prove” his entitlement to relief without a hearing is a legal Catch-22

Practically, however, the proposed rule risks unfairness and the improper execution of inmates despite their meritorious claims. The reason for this is that under the proposed rule, no stay would be granted and execution will be carried out with nothing more than a preliminary review of the applicable law and facts of the inmate’s case, without a full review of the law and the facts necessary to ensure reliability in the imposition of the death penalty, an Eighth Amendment requirement.

In other words, a reviewing court would deny a stay (and be unable to grant a stay) based solely upon a probabilistic determination of the merits of an inmate's claims – without the benefit of full investigation of the facts by counsel, full presentation of such facts by counsel, and full briefing and argument from the parties and full application of the law to the facts of the case.

The problem with such a rule is that, absent a full review of the law and facts in a case, appellate judges make mistakes – mistakes that become apparent only after judges have before them the full record and have taken the time to deliberately apply the law to the facts, something that cannot be done in the type of preliminary, incomplete assessment of the merits contained in the proposed rule.

In a capital case, making life or death depend upon an incomplete, rather than a complete, review of the merits creates a recipe for disaster, which is why the proposed rule ought not be adopted.

Consider Justice Ruth Bader Ginsburg in the case of *Conkright v. Frommert*, 556 U.S. 1401 (2009)(Ginsburg, J.). In *Conkright*, the petitioners requested a stay of the lower court proceedings not once, but twice, from Justice Ginsburg, contending that they were ultimately entitled to relief. Twice, Justice Ginsburg concluded that the petitioners had not succeeded in establishing either that the Supreme Court would grant certiorari or that the petitioners had shown “a fair prospect” that the Supreme Court would reverse by concluding “that the decision below was erroneous.” *Id.* at 867.

As it turns out, though brilliant and well-intentioned, Justice Ginsburg's denial of a stay based on her preliminary review of the case was absolutely wrong both times. Contrary to Justice Ginsburg's preliminary assessment, the Supreme Court did grant certiorari. *Conkright v. Frommert*, 557 U.S. 933 (2009). And then after full briefing and review, the Supreme Court

reversed (5-3), concluding that the petitioners were in fact entitled to the very relief that Justice Ginsburg thought they weren't. *See Conkright v. Frommert*, 559 U.S. 506 (2010).

In sum, Justice Ginsburg's preliminary assessment of the merits in *Conkright* proves precisely why this Court's proposed rule is inadequate. The proposed rule makes life-or-death decisions contingent upon preliminary, incomplete assessments of the merits of capital cases – not a full, comprehensive application of the law to the facts. If Justice Ginsburg can make errors under such circumstances, this Court can as well under the proposed rule.

Relying on unexamined, untested assertions in filings in an appellate court allows predispositions and prejudices to carry the day and virtually guarantees that the facts relating to a nonfrivolous constitutional claim will not be sufficiently developed for meaningful and informed review. Frustration with the lengthy, protracted capital process -- in no small degree a result of attempting meaningfully to address and ameliorate known problems and deficiencies in the machinery of capital prosecutions -- is simply no license for arbitrariness on the part of the state's highest, most respected court.

2. Requiring a petitioner to prove a "significant possibility" of success on the merits imposes an onerous burden

The proposed evidentiary burden of "significant possibility" is far more onerous and is novel. The more familiar standard that is widely used by court in this context is "strong likelihood" of success on the merits. *See e.g. In re Garner*, 612 F.3d 533, 536 (6th Cir. 2010). Other standards a committee appointed by the Court could consider include: preliminary showing; threshold showing; colorable claim; reasonable possibility.

3. The Proposed Change Fails To Take Into Consideration Irreparable Harm To The Inmate; Whether a Stay Will Cause Substantial Harm to the State, And Whether the Public Interest Is Best Served

Under the proposed rule, court would not consider the irreparable harm to the petitioner and to the state as a whole in executing someone in violation of law. But due process demands that where the prospect of serious harm is magnified in a capital case without proper review, the court must consider that harm when considering whether to grant a stay or delay the setting of a date.

Ultimately, not allowing a court to explicitly take into account the irreparable harm while requiring a petitioner to "prove" entitlement to relief without a hearing while making that "proof" meet a heavy burden of "significant possibility" of relief, means that people will face execution despite violation of their constitutional rights.

After consultation by stakeholders, the court should put in place a rule that better balances the relevant factors, and adopt a standard that takes into account irreparable harm to the petitioner, doesn't require absolute "proof" of entitlement to relief without a hearing, and relaxes the showing that needs to be made (such as a "reasonable possibility" of securing relief). That will insure that persons with valid claims will be heard in a timely manner and not executed in spite of possible violations of their constitutional rights.

IV. CONCLUSION

Very respectfully, we urge this Court to reject the proposed rule change. The proposed rule change is inconsistent with this court's obligations to ensure that no person is executed by the state of Tennessee in violation of his or her rights under the federal and state constitutions.

To the extent that there are perceived problems with the current approach to this Court's review of cases which appear ripe for execution dates, we respectfully suggest that the Court appoint a committee of stakeholders to study the issue and make recommendations to the Court.

BY: 

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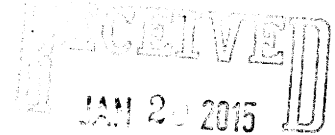
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**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**IN RE RULE 12, SECTION 4
RULES OF THE TENNESSEE SUPREME COURT**

No. ADM2014-02063



COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association (“TBA”), by and through its President, Jonathan O. Steen; Chair, TBA Criminal Justice Section, Andrew (Andy) S. Roskind; General Counsel, Paul Ney; and Executive Director, Allan F. Ramsaur, files this comment relative to the proposed amendments to Tenn. Sup. Ct. R. 12 §4.

BACKGROUND

Rule 12, Rules of the Tennessee Supreme Court, establishes procedures in capital cases. Section 4 of the Rule governs the setting of execution dates at the conclusion of the standard three-tier appeals process. The Court is considering amendments to Section 4(A) and Section 4(E) of Rule 12 to set standards for granting or denying a motion by the State to set an execution date, and for granting a death row inmate’s motion for a stay or delay of execution for pending state or federal court litigation of collateral issues.

Of specific concern to the TBA is the proposed amendment within Section 4 stating that (1) the Court will not stay setting of an execution date or (2) grant a stay or delay an execution date, once set, pending resolution of collateral litigation in state or federal court unless the inmate can prove a significant possibility of success on the merits in that litigation.

The proposed amendment to Rule 12 represents a potential deviation of the long established “heightened due process standards involved in capital cases” as well as the “heightened reliability required and the gravity of the ultimate penalty in capital cases.” *State v. Smith*, 357 S.W.3d 322, 346 (Tenn. 2011). As an example, traditionally, the Court has applied due process principles in determining whether to grant or deny a stay or delay of execution pending resolution of collateral litigation in state court regarding the constitutionality of execution protocols. *See State v. Stephen M. West*, M1987-130-SC-DPE-DD (Tenn. November 29, 2010) (Order at p. 3).

The proposed amendment appears to require the Court to make a finding regarding the possibility of success in litigation without a fully developed record addressing the specific merits of the challenge and absent a hearing or trial on the merits during which both sides have an open and full opportunity to develop the facts that have a bearing on the constitutionality of the underlying challenge (stay or delay in execution). Our Court, in allowing prior challenges (stays or delays), has concluded that “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.” *Stephen M. West v. Ray*, No. M2010-02275-SC-R11-CV (Tenn. Nov. 6, 2010) (Order at p. 2).


In order to continue the heightened due process standards so long a part of Tennessee capital punishment jurisprudence, the Court should continue to exercise discretion on a case by case basis regarding stays sought pending collateral litigation so as to allow the record to fully develop. The proposed amendment appears to put a death row inmate in the inevitable position of establishing a significant possibility of success before having the opportunity to fully investigate the underlying claim.

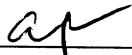
Further, as currently written, the proposed “significant possibility of success” language has not been defined, which raises the due process question of what fact(s), circumstance(s), and/or evidence must be alleged in the collateral litigation to sustain this new burden.


CONCLUSION


For the reasons as stated, the TBA supports the Court’s longstanding heightened due process standards applicable in capital punishment jurisprudence and opposes the proposed amendment to the extent that the amendment deviates from such a standard.

Respectfully Submitted,

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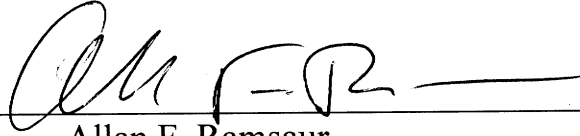
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.

A handwritten signature in black ink, appearing to read "Allan F. Ramsaur", written over a horizontal line.

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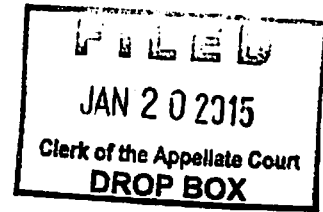
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James Hivner, Clerk
Re: Rule 12, Section 4
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407



Re: Rule 12, Section 4
No. ADM2014-02063

Dear Sir:

The Tennessee Association of Criminal Defense Lawyers is a non-profit statewide organization with over one thousand members, comprised predominantly of attorneys actively engaged in the representation of criminal defendants. Founded in 1973, TACDL is the one of the oldest organizations in the nation dedicated primarily to advancing the mission of criminal defense lawyers, and protecting the clients they serve. TACDL works to protect and ensure the individual rights guaranteed by the United States and Tennessee Constitutions in criminal cases. TACDL seeks to promote justice, liberty, and the common good. TACDL provides education, training, and support to lawyers who represent citizens accused of crimes. TACDL also advocates for fair and effective criminal justice in the courts, the legislature – wherever justice demands. In furtherance of these principles, TACDL submits this Comment stating its opposition to the proposed amendments to Rule 12, Rules of the Tennessee Supreme Court.

As an organization of over one thousand attorneys licensed to practice law in Tennessee, TACDL believes that the Court's current approach is correct. The Court should continue to exercise discretion regarding the application for stays of execution pending collateral litigation on a case by case basis. We are a nation, and a state, of laws with an emphasis and dedication to principles of due process. TACDL favors the current approach of Rule 12 that allows litigation of a fully developed record after both parties have the opportunity to develop facts. In the case of a capital sentence, no greater injustice exists than that of the execution of a citizen who was denied the right to fully litigate his case. TACDL opposes the proposed amendment to Tennessee Supreme Court Rule 12.

The proposed amendment to Rule 12 is also contrary to the long established legal principles of our state. The Tennessee Supreme Court has "on numerous occasions recognized 'the heightened due process applicable in capital cases' and 'the heightened reliability required and the gravity of the ultimate penalty in capital cases.'" *State v. Smith*, 357 S.W.3d 322, 346 (Tenn. 2011) (citations omitted). Rule 12, Rules of the Tennessee Supreme Court, Section 4 governs the setting of execution dates at the conclusion of the standard three-tier appeals process and

thus must reflect the principles of heightened due process required in capital cases. In practice, this Court has applied due process principles in determining whether to grant or deny a stay or delay of execution pending resolution of collateral litigation in state court regarding the constitutionality of execution protocols. *See State v. Stephen Michael West*, No. M1987-130-SC-DPE-DD (Tenn. November 29, 2010) (Order), at p. 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. Edmund Zagorski, No. M1996-00110-SC-DPE-DD (Tenn. October 22, 2014) (Order); *State v. Billy Ray Irick*, No. M1987-00131-SC-DPE-DD (Tenn. September 25, 2014) (Order); *Donald Wayne Strouth v. State of Tennessee*, 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 proposed amendments to Rule 12, Section 4, represent a deviation from these principles and unnecessarily constrain this Court’s exercise of discretion in matters of life and death. The proposed language stating that an execution will not be stayed or delayed “unless the prisoner can prove a significant possibility of success on the merits in that litigation” raises the specter of Tennessee executions occurring without the benefit of due process in collateral proceedings related to the constitutionality of the methods by which Tennessee carries out executions. With the enactment of legislation authorizing mandatory use of the electric chair under certain conditions, Tennessee has become the only government in the world poised to electrocute a person involuntarily. Thus it is particularly problematic that the proposed language requires this Court to make a finding regarding the possibility of success in litigation without “a fully developed record addressing the specific merits of the challenge” and absent “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.” Without that record, the Court would task itself with the impossible—guessing the outcome of litigation without knowing facts which are necessarily dispositive of the ultimate issue in method of execution litigation.

TACDL submits that the Court’s current approach is correct: the Court should continue to exercise discretion on a case by case basis regarding stays sought

pending collateral litigation with an emphasis upon due process principles to allow litigation upon a fully developed record after both parties have the opportunity to develop facts. After review by our Executive Committee, Capital Defense Committee, and the entire Board of Directors, the position of an organization representing over one thousand members of the bar is clear: TACDL opposes the proposed amendment to Tennessee Supreme Court Rule 12.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

IN RE: PETITION TO AMEND RULE 12, SECTION 4, RULES OF THE TENNESSEE
SUPREME COURT

2015 JAN 20 PM 3: 24
APPELLATE COURT CLERK
NASHVILLE

No. ADM2014-02063 – Filed: October 22, 2014

RESPONSE TO INVITATION FOR PUBLIC COMMENT

In response to the Tennessee Supreme Court’s request for comment on the proposed change to Rule 12, Section 4, of the Tennessee Rules of the Supreme Court, the Executive Committee of the Tennessee District Public Defenders Conference (“Committee”) wishes to express its support of the comment filed by the Office of the Post-Conviction Defender (“OPCD”) on January 16, 2015, encouraging the Court to maintain Rule 12, Section 4 as it is currently written.

The Committee agrees the collateral claims of relief offered under current law should continue to be made available to death row inmates before an execution date is set. As the OPCD has discussed in its comment, the Tennessee Supreme Court has taken a position of heightened review for those who are subject to the penalty of death.¹ The Committee agrees the Court’s practice of heightened review in these cases appears more open and fair when there is a process which permits all collateral matters to be heard prior to any execution date determination.

Therefore, the Committee reiterates its support of the OPCD’s position requesting the Court to leave Rule 12, Section 4 of the Tennessee Rules of the Supreme Court as it is currently written.

¹ Office of the Post-Conviction Defender brief, p. 3, citing *Smith v. State*, 357 S.W.3d 322, 346 (Tenn. 2011).

Respectfully submitted,

Executive Committee of the Tennessee District Public
Defenders Conference

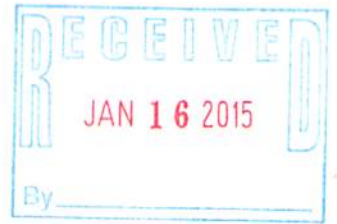
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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,



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January 12, 2015

James Hiver, Clerk
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Tennessee Appellate Courts
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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.