IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: DARYL KEITH HOLTON	)	BEDFORD COUNTY
	)	ORIGINAL APPEAL NO.
	)	M2000-00766-SC-DDT-DD

RESPONSE TO "PETITION FOR THIS COURT, IN THE EXERCISE OF ITS INHERENT AUTHORITY, TO SUA SPONTE WITHDRAW ORDER OF EXECUTION"

The Court has before it a petition submitted by 78 members of the Tennessee Bar requesting that the court exercise its inherent authority to withdraw the execution order in the case of Daryl Holton "pending a review of the constitutionality of electrocution." The petition should be denied.

First, the petitioners have no standing to file anything in the case of Daryl Holton. Indeed, both this Court and the Sixth Circuit Court of Appeals have already rejected the efforts by attorneys with the Tennessee Post-Conviction Defender and Federal Defender Services of Eastern Tennessee, Inc., to file petitions on Holton's behalf without his consent. *Holton v. State*, 201 S.W.3d 626 (Tenn. 2006); *Daryl Keith Holton v. Ricky Bell*, No. 06-6178 (6th Cir. Jan. 9, 2007) (affirming the district court's dismissal of federal habeas petition as unauthorized). Petitioners, who do not even remotely satisfy either of the two prerequisites for next-friend status — an adequate explanation

why the real party in interest cannot appear on his own behalf and some significant relationship to the real party in interest, *see Holton*, 201 S.W.3d at 632 — likewise lack standing here.

Moreover, because Holton has not initiated any challenge to the constitutionality of electrocution, there is no case or controversy, an essential element for the exercise of the Court's judicial power to decide constitutional questions. This Court's jurisdiction is both established and limited by the Tennessee Constitution, art. VI, §§ 1 and 2. Article VI, section 2, limits the jurisdiction of the Supreme Court to appellate proceedings.

> The Supreme Court shall consist of five Judges, of whom not more than two shall reside in any one of the grand divisions of the State. The Judges shall designate one of their own number who shall preside as Chief Justice. The concurrence of three of the Judges shall in every case be necessary to a decision. *The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law*; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. Said Court shall be held in Knoxville, Nashville and Jackson.

Tenn. Const. art. VI, §2 (emphasis added).

The Supreme Court of Tennessee "is a court of appeals and errors, and [is] limited in authority to the adjudication of issues that are presented and decided in the trial courts, and a record thereof preserved as prescribed in the statutes and Rules of this Court." *In re the Adoption of Female Child, E.N.R.*, 42 S.W.3d 26, 31-32 (Tenn. 2001) (quoting *Dorrier v. Dark*, 537 S.W.2d 888, 890 (Tenn. 1976)).

> Section 2 of article 6 of the state Constitution provides that the jurisdiction of the Supreme Court "shall be appellate only . . . ." This section of the Constitution has been construed in many cases, and the holdings of this court have been uniform to the effect that it is without original jurisdiction in any matter, and that it is beyond the power of the Legislature to confer original jurisdiction upon it.

Pierce v. Tharp, 461 S.W.2d 950 (Tenn. 1970) (quoting *In re Bowers*, 137 Tenn. 193, 192 S.W. 919 (Tenn. 1917)). The appellate jurisdiction of this Court has been construed as requiring review of the "actions of a *court*." *Stewart Title Guar. Co. v. McReynolds*, 886 S.W.2d 233, 238 (Tenn. App. 1994) (citing *In re Cumberland Power Co.*, 147 Tenn. 504, 249 S.W. 818 (1923)) (emphasis in original). Holton has no known pending actions in any state or federal court. Because he has consistently declined to initiate available post-judgment proceedings to challenge the constitutionality of his convictions and sentence, there is nothing for this court to review and, consequently, no vehicle by which to address the constitutional issue the petitioners have framed.

The decision of the Nebraska Supreme Court in *State v. Moore*, 730 N.W.2d 563 (Neb. 2007), provides no help for petitioners' cause. First, unlike the situation posited here, the Nebraska Supreme Court did not stay Moore's execution so that it could consider the constitutionality of electrocution in *that* case. Rather, the court explained in its opinion that it had pending before it another case in which the question was presented and in which it had been briefed on a fully developed record. Not so here. Indeed, the petitioners have failed to explain precisely how the review it proposes should

take place, given this court's limited jurisdiction and Holton's consistent competent refusal to initiate any proceedings on his own behalf.

Furthermore, unlike Moore, Holton chose to waive his right to be executed by another available method.[1] As this court recognized in *State v. Morris*, 24 S.W.3d 788 (Tenn. 2000), a defendant who elects a certain means of death, such as electrocution, waives his constitutional challenges to the manner of executing the sentence. 24 S.W.3d at 797 (citing *Stewart v. LaGrand*, 526 U.S. 115 (1999)). More importantly, this Court has consistently rejected claims that death by electrocution constitutes cruel and unusual punishment. *See, e.g., State v. Terry*, 46 S.W.3d 147, 170 (Tenn. 2001), *cert. denied*, 534 U.S. 1023 (2001); *State v. Black*, 815 S.W.2d 166, 178-79 (Tenn. 1991) (electrocution is a constitutionally permissible method of execution).[2]

---

[1]Electrocution is currently the sole method of execution in Nebraska. *See Moore*, 730 N.W.2d at 496 ("Under Nebraska law, the mode of inflicting the punishment of death, *in all cases,* is 'by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death.'") (emphasis added). However, Nebraska is not the only state that allows execution by electrocution. Currently, Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee and Virginia still retain electrocution as an authorized method of execution. U.S. Dept of Justice, Bureau of Justice Statistics, Capital Punishment, 2005, <http://www.ojp.gov/bjs/pub/pdf/cp05.pdf> (Dec. 2006).

[2]The decision of the Georgia Supreme Court declaring electrocution cruel and unusual was explicitly based on the Georgia Constitution, and the State is unaware of any decision holding that death by electrocution violates the Federal Constitution.

For all of these reasons, the petition should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

JENNIFER L. SMITH
Associate Deputy Attorney General
Criminal Justice Division
P.O. Box 20207
Nashville, TN 37202-0207
Phone: (615) 741-3487
B.P.R. No. 16514

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent via fax and by first-class mail, postage prepaid, to:

Daryl Keith Holton, No. 306263
Riverbend Maximum Security Institution
7475 Cockrill Bend Industrial Road
Nashville, TN 37209

Bradley A. MacLean
Stites & Harbison, PLLC
Financial Center, Suite 1800
424 Church Street
Nashville, TN 37219

on this 11th day of September, 2007.

Jennifer L Smith

JENNIFER L. SMITH
Associate Deputy Attorney General