

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 these inmates upon final disposition of their 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 the Public Defender’s Conference as amicus.

The proposed brief amicus curiae also advances an incorrect legal standard for the stay or delay of execution. The Conference urges this Court to maintain its “prior practice” of permitting the defendant to litigate the constitutionality of the method of their execution and avoid setting a “quick” execution date. (*See* Briefs Amicus Curiae, at 3-4.) First, this Court’s own rules contemplate, in cases such as these, the setting of an execution date as soon as seven days from the date of the order. *See* Sup. Ct. R. 12.4(E). Second, the defendant here was lawfully convicted and sentenced to death by a Tennessee jury decades ago. His executions at this point can in no way be characterized as “quick.” Third, the would-be amicus points to

earlier orders of this Court staying or delaying execution dates during the pendency of proceedings challenging previous execution protocols as evidence of the Court's "settled course of practice." See, e.g. *State v. West*, No. M1987-000130-SC-DPE-DD (Order, Tenn., Nov. 29, 2010). But that practice pre-dates the Court's 2015 order 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. Thus, rather than seeking a departure from prior practice, the State's motion to set execution dates seeks adherence to the plain language of this Court's rules.

Furthermore, the Conference erroneously contends that due process mandates that the defendant be allowed an opportunity to litigate the constitutionality of the State's lethal injection protocol. But 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 sentence is a purely equitable remedy. *Hill*, 547 U.S. at 584. And, the rules of this Court define the requirements for a stay or delay of execution 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).

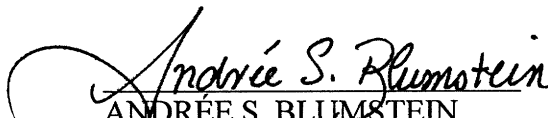
Rule 31(a) of the Tennessee Rules of Appellate Procedure requires leave of court before an amicus brief may be filed. That provision ensures that amicus briefs provide "objective assistance" to the court rather than function as a type of "adversary intervention." *See* Tenn. R. App. P. 31(a), Advisory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

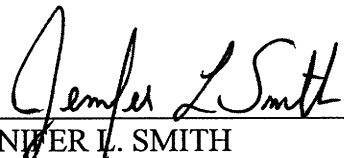
CONCLUSION

The Court should deny the motion of Tennessee District Public Defender's Conference for leave to file a brief as amici curiae.

Respectfully submitted,

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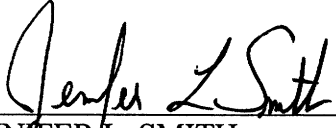
CERTIFICATE OF SERVICE

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 9th day of March, 2018, to the following:

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