IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Movant,	)	
	)	**Shelby County**
v.	)	**Trial Court Nos.**
	)	**87-04409 and 87-04410**
PERVIS T. PAYNE,	)	**Direct Appeal No.**
	)	**M1988-00096-SC-DPE-DD**[1]
Defendant.	)	

RESPONSE IN OPPOSITION TO 90-DAY EXTENSION REQUEST

By order entered September 27, 2019, this Court required a response from the State to Payne's request to extend from 10 days to 90 days his time for responding to the State's Tenn. S. Ct. R. 12.4 motion. Although the State opposes a 90-day extension for the reasons explained below, the State does not oppose allowing Payne a reasonable amount of time commensurate with the circumstances and the purpose of Rule 12.4.

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[1] The original trial court numbers in the caption of the State's Rule 12.4(A) motion omitted one case number for which Payne was tried. That number, 87-04410, has been added to the case numbers listed in the caption above.

Rule 12.4 requires the Attorney General to file a motion requesting this Court to set an execution date "[a]fter a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings." Tenn. Sup. Ct. R. 12.4(A).

Rule 12.4(A) allows a response to a motion to set an execution date and imposes a deadline for that response of 10 days after the motion has been filed. There is a reason for this 10-day limit, as opposed to, say, a 30-day limit: the Rule contemplates a limited, specifically targeted response; the response is not intended as a vehicle for relitigating the case, rather it is intended to let this Court know of any potential impediments to execution. To that end, the Rule focuses specifically on two types of potential impediments to execution as appropriate to raise in opposition to a motion to set an execution date. First, a response to the motion is the proper vehicle for raising any claim that the prisoner is not competent for execution. In fact, this Court has explained that a claim that the defendant is incompetent for execution ripens only when execution is imminent, and thus the time for raising the claim is in response to the State's motion to set an execution date. *Van Tran v. State*, 6 S.W.3d 257, 263, 267 (Tenn. 1999). Second, the response is intended as the appropriate vehicle for alerting the Court to any pending collateral proceedings that might call for a delay in the setting of an execution date—but only if the prisoner can

prove a likelihood of success on the merits of such a claim. Tenn. S. Ct. R. 2.4(A).

Payne is one of the nine death-row prisoners who have now completed the three-tier review process. Payne, like each of the other eight prisoners, has asked for a 90-day extension to respond to the Rule 12.4 motion filed in his case. The murders in these nine cases were committed between 1987 and 1994, so the oldest of these cases, which include Payne's, have been in litigation for thirty-two years. Even the most recent among these murder cases have been in litigation for twenty-five years.

Despite the circumscribed purpose to be served by any response to a Rule 12.4(A) motion, counsel for all nine capital defendants make plain in their respective extension motions that they are not planning to file targeted, limited responses as contemplated by the Rule. Instead, they cite the need for significant additional investigation of their clients' cases for potential new issues to be raised in this Court and for preparation of lengthy responses. It is for this reason, chiefly, that they are asking for the 90-day extension. Contrary to their views, however, the response allowed under Rule 12.4(A) is not intended to promote the renewed re-litigation that counsel for the defendants anticipate. Rather, Rule 12 clearly contemplates only a narrow universe of matters to be raised in response, to which the 10-day period for filing that response has been reasonably tailored, and so a greatly extended filing deadline appears unwarranted.

Moreover, extensive investigation and briefing should not be necessary for making a full response. Since counsel have been representing each of these defendants for a number of years, presumably counsel would already be aware if competency were a potential impediment. And even when a claim of present incompetency is raised, it will not constitute grounds for denying a motion to set; instead, in setting the execution date, this Court will remand the competency issue to the trial court for determination. *Van Tran v. State*, 6 S.W.3d at 267. Likewise, since current counsel are already at least aware of, if not involved in, any pending litigation that might be claimed as grounds for a delay in setting an execution date, no extensive investigation or briefing should be necessary to respond to the Rule 12.4 motion in that respect.

In sum, the 10-day response time provided by Rule 12.4(A), which is designed to allow adequate time for the response contemplated by the Rule, seems appropriate here since this case has been litigated and re-litigated over the course of the last 32 years and counsel are familiar with this defendant, his competency issues, if any, and his other claims and litigation, if any.

But the State admittedly did neglect to serve the Rule 12.4 motion electronically, and that failure did cut into Payne's response time by several days. Counsel sincerely apologizes for that failure and assures the Court and opposing counsel that it was due to an honest oversight, not calculated strategy. In light of that omission and in consideration of

the fact that the team of attorneys from the Federal Public Defender's Office in the Middle District of Tennessee is representing seven of the nine defendants and the team of attorneys from the Federal Community Defender's Office in the Eastern District of Tennessee is representing the other two, the State is not opposed to the granting of reasonable time to respond to the motions to set but believes that ninety days is excessive and unnecessary under the circumstances.

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 31 day of October, 2019, to the following:

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The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by e-mail at Amy.Tarkington@ag.tn.gov.

Amy L. Tarkington
Associate Solicitor General