

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

IN RE: DARYL KEITH HOLTON    )    BEDFORD COUNTY  
  )    ORIGINAL APPEAL NO.  
  )    M2000-00735-SC-DDT-DD

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MOTION TO RE-SET EXECUTION DATE

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On January 5, 2004, upon affirming Holton’s convictions and death sentences on direct appeal, this Court set an execution date of June 3, 2004. *State v. Holton*, 126 S.W.3d 845 (Tenn. 2004). *See* Tenn. Code Ann. § 40-30-120(a) (“When affirming a conviction and sentence of death on direct appeal, the Tennessee Supreme Court shall contemporaneously set a date for an execution.”). The Court subsequently re-set the date for June 8, 2005, to allow Holton time to submit a petition for writ of certiorari to the United States Supreme Court.<sup>1</sup>

On May 16, 2005, the Bedford County Circuit Court granted a stay of execution under the guise of Tenn. Code Ann. § 40-30-120 (“Upon the filing of a petition for post-conviction relief, the court in which the conviction occurred shall issue a stay of the execution date which shall continue in effect for the duration of any appeals or until the

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<sup>1</sup>The Supreme Court denied certiorari on October 4, 2004. *Holton v. Tennessee*, 543 U.S. 816 (2004).

post-conviction action is otherwise final.”). The stay was based upon the filing of an unsigned, unverified, and untimely post-conviction petition by the Tennessee Post-Conviction Defender on Holton’s behalf.<sup>2</sup> This Court granted the State’s application for extraordinary appeal pursuant to Tenn. R. App. P. 10 and, on May 4, 2006, vacated the lower court’s order and dismissed the petition. *Daryl Keith Holton v. State*, No. M2005-01870-SC-S10-PD (Tenn. May 4, 2006). The trial court’s unauthorized stay of execution having been vacated, this Court should now re-set a date for an execution.

Holton’s counsel will undoubtedly point to pending federal habeas corpus proceedings as a legal impediment to the setting of a new execution date. *Daryl Keith Holton v. Ricky Bell, Warden*, No. 1:05-cv-00202 (E.D. Tenn.) (Phillips, District Judge). But the petition in that case suffers from the same infirmity as the one rejected by this Court — it was neither signed nor authorized by Holton nor does it allege, let alone demonstrate, that the conditions for “next friend” standing currently exist. *See West v. Bell*, 242 F.3d 338 (6th Cir. 2001) (necessary prerequisite for standing to file a petition for writ of habeas corpus under 28 U.S.C. § 2254 is that a state prisoner actually invoke federal jurisdiction, either personally or through a qualified “next friend.”). Moreover, if the federal district court determines that its jurisdiction under § 2254 has been invoked properly, it is fully empowered to stay any state proceedings pending resolution

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<sup>2</sup>Under Tenn. Code Ann. § 40-30-102(a), Holton’s post-conviction petition was due on or before February 16, 2005.

of the habeas corpus proceeding under 28 U.S.C. § 2251.<sup>3</sup> But this Court need not wait for that determination. The proceedings in state court have clearly come to an end, with Holton, by his own inaction, forfeiting his statutory right to state post-conviction review of his convictions and death sentences.

To the extent Rule 12.4(A), Rules of the Supreme Court of Tennessee, may be read to prohibit the State from requesting an execution date prior to the expiration of the time for filing a certiorari petition in the federal habeas proceeding, that rule has no application here. Rule 12.4 contemplates that a death-sentenced state prisoner is actively pursuing the standard three-tier appeals process. Here, Holton himself has initiated neither state post-conviction nor federal habeas proceedings or otherwise demonstrated any intent to challenge his convictions and/or death sentences, so the State's present motion should not be deemed premature. Instead, the State seeks merely to effectuate the directive of Tenn. Code Ann. § 40-30-120(a), improperly thwarted by the post-conviction court, which mandates that an execution date be set upon the affirmance of a state prisoner's conviction and death sentence on direct appeal and expressly prohibits a stay of execution prior to the filing of a petition for post-conviction relief.<sup>4</sup>

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<sup>3</sup>There is currently no federal court stay of execution.

<sup>4</sup>Had Holton himself unsuccessfully pursued state post-conviction relief, the State would be permitted to file a motion to set under this Court's Rule 12.3, which provides: "[w]henever a death-row prisoner has unsuccessfully pursued state post-conviction relief through appeal or application for permission to appeal to this Court, should there be no execution date in effect, the State Attorney General shall file a motion requesting that this Court set an execution date."

There being no proper post-conviction petition filed by Holton challenging his convictions and/or sentences or any other legal impediment to the setting of an execution date, this Court should re-set Holton's execution date forthwith.

Respectfully submitted,

PAUL G. SUMMERS  
Attorney General and Reporter

*/s/ Michael E. Moore*

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MICHAEL E. MOORE  
Solicitor General

*/s/ Jennifer L. Smith*

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## 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: Donald E. Dawson, Tennessee Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee 37243; and Stephen Ferrell, Assistant Federal Community Defender, 530 South Gay St., Suite 900, Knoxville, TN 37902, on this \_\_\_\_\_ day of May, 2006.

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JENNIFER L. SMITH  
Associate Deputy Attorney General