

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED  
JAN 29 2018  
Clerk of the Appellate Court  
DROP BOX *KJM*

STATE OF TENNESSEE,

Movant,

v.

NICHOLAS TODD SUTTON,

Defendant.

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No. E2000-00712-SC-DDT-DD

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RESPONSE TO MOTION TO DEFER  
THE SETTING OF AN EXECUTION DATE

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The defendant, Sutton, has filed a motion requesting that this Court deny any request to set an execution date and stay his execution pending disposition of a reopened state post-conviction petition. The defendant's motion should be denied because he has not met and cannot meet the statutory requirements for a stay of execution.

Tennessee Code Ann. § 40-30-120 governs stays of execution when an inmate under a death sentence files a petition for post-conviction relief. When, as here, a post-conviction petition is not the first petition attacking the judgment in question, a stay of execution is not permitted "unless a court of competent jurisdiction first finds that a motion to reopen that meets the requirements set out in § 40-30-117 has been granted." Tenn. Code Ann. § 40-30-120(b). But even then, a stay of execution is not automatic. Rather, to obtain a stay, the petitioner must show that "there is a significant possibility that the death sentence will be invalidated" upon

consideration of the petition and that “there is a significant possibility that the death sentence will be carried out before consideration of the petition is concluded.” Tenn. Code Ann. § 40-30-120(c).

And any motion for a stay “must be presented first where the petition is filed.” Tenn. Code Ann. § 40-30-120(d). This requirement is designed to allow the trial court to consider in the first instance whether a petitioner has made the showing required for a stay under Tenn. Code Ann. § 40-30-120(c). Only then is the trial court’s stay decision reviewable by the court of criminal appeals and, subsequently, by this Court on a motion for review filed by either party.

*Id.*

The defendant’s motion satisfies none of these requirements. First, it does not appear that the defendant has presented a motion for a stay in the court in which his post-conviction petition is pending. Second, the defendant can show no likelihood that his death sentence will be invalidated as a result of the reopened post-conviction proceeding.

The defendant relies—in vain—on *Johnson v. United States*, 135 S.Ct. 2251 (2015), to suggest that his death sentence will likely be invalidated. In *Johnson*, the United Supreme Court held that the so-called “residual clause” of the federal Armed Career Criminal Act (“ACCA”) is unconstitutionally vague. The Supreme Court later announced that “*Johnson* changed the substantive reach of the Armed Career Criminal Act” and is therefore a substantive decision that is retroactively applicable on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). But *Johnson* does not impact the defendant’s death sentence because that decision addresses only the residual clause of the ACCA, not the state statute on which the defendant’s sentence was based. *See Johnson*, 135 S.Ct. at 2563 (“We hold that imposing an increased

sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process.”). Indeed, the Supreme Court pointedly observed that its holding did not place into constitutional doubt the “dozens of federal and state criminal laws” employing similar terms like “substantial risk,” “grave risk,” or the like. *Johnson*, 135 S.Ct. at 2561.

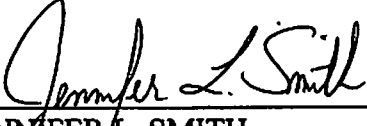
Moreover, Tennessee appellate courts have consistently rejected the identical claim concerning the application of *Johnson* to Tennessee’s capital sentencing statute. *See, e.g., Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017) (perm. app. denied Jan. 19, 2018); *Dennis Wade Suttles v. State*, No. E2016-02162-CCA-R28-PD (Tenn. Crim. App. Feb. 13, 2017) (perm. app. denied May 18, 2017); *Gary W. Sutton v. State*, No. E2016-02112-CCA-R28-PD (Tenn. Crim. App. Jan. 23, 2017) (perm. app. denied May 18, 2017). The defendant cannot show that his case warrants a different result.

The defendant’s Motion to Defer the Setting of an Execution Date should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Response was forwarded by United States mail, first-class postage prepaid, and by email on the 29<sup>th</sup> day of January, 2018, to the following:

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