IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
V.	)	**No. E2000-00712-SC-DPE-DD**
	)	
NICHOLAS TODD SUTTON,	)	
Defendant.	)	

BRIEF OF AMICUS CURIAE TENNESSEE DISTRICT PUBLIC DEFENDER'S CONFERENCE REGARDING SETTING OF EXECUTION DATES

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STATEMENT OF AMICUS CURIAE

The Tennessee District Public Defenders Conference was created in 1989 by the General Assembly. Consisting of 31 elected or appointed district public defenders and their assistants, the main directive of the Conference is the representation of indigent defendants in criminal proceedings across Tennessee. Over 200 state and local public defenders represented indigent defendants in nearly 200,000 cases in 2017. The Conference seeks to provide an organization that promotes communication amongst the 31 judicial districts to achieve a more effective administration of justice through education and legislative review, striving for the highest level of competency in all district offices, and to serve in a liaison capacity between the Conference and the various departments and agencies of government.

STATEMENT OF ISSUE ADDRESSED BY AMICUS

The State has developed a new lethal-injection protocol. It now seeks to have execution dates set so soon that there is not enough time to test fully the constitutionality of that new protocol. Should this Court depart from its own prior procedure and set execution dates that would deny the defendant an opportunity to litigate his claim before he is executed?

STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of the case and the facts as set forth in the *Response in Opposition to Motion to Set Execution Dates*.

ARGUMENT AND POSITION OF AMICUS CURIAE

I. INTRODUCTION.

The primary issue at hand appears relatively narrow. This Court has repeatedly stated that, in setting execution dates, it is appropriate to allow adequate time for constitutional challenges to the method of execution. As it wrote in the *Stephen Michael West* case: "The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge." *November 29, 2010 Order* in *State v. Stephen Michael West*, No. M1987-00130-SC-DPE-DD. Here, the State has propounded a new lethal injection method, ostensibly due to difficulties in complying with prior protocols, and a declaratory judgment action challenging that new method of execution has been filed in Chancery Court. Despite this Court's precedent, the State requests this Court set execution dates in the next three months. It appears clear, if not uncontroverted, that the requested execution dates prior to June 1 would not allow for litigation of the constitutionality of the new method based on a fully-developed record. The defendant would be executed without any court having an opportunity to make an informed decision as to the validity of the method of his death.

As reason for departing from prior practice and setting such quick execution dates, the State offers only a practical justification: that its drugs are approaching their expiration date and the State is "uncertain" whether it will be able to obtain additional drugs in the future. The question therefore is whether this reason, even if accepted as factually accurate, is sufficient to justify the Court departing from its prior practice and abbreviating the ability of this defendant to litigate the constitutionality of the method of his execution. It is not.

II. THE STATE'S PERCEIVED DIFFICULTY IN OBTAINING DRUGS IS AN INADEQUATE REASON FOR THIS COURT TO DEPART FROM PRIOR PRACTICE.

The practical difficulties identified by the State present no reason for this Court to break from its settled course of practice, as set out in *West* and other cases. *See J. T. Fargason Co. v. Ball*, 128 Tenn. 137, 159 S.W. 221, 222 (1913) ("The rule of stare decisis is one of commanding importance, giving, as it does, firmness and stability to principles of law evidenced by judicial decisions, and so enabling the people to safely judge of their legal rights"). There is no reason to believe that this Court, in its repeated holding that defendants should be able to litigate challenges to the method of their execution before they are executed, was obviously mistaken. *See Hooker v. Haslam*, 437 S.W.3d 409, 422 (Tenn. 2014) (departure from precedent appropriate when there is "obvious error or unreasonableness in the precedent"). The State has not offered any serious argument for a change in procedure; strikingly, in its *Motion* it has almost completely ignored the fact that it is requesting such a radical departure. This Court should follow the same

procedures it has used again and again, and allow the defendant sufficient time to litigate his constitutional challenges.

III. DUE PROCESS MANDATES THAT THE DEFENDANT HAVE AN OPPORTUNITY TO LITIGATE THE CONSTITUTIONALITY OF THIS NEW METHOD OF EXECUTION.

Further, even if this Court had never confronted this procedural question before, the answer would be the same: a defendant must be given an opportunity to litigate a colorable challenge to the State's intended technique of execution. The State's practical difficulties in procuring chemicals present no reason to curtail the rights of defendants or the significant interest of the citizens of Tennessee in ensuring that any punishment inflicted in their name is not cruel and unusual. As this Court has acknowledged, the dictates of the Constitution on this point are clear. The protections of due process and the prohibition against cruel and unusual punishment, heightened in this area of irrevocable action, require an opportunity for the presentation of serious legal challenges. That this procedure may be inconvenient for the State is, in the end, irrelevant. As this Court wrote over 150 years ago, constitutional commands do not disappear when they become more difficult to follow:

> The practical inconvenience and mischievous consequences which may occasionally arise out of a strict adherence to the Constitution … can be no reason for a plain violation of the Constitution; for this, no possible consequences, however apparently unreasonable or absurd, can be admitted to afford sufficient reason.
>
> The provision of the Constitution is, in itself, a wise, just, and necessary safeguard to the rights and liberty of the accused. Like all general rules and principles of law, it may, in exceptional cases, be attended with inconvenient consequences in its practical operation, but these must necessarily be submitted to for the sake of the general salutary effect of the principle.

Kirk v. State, 41 Tenn. 344, 349 (1860).

In a conclusory way, the State argues that, unless this defendant is executed by June 1, 2018, public confidence in the criminal justice system will be undermined. *See Motion* at 11. *Amicus* suggests just the opposite: a system that re-writes its rules when they begin to interfere with a desired outcome is one that will not hold the public's respect.

In hundreds of courtrooms across the State every day, public defenders handle cases varying from minor misdemeanors to capital charges. Public defenders cannot promise to fix any injustices that their clients have suffered outside of the courthouse; they cannot promise to protect their clients from future misfortunes; and, most significantly, they cannot promise any favorable outcomes in court. The only thing public defenders, like any attorneys in the system, can truthfully promise clients is that the clients will be entitled to their day in court and to a decision made based on the facts in their case. This is the essence of due process. *See Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006) ("The most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner"). It is the one principle without which our system cannot function. *Amicus* requests merely that this Court afford this defendant his day in court on this crucial question and allow him an opportunity to litigate his serious claims that the State of Tennessee intends to execute them unconstitutionally.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent via E-Mail, pursuant to Tenn. Sup. Ct. Rule 12(4)(c), to the following:

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