

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

<b>STATE OF TENNESSEE,</b>	)	
	)	
	)	<b>DAVIDSON COUNTY</b>
<b>v.</b>	)	<b>No. M2000-00641-SC-DPE-CD</b>
	)	
	)	<b>CAPITAL CASE</b>
<b>BYRON LEWIS BLACK,</b>	)	<b>Execution Date: Oct. 8, 2020</b>
	)	
<b>Defendant.</b>	)	

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**RESPONSE OF THE STATE OF TENNESSEE IN OPPOSITION  
TO THE MOTION TO STAY EXECUTION**

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On April 29, 2020, Byron Black (“Black”) filed a motion to stay his execution based on the outbreak of the novel coronavirus disease COVID-19. (Motion, pp. 1-6.) He points to the presence of the virus in the general population and in the State’s prisons and the on-going efforts to contain the virus through stay-at-home recommendations and social distancing and alleges that the pandemic will affect his ability to prepare for his competency-to-be-executed hearing and to seek clemency. (Motion, pp. 6, 14.) But Black’s motion is premature, as he merely speculates about what the public health conditions will be at the time of his competency hearing. This Court therefore should deny his motion.

By this Court’s order, Black’s competency petition is not due to be filed until July 24 to July 28, 2020, and a competency hearing would not occur until August 2020. Given the currently changing landscape of many aspects of the pandemic, it is simply too early to know what effect,

if any, the virus will have on Black’s ability to prepare for a competency hearing three months from now.<sup>1</sup>

As Governor Lee has aptly noted, COVID-19 presents “a rapidly evolving situation.” <https://www.tn.gov/governor/covid-19.html> (“This is a rapidly evolving situation that Gov. Lee is continuously monitoring.”) The April statistics Black cites concerning the prevalence and deadly effects of the virus might not hold true for the upcoming summer months, particularly the relevant period from late July through August.

Likewise, communities’ current efforts to test for and contain the virus—stay-at-home orders, social distancing, and restrictions on prison visits and elective medical procedures—are evolving. Indeed, as many states experienced the positive results of stay-at-home orders, the first steps toward reopening non-essential businesses began as early as April 24. Adam K. Raymond, [\*These Are the States Opening Back up For Business\*](#), New York Intelligencer (May 4, 2020).

Governor Lee has begun encouraging Tennesseans to return to work in light of a “recent reduction in the spread of COVID-19 in Tennessee.” [\*Executive Order No. 30\*](#), pp. 1-2. To be sure, the Governor has advised citizens and companies to abide by social distancing protocols and to use remote working capabilities when possible, *id.* at ¶¶ 1, 4, 8,

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<sup>1</sup> Nor is Black entitled to months of preparation with certainty about how the hearing will transpire. The last time the Court remanded for a competency proceeding, it ordered that the trial court begin proceedings “expeditious[ly].” [\*State v. Irick\*](#), 320 S.W.3d 284, 287 (Tenn. 2010). The trial court granted the petition for a competency determination just 11 days later and, following a hearing, found the petitioner competent to be executed 32 days after this Court’s remand order. *Id.*

but the State is reopening. And, although counties with locally run health departments were excluded from this order, [Executive Order No. 30](#), ¶13, many of those counties are also reopening or eyeing an imminent reopening.<sup>2</sup> This Court’s own recent order regarding COVID-19 contemplates a return to most in-court proceedings by June and to holding jury trials in July. [In re: COVID-19 Pandemic](#), No. ADM2020-00428, at pp. 1-2 (Tenn. Apr. 24, 2020) (order modifying restrictions on in-person court proceedings).

These efforts will certainly continue to evolve over the summer months, in areas that address Black’s particular concerns. For example, Black submits that his expert witnesses, who live out of state, cannot travel to Nashville to conduct a contemporary evaluation of him in July. (Motion, p. 8.) However, while the Center for Disease Control (“CDC”) currently advises against non-essential travel, *see* <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (last visited May 4, 2020), the CDC’s advisory is prefaced with its acknowledgement that the situation is fluid: “The COVID-19 outbreak in United States is a rapidly evolving situation. The status of the outbreak varies by location and state and local authorities are updating

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<sup>2</sup> *E.g.*, Memphis & Shelby County to Enter Phase 1 of Back-to-Business Plan, <https://covid19.memphistn.gov/memphis-shelby-county-to-enter-phase-1-of-back-to-business-plan/> (Apr. 30, 2020); Mike Pare, [Stores, malls and gyms allowed to reopen in Hamilton County this week as COVID-19 restrictions ease](#), Chattanooga Times Free Press (Apr. 28, 2020); Brett Kelman, [Nashville aiming for early May reopening, despite spike in new coronavirus cases](#), The Tennessean (Apr. 27, 2020); Tyler Whetstone, [How Knoxville and Knox County plan to open things back up amid coronavirus](#), Knoxville News Sentinel (Apr. 27, 2020).

their guidance frequently.” *Id.* At this time, it is not possible to predict what advisory the CDC will issue for July travel.<sup>3</sup>

Black also submits that, as of the date he filed his motion, he was unable to obtain the neuroimaging study he says he needs for his competency hearing, because hospitals were reserving the use of their imaging equipment for COVID-19 and other emergency patients. (Motion, p. 12.) And he submits that he and his transport officers would run a significant risk of contracting the virus from the imaging facility. (Motion, pp. 11-12.) But on April 27, 2020, Governor Lee announced that elective medical procedures could resume. <https://www.tn.gov/governor/covid-19/covid-19-daily-bulletin/2020/4/27/covid-19-bulletin--26---april-27--2020.html> And Black cannot presume that effective safety precautions would not be observed by the imaging facility or his transport officers.

Further, Black asserts that his witnesses cannot travel to Nashville to testify at an August competency hearing given their health conditions and a predicted spread of the virus throughout the summer months. (Motion, p. 13.) But, as noted, this Court’s recent order contemplates a return to in-court proceedings by June and to jury trials in July. *In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Apr. 24, 2020). Black cannot presume that he will be unable to obtain necessary witnesses for

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<sup>3</sup> In any case, of course, Black does not have a right to out-of-state experts. *State v. Reid*, 213 S.W.3d 792, 828 (Tenn. 2006) (noting that, even when a capital defendant is entitled to expert services, he is not entitled to an expert of his choice). And he has not asserted that he would be unable to prepare for his competency hearing using local experts.

a hearing that would take place a full month after jury trials are set to resume.

Black also submits that the State of Texas has stayed executions because of COVID-19 and notes that this Court postponed the execution of Oscar Smith to February 4, 2021. (Motion, p. 19.) Significantly, though, the executions in those cases—scheduled for March through early June—were reset when the executions were imminent and the courts could say with some certainty that there was not enough time to accommodate for the virus. *State v. Smith*, No. M2016-01869-SC-R11-PD (Tenn. Apr. 17, 2020) (order resetting June 4 execution); [\*In re Hummel\*](#), No. WR-81,578-02, 2020 WL 1268970, at \*1 (Tex. Crim. App. Mar. 16, 2020) (two days before execution); [\*In re Beatty\*](#), No. WR-59,939-04, 2020 WL 1329145, at \*1 (Tex. Crim. App. Mar. 19, 2020) (six days before execution); [\*In re Fabian Hernandez\*](#), No. WR-81,577-02, 2020 WL 1645052, at \*1 (Tex. Crim. App. Apr. 1, 2020) (22 days before execution); [\*In re Edward Busby\*](#), No. WR-70,747-03, 2020 WL 2029306, at \*1 (Tex. Crim. App. Apr. 27, 2020) (nine days before execution). Given the expected flux of developments during the summer months, however, it cannot currently be said with any certainty that the virus will affect Black's ability to prepare for an August competency hearing.

Finally, Black claims that his clemency application will be affected by the coronavirus response in Tennessee. (Motion, p. 14.) But the Governor has authority to grant a reprieve at any time if he believes COVID-19 has impeded Black's ability to adequately prepare a clemency application for his review. See [Tenn. Const. art. III, § 6](#). On the other

hand, this Court has no role in clemency proceedings aside from determining whether to issue a certificate of commutation in appropriate cases, [Tenn. Code Ann. § 40-27-106](#); [Workman v. State](#), 22 S.W.3d 807, 808 (Tenn. 2000), which the Court refused to do when it set Black's execution date. *State v. Black*, No. M2000-000641-SC-DPE-PD (Tenn. Feb. 24, 2020) (order setting execution date) (per curiam).

The Court is aware of the status of COVID-19 in Tennessee and its impact on the judicial system. If public health circumstances worsen, the Court can take whatever actions are necessary regarding Black's hearing and execution as they approach. As it stands, however, the Court should refuse his request for a stay of execution.

## CONCLUSION

Black has not established that he is entitled to a stay of execution at this time, and this Court should deny his motion.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

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s/ Katharine K. Decker  
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