

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

STATE OF TENNESSEE,)	
)	HAMILTON COUNTY
v.)	No. E1998-00562-SC-R11-PD
)	
)	CAPITAL CASE
HAROLD WAYNE NICHOLS,)	
)	Execution Date: Aug. 4, 2020
Defendant.)	

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

Harold Wayne Nichols (“Nichols”) has filed a motion to stay his August 4, 2020 execution based on the COVID-19 pandemic. But Nichols largely speculates about future public health conditions and restrictions that he claims will affect litigation or his request for clemency. This speculation does not justify a stay, and the Court should deny his motion.

Initially, Nichols refers to “ongoing legal challenges” that social distancing and other restrictions have affected, but he does not identify or discuss these challenges. Nichols’s only pending litigation is an original federal habeas petition currently pending in the U.S. Supreme Court. *In re Harold Wayne Nichols*, No. 19-8179. Because this Court “will not grant a stay or delay of an execution date pending resolution of collateral litigation in federal court,” [Tenn. Sup. Ct. R. 12.4\(E\)](#), this habeas petition is not a basis for a stay from this Court.

Nichols also mentions the need for his legal team to “explore possible judicial remedies” without elaboration. But this Court will not stay an execution pending resolution of collateral litigation in state court

unless the prisoner can prove a likelihood of success on the merits, which requires showing more than a mere possibility of success. [State v. Irick](#), 556 S.W.3d 686, 689 (Tenn. 2018). Thus, Nichols's broad reference to possible litigation does not satisfy the standard for granting a stay.

Nichols also argues that his request for clemency will be adversely affected by the COVID-19 response in Tennessee. But the Governor has authority to grant a reprieve at any time if he believes COVID-19 has impeded Nichols's ability to 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 Nichols's execution date, [Nichols v. State](#), No. E1998-00562-SC-R11-PD (Tenn. Jan. 15, 2020) (order setting execution date) (per curiam). Thus, the need for more time to prepare a request for clemency does not warrant a stay from this Court.

Nichols further argues that current and future public health conditions will preclude him from preparing for his August 4, 2020 execution and will make the execution itself unsafe. But Governor Lee has the authority to issue a reprieve if the public health conditions in August make the execution unsafe for prison staff and witnesses, and he may consider any difficulty Nichols has had coordinating his personal preparation for the execution as a result of COVID-19 related restrictions.

Nichols notes that this Court recently stayed Oscar Smith's execution.¹ *State v. Smith*, No. M2016-01869-SC-R11-PD (Tenn. Apr. 17, 2020) (order resetting June 4, 2020 execution). However, the Court issued that stay seven weeks before Smith's execution at a time when this Court and Governor Lee were limiting business and travel in the state.² Nichols's execution, on the other hand, is still three months away, and both this Court and the Governor have already begun easing those restrictions.

In fact, this Court's 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). Similarly, Governor Lee has authorized most business to

¹ Nichols also points to executions that have been delayed in Texas, but each of the executions stayed by the Texas Court of Criminal Appeals was imminent and only stayed for 60 days. [*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. W-70,747-03, 2020 WL 2029306, at *1 (Tex. Crim. App. Apr. 27, 2020) (nine days before execution).

² [*In re: COVID-19 Pandemic*](#), No. ADM2020-00428 (Tenn. March 25, 2020) (order extending limits on in-person court proceedings through April 30, 2020); [Executive Order 27](#) (extending stay at home order to April 30, 2020); [Executive Order 23](#) (requiring Tennesseans to stay at home except for essential activities or services through April 14, 2020); [Executive Order 22](#) (closing non-essential businesses).

reopen and encouraged 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, but the state is reopening. 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.³

If citizens will be called upon to serve as jurors and return to their places of employment in August, there is no reason Nichols’s execution should not also proceed as scheduled. 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 Nichols’s execution when the date is imminent. As it stands, however, the Court should refuse Nichols’s request for a stay of execution.

³ *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).

CONCLUSION

Nichols 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/ Zachary T. Hinkle
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