

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

STATE OF TENNESSEE,)	
)	CAPITAL CASE
Respondent,)	
)	No. E1998-00562-SC-R11-PD
v.)	
)	Execution Set for August 4, 2020
HAROLD WAYNE NICHOLS,)	
)	
Movant.)	

MOTION FOR A STAY OF EXECUTION DUE TO COVID-19 PANDEMIC

Movant, Harold Wayne Nichols, requests this Court stay his execution date because the COVID-19 pandemic has created a dangerous environment in which to carry out an execution and prevents necessary work and preparation of an application for executive clemency. In support thereof, Mr. Nichols submits:

1. Harold Wayne Nichols is currently incarcerated in Nashville at the Riverbend Maximum Security Institution (“RMSI”) under a sentence of death and is scheduled to be executed on the premises at RMSI by the State of Tennessee on August 4, 2020.

2. Mr. Nichols has a right to seek executive clemency from Governor Lee. He also has ongoing legal challenges and continues to explore other possible judicial remedies. These efforts require substantial collaboration among members of the legal team, Mr. Nichols, and members of the public that cannot safely or effectively take place during a global pandemic. The absence of such work deprives Mr. Nichols

of a meaningful right to seek clemency and deprives the Governor of the information necessary to make life or death decisions.

3. Executive clemency is of vital importance in assuring that the death penalty is carried out justly; indeed, it has been called “the fail safe” in our criminal justice system. *Herrera v. Collins*, 506 U.S. 390, 415 (1993). “Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera*, 506 U.S. at 411-12 (footnote omitted)). The Governor’s pardon power is derived from Article 3, Section 6 of the Tennessee Constitution which says, “He shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment.” Any clemency request to Governor Lee would ordinarily be submitted approximately six weeks before the scheduled date for Mr. Nichols’ execution on August 4, 2020, in other words, by June 30, 2020.

4. Effective representation in the clemency process is required. *See, e.g., Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) (finding a stay necessary to make the “right to counsel meaningful”). Clemency, like other stages of a capital case, “has a unique role to play in the capital process, because both legal and social norms commonly evolve over the course of a case, and because of the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings, jurisdictions that retain capital punishment must provide

representation in accordance with the standards of these Guidelines[.]”¹ Much work remains to be done on Mr. Nichols’ behalf: “in addition to assembling the most persuasive possible record for the decisionmaker, counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process.”² Clemency can be granted “for a broad range of humanitarian reasons,”³ thus a thorough investigation is required to procure and effectively present information.⁴ “The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client’s character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death.”⁵ *See also* Attachment A, Declaration of Emily Olson-Gault, Director and Chief Counsel of the ABA Death Penalty Representation Project ¶¶18-24, 31 (describing the nature of the investigation required). Because “of the tremendous amount of investigation that the capital team must complete to adequately represent a person under a death sentence,” in this case—Mr. Nichols—there is an acute need for time and resources to prepare the clemency request.⁶ Attachment A, Olson-Gault Declaration ¶12.

5. The novel coronavirus, SARS-CoV-2 or “COVID-19,” is unprecedented for its level of dangerousness. As of April 30, 2020, there are more than 3 million

¹ *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“ABA Guidelines”), 31 Hofstra L. Rev. 930-31 (Feb. 2003).

² *Id.* at 937.

³ *Id.*

⁴ *Id.* at 955; *see also id.* at 1088 (ABA Guideline 10.15.2-Duties of Clemency Counsel).

⁵ *ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“Supplementary Guidelines”), Supplementary Guideline 10.11(B).

⁶ *Id.*

confirmed cases of people with COVID-19 and more than 220,000 people have died from the disease globally.⁷ The numbers grow by the day. This death toll has far surpassed that of the severe acute respiratory syndrome (“SARS”) epidemic that occurred in 2002 and 2003.⁸ COVID-19 is causing more infections and deaths than either SARS or the Middle East respiratory syndrome (“MERS”).⁹ Moreover, “the virus is significantly more lethal than seasonal flu.”¹⁰ The *infection fatality rate* measured in New York City, an epicenter of the virus in the United States, is about 0.5%, or one death per 200 infections.¹¹ The *infection fatality rate* for seasonal flu is 0.05%.¹² In the United States, according to the John Hopkins Coronavirus Resource Center, the coronavirus fatality count now exceeds the nation’s death toll from the Vietnam War.¹³

6. COVID-19 is a new type of coronavirus; “a virus that scientists haven’t seen before.”¹⁴ Doctors and scientists are trying to determine how the virus is transmitted between people and to better understand the pathogenesis of the infection and resulting inflammatory response. COVID-19 is unique because

⁷ Kathy Katella, *5 Things Everyone Should Know About the Coronavirus Outbreak*, Yale Medicine (Updated April 29, 2020) <https://www.yalemedicine.org/stories/2019-novel-coronavirus/> (last visited Apr. 30, 2020).

⁸ *Id.*

⁹ <https://www.niaid.nih.gov/diseases-conditions/covid-19>

¹⁰ Joel Achenbach, *Antibody tests support what’s been obvious: Covid-19 is much more lethal than the flu*, The Washington Post (Apr. 28, 2020), https://www.washingtonpost.com/health/antibody-tests-support-whats-been-obvious-covid-19-is-much-more-lethal-than-flu/2020/04/28/2fc215d8-87f7-11ea-ac8a-fe9b8088e101_story.html

¹¹ *Id.*

¹² *Id.*

¹³ Sanjana Karanth, *Coronavirus Deaths in U.S. Exceed Toll from Vietnam War*, huffpost.com (April 28, 2020), https://www.huffpost.com/entry/covid-19-news-worldwide-updates_n_5ea6d9e6c5b6dd3f9087f3d0#update20200428-1900; <https://coronavirus.jhu.edu/map.html> (reporting total deaths of more than 60,000, as of April 29, 2020).

¹⁴ <https://www.yalemedicine.org/stories/2019-novel-coronavirus/>

patients have high viral loads even without fever or with mild symptoms.¹⁵ This means the virus remains for a longer period of time and infected individuals with no or mild symptoms can release and spread the virus to others.¹⁶

7. COVID-19 causes respiratory tract illnesses and can lead to pneumonia, respiratory failure, septic shock, and death.¹⁷ Known symptoms were reported initially as shortness of breath, cough, and fever.¹⁸ The Center for Disease Control (“CDC”) recently confirmed six additional symptoms common to COVID-19 patients: chills, repeated shaking with chills, muscle pain, headache, sore throat, new loss of taste or smell.¹⁹ The symptoms can appear two to fourteen days after exposure to the virus.²⁰ In addition, about 36% of persons with COVID-19 suffer neurological manifestations early in the illness.²¹ Doctors and scientists have found that COVID-19 can cause a blood-clotting complication where the blood clots in unusual ways and does not respond to anticoagulants.²² Some patients’ lungs fill

¹⁵Yixuan Wang, *et. al.*, Unique epidemiological and clinical features of the emerging 2019 novel coronavirus pneumonia (COVID-10) implicate special control measures, 92 *J. Med. Virology* 568, 571 (Feb. 24, 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/jmv.25748>

¹⁶ *Id.* at 574.

¹⁷ *Coronavirus and COVID-19: What You Should Know*, <https://www.webmd.com/lung/coronavirus>

¹⁸ Angela Fritz, *et. al*, *CDC confirms six coronavirus symptoms showing up in patients over and over*, *The Washington Post* (Apr. 27, 2020), <https://www.washingtonpost.com/health/2020/04/27/six-new-coronavirus-symptoms/>

¹⁹ *Id.*; <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>

²⁰ *Ibid.* The median time from first symptom to dyspnea (difficult or labored breathing) has been measured at 5 days, the time to hospital admission is 7 days, and the time to acute respiratory distress syndrome is 8 days. Yixuan Wang, *et. al.*, *Unique epidemiological and clinical features of the emerging 2019 novel coronavirus pneumonia (COVID-10) implicate special control measures*, 92 *J. Med. Virology* 568, 571 (Feb. 24, 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/jmv.25748>

²¹ Ling Mao, *Neurologic Manifestations of Hospitalized Patients with Coronavirus Disease 2019, Wuhan, China*, *JAMA Neurol.* Published online April 10, 2020, doi:10.1001/jamaneurol.2020.1127, <https://jamanetwork.com/journals/jamaneurology/fullarticle/2764549?resultClick=24>

²² Maggie Fox, *Covid-19 causes sudden strokes in young adults, doctors say*, (April 23, 2020), <https://www.cnn.com/2020/04/22/health/strokes-coronavirus-young-adults/index.html>; Angela Fritz, *et. al*, *CDC confirms six coronavirus symptoms showing up in patients over and over*, *The Washington*

with hundreds of micro-clots and larger clots can break off and cause a stroke or heart attack.²³ This appears to be causing sudden strokes or heart attacks in adults in their 30s and 40s who are not otherwise terribly ill.²⁴ No pharmaceutical products have yet been shown to be safe and effective for treating COVID-19.²⁵

8. The COVID-19 pandemic has required all aspects of society to implement social-distancing procedures to combat the spread of the virus for protection of the public from risks associated with COVID-19. On January 30, 2020, the World Health Organization declared the yet-to-be-named COVID-19 virus outbreak a Public Health Emergency of International Concern.²⁶ The COVID-19 outbreak was declared a pandemic on March 11, 2020.²⁷ On March 13, 2020, President Donald Trump declared a national emergency, beginning March 1, 2020.²⁸ On March 12, 2020, Governor Lee declared a state of emergency in Tennessee.²⁹ Per the Governor's Executive Order, Tennesseans are required to stay at home through April 30, 2020, unless engaging in essential services or essential activities.³⁰ The activities involved in gathering information and support for Mr. Nichols' clemency

Post (Apr. 27, 2020), <https://www.washingtonpost.com/health/2020/04/27/six-new-coronavirus-symptoms>

²³ Angela Fritz, et. al, *CDC confirms six coronavirus symptoms showing up in patients over and over*, The Washington Post (Apr. 27, 2020) <https://www.washingtonpost.com/health/2020/04/27/six-new-coronavirus-symptoms/>

²⁴ Maggie Fox, *Covid-19 causes sudden strokes in young adults, doctors say*, CNN (Apr. 23, 2020) <https://www.cnn.com/2020/04/22/health/strokes-coronavirus-young-adults/index.html>

²⁵ <https://www.yalemedicine.org/stories/2019-novel-coronavirus/>

²⁶ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>

²⁷ *Id.*

²⁸ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

²⁹ Executive Order 14, <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee14.pdf>

³⁰ Executive Order 23, <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee23.pdf>

request and exploring possible judicial remedies do not qualify as essential services or activities.

9. On April 26, 2020, the White House Coronavirus Task Force Coordinator Deborah Birx stated: “social distancing will be with us through the summer to really ensure that we protect one another as we move through these phases.”³¹ The reopening guidelines recently discussed by Governor Lee do not apply to Tennessee’s largest cities, including Nashville (the city where Mr. Nichols is incarcerated), Knoxville (the city where undersigned counsel resides and works), and Chattanooga (the city where Mr. Nichols was prosecuted).³² These three cities (and Memphis) have all held off from promising to reopen by any particular date.³³

10. The pandemic has necessitated numerous restrictions which curb the activities of Mr. Nichols’ legal team. For instance, counsel is prevented from speaking in person to Mr. Nichols and performing all the duties necessary to prepare a competent application for executive clemency and effectively explore possible judicial remedies. Since March 16, 2020, Mr. Nichols’ legal team at Federal Defender Services of Eastern Tennessee, Inc., has been required to work from home and not travel for work-related purposes. In order to help correctional facilities prevent the spread of COVID-19 from outside the facility to inside, the CDC has

³¹ Felicia Sonmez, *et. al*, *Social Distancing Could Last for Months, White House coronavirus coordinator says*, The Washington Post (Apr. 26, 2020), https://www.washingtonpost.com/politics/social-distancing-could-lastmonths-white-house-coronavirus-coordinator-says/2020/04/26/ad8d2f84-87de-11ea-8ac1-bfb250876b7a_story.html

³² Associated Press, Wire Service Content, *Tennessee Won’t Enforce New Reopening Guidelines*, (Apr. 24, 2020), <https://www.usnews.com/news/best-states/tennessee/articles/2020-04-24/tennessee-wont-enforce-new-reopening-guidelines>

³³ *Id.*

issued guidance for correctional facilities that includes suspension or modification of visitation practices and restricting non-essential persons from entering the facility.³⁴ The Tennessee Department of Correction (“TDOC”) has suspended family and friend visitation, and legal visits have been suspended, absent special permission.³⁵ As a result of counsel’s work-place restrictions (based on CDC recommendations), TDOC restrictions, and state travel restrictions and social-distancing policies, counsel has been unable to conduct in-person, face-to-face meetings with Mr. Nichols to discuss his case, his clemency request, or decisions required by Tennessee’s execution protocol and necessitated by end-of-life matters.³⁶

11. Because of the pandemic, counsel cannot “maintain close contact with” and “monitor [Mr. Nichols]’ mental, physical and emotional condition [.]”³⁷ Such contact is “necessary to ensure that [Mr. Nichols] is ‘cognitively and emotionally competent to make sound decision concerning his case.’” Attachment A, Olson-Gault Declaration ¶28 (quoting ABA Guideline 4.1, Commentary, at 959). The fact that “in-person visits cannot take place prevents counsel from ensuring that [Mr. Nichols] is competent.” *See* Attachment A, Olson-Gault Declaration ¶28.

12. As a result of the pandemic, Mr. Nichols’ legal team is unable to conduct the investigation required to gather meaningful information for presentation in a clemency request to the Governor and required to make key

³⁴ <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>

³⁵ Frequently Asked Questions Regarding COVID-10, TDOC, questions 1 & 11, <https://www.tn.gov/correction/frequently-asked-questions-regarding-covid-19.html>

³⁶ *See* Supplementary Guideline 10.11(C); ABA Guideline 10.5 & Commentary, at 31 Hofstra L. Rev. 1005-11.

³⁷ ABA Guideline 10.15.1(E)(1)-(2).

strategic decisions. *See* Attachment A, Olson-Gault Declaration ¶¶30. In-person visits with Mr. Nichols’ family, friends, students, as well as other persons with relevant knowledge of Mr. Nichols are crucial for gathering a complete picture of the man who will be seeking executive clemency. *See* Attachment A, Olson-Gault Declaration ¶¶ 23-27.

13. As a result of the pandemic, the prison has cancelled visitation and this has substantially affected Mr. Nichols’ ability to prepare mentally and spiritually for his death. It is as true today as hundreds of years ago that the law values such an opportunity.³⁸

14. As a result of the pandemic, the judicial system as a whole has altered its operations and shifted its priorities. In response to the COVID-19 pandemic, this Court declared a state of emergency for the Judicial Branch of Tennessee on March 13, 2020, and suspended most in-person court proceedings through March 31, 2020.³⁹ The suspension of most in-person court proceedings has been extended through May 31, 2020, with jury trials suspended through July 3, 2020.⁴⁰

15. In addition, “[t]he Judicial Conference of the United States has [] found that emergency conditions due to the national emergency declared by the President have affected and will materially affect the functioning of the federal courts generally.”⁴¹ The federal District Court for the Eastern District of Tennessee, where

³⁸ *Ford v. Wainwright*, 477 U.S. 399, 421 (1986) (Powell, J., concurring) (The execution of person without the ability to prepare for his death would “impose a uniquely cruel penalty.”); *see also Thompson v. Bell*, 580 F.3d 423, 440 (6th Cir. 2009).

³⁹ *In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Mar. 13, 2020).

⁴⁰ *In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. Apr. 24, 2020).

⁴¹ *In re: Authorization for Video and Audio teleconferencing During COVID-19 Pandemic Pursuant to the CARES Act*, No. SO-20-08, page 1 (E.D. Tenn. Mar. 30, 2020).

Mr. Nichols' conviction is based, has suspended many in-person proceedings through May 30, 2020, including grand jury proceedings.⁴² The court has found that felony pleas and sentencing "cannot be conducted in person in this district without seriously jeopardizing public health and safety."⁴³ The Court noted in its most recent order extending the time period for restricted operations, that such restrictions were warranted because "the COVID-19 pandemic continues, and in consideration of updated guidance from the CDC as well as federal, state, and local public health authorities[.]"⁴⁴ The United States Supreme Court has closed its building to the public, postponed oral arguments, and *sua sponte* entered a general order extending the filing date for any petition for writ of certiorari and providing for extensions of other deadlines.⁴⁵ On April 22, 2020, the Potter Stewart Federal Courthouse in Cincinnati, Ohio, which houses the federal district court for the Southern District of Ohio and the Sixth Circuit Court of Appeals, closed after a Physical Security Officer (PSO) responsible for the courthouse tested positive for COVID-19.⁴⁶ The court's order notes that the PSO "could have come into contact with Court employees throughout the Courthouse."⁴⁷ The courthouse closed three

⁴² *In re: Extensions of Time Set Forth in SO-20-06 and SO-20-09 Regarding Court Operations under the Exigent Circumstances Created by COVID-19*, No. SO-20-12 (E.D. Tenn. Apr. 27, 2020).

⁴³ *In re: Authorization for Video and Audio Teleconferencing During COVID-19 Pandemic Pursuant to the CARES Act*, No. SO-20-08, page 2 (E.D. Tenn. Mar. 30, 2020).

⁴⁴ *In re: Extensions of Time Set Forth in SO-20-06 and SO-20-09 Regarding Court Operations under the Exigent Circumstances Created by COVID-19*, No. SO-20-12 (E.D. Tenn. Apr. 27, 2020).

⁴⁵ https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20;
https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20;
https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

⁴⁶ *In re: Temporary Closure of the Potter Stewart Courthouse*, Gen. Order 20-12 (S.D. Ohio Apr. 22, 2020).

⁴⁷ *Id.*

days after the PSO last worked in the courthouse before becoming symptomatic and was closed for six days for remediation operations. It recently reopened, but with reduced staff levels and other restrictions previously adopted by the Court to remain in effect until further order.⁴⁸

16. Courts have rescheduled execution dates in recognition of the extraordinary circumstances of this pandemic and its detrimental effect on the representation of persons with execution dates. The State of Texas has now stayed six executions in light of COVID-19.⁴⁹ This Court recently re-scheduled Oscar Smith's June 4th execution date to February 4, 2021.⁵⁰

17. The exigent circumstances created by the COVID-19 pandemic are not diminishing. On April 2, 2020, the CDC recommended that all Americans wear masks anytime they leave their homes to mitigate the spread of the virus.⁵¹ In the United States, and in Tennessee, the total number of COVID-19 cases continues to increase. According to the CDC, as of April 30, 2020, the number of reported cases in the United States is 1,031,659, with 60,057 deaths.⁵² The following graphic from

⁴⁸ *In re: Re-opening of the Potter Stewart Courthouse*, Gen. Order 20-14 (S.D. Ohio Apr. 27, 2020).

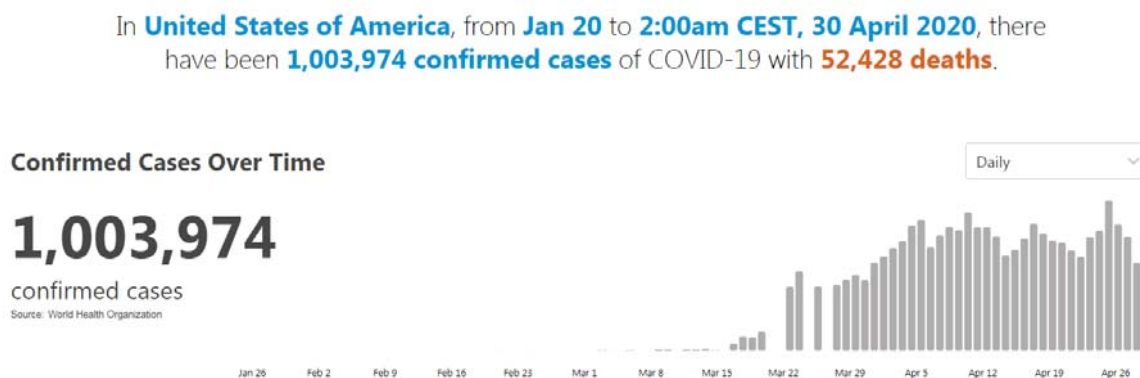
⁴⁹ Associated Press, *6th Texas execution delayed as attorneys cite pandemic*, Centre Daily Times, (Apr. 28, 2020), <https://www.centredaily.com/news/business/health-care/article242342331.html>

⁵⁰ *State v. Smith*, No. M2016-01869-SC-R11-PD, Order (Tenn. Apr. 17, 2020).

⁵¹ CDC, Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (last visited Apr. 30, 2020)

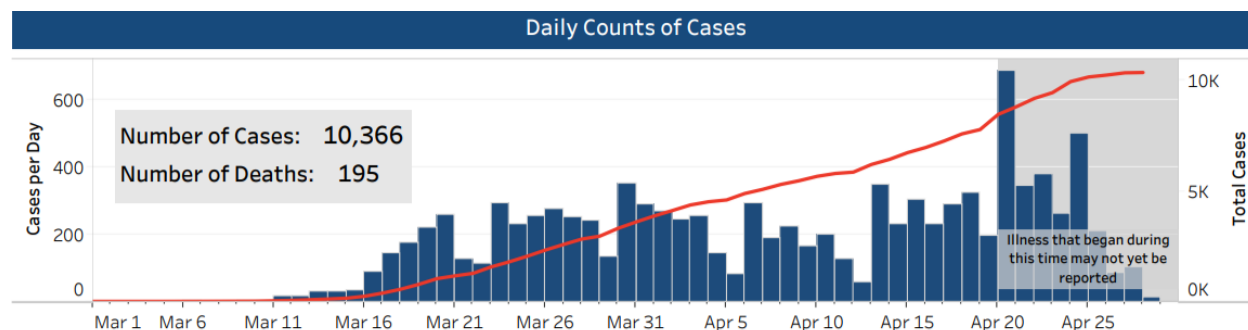
⁵² https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html#anchor_1586784349 (last visited Apr. 30, 2020)

the World Health Organization illustrates the increase of COVID-19 in the United States since the first case was reported on January 14, 2020:⁵³



18. As of April 29, 2020, the number of cases in Tennessee is 10,366.⁵⁴

There have been 195 deaths, which represents 2% of COVID-19 cases.⁵⁵ The following chart illustrates the increase of COVID-19 in Tennessee since the first case reported on March 5, 2020:⁵⁶



⁵³ <https://covid19.who.int/region/amro/country/us> (updated Apr. 30, 2020) (last visited Apr. 30, 2020)

⁵⁴ *Tennessee COVID-19 – April 19, 2020 Epidemiology and Surveillance Data, Daily Counts of Cases* <https://www.tn.gov/content/tn/health/cedep/ncov/data.html> (last visited Apr. 30, 2020)

⁵⁵ *Id.* A transmission number below 1.0 for a sustained period of time is necessary to slow the epidemic, but Tennessee has not yet reached that number. Cameron Taylor, *New Vanderbilt COVID-19 Model Shows Progress in Coronavirus Battle*, News4Nashville (Apr. 16, 2020) https://www.wsmv.com/news/new-vanderbilt-covid-19-model-shows-progress-in-coronavirus-battle/article_264d77aa-8044-11ea-b003-b74e4fc54d38.html; Vanderbilt COVID-19 Modeling Report for Tennessee (Apr. 16, 2020)

⁵⁶ *Tennessee COVID-19 – April 19, 2020 Epidemiology and Surveillance Data, Daily Counts of Cases* <https://www.tn.gov/content/tn/health/cedep/ncov/data.html> (last visited Apr. 30, 2020)

19. Davidson County, where Mr. Nichols is imprisoned and his execution is scheduled to occur, has 2,454 cases and 25 deaths.⁵⁷ It continues to lead the state in numbers of confirmed cases and is second only to Shelby County in the number of deaths. Hamilton County, where the crime occurred, has 152 confirmed cases and 13 deaths.⁵⁸ Knox County, where Mr. Nichols' legal team is located, has 221 cases and 5 deaths.⁵⁹

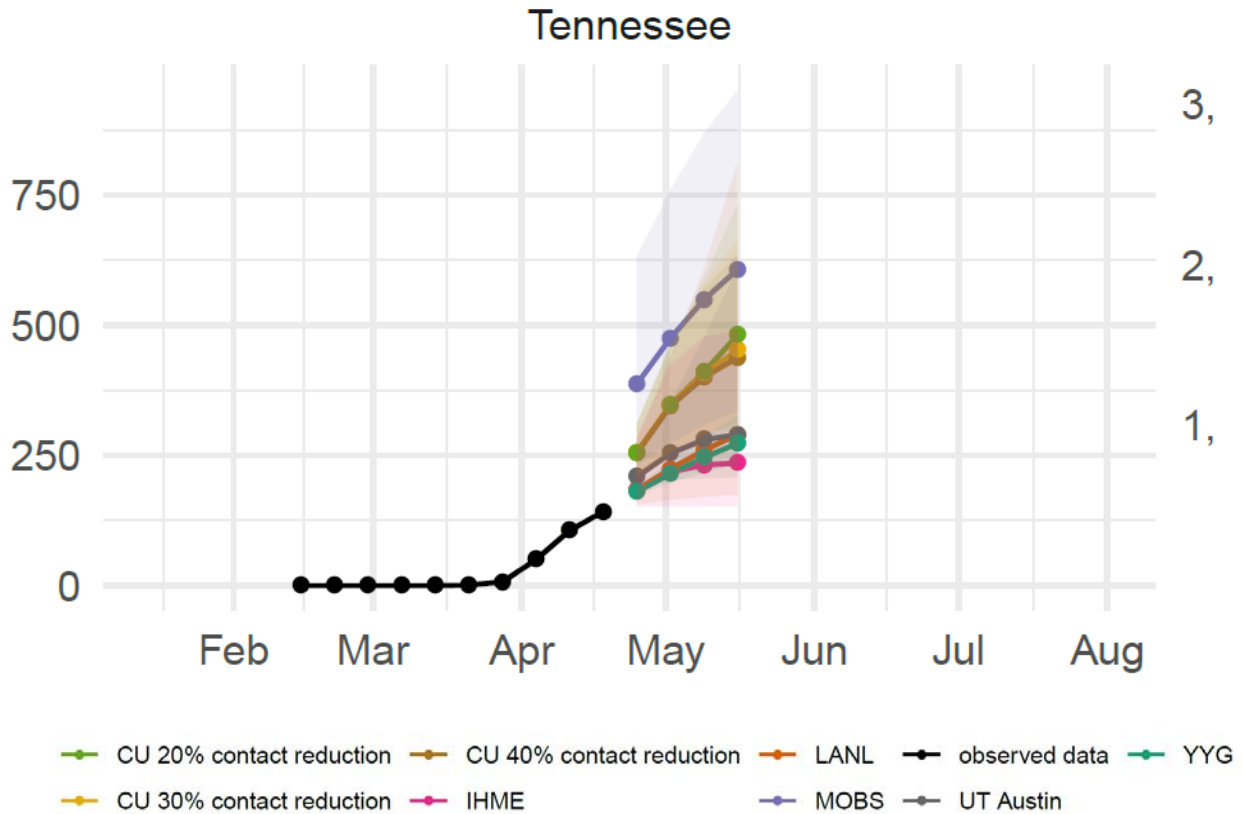
20. If social distancing measures remain in place, the number of deaths from COVID-19 through the first week of May 2020 are projected as follows:⁶⁰

⁵⁷ *Tennessee COVID_19 – April 29, 2020 Epidemiology and Surveillance Data, Cases and Labs by County* <https://www.tn.gov/health/cedep/ncov.html> (last visited Apr. 30, 2020)

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/2020-04-20-state-plots-no-ens.pdf> (last visited Apr. 30, 2020)



21. If social-distancing measures are relaxed, doctors and scientists predict an increase in COVID-19 transmission, cases and deaths.⁶¹

22. The health of many people would be jeopardized if an execution is conducted in August 2020. In Tennessee, it takes more than twenty people to carry-out an execution.⁶² Tennessee Department of Corrections (“TDOC”) staff, state employees and contractors work in confined spaces and in close proximity to

⁶¹ Jonathan Roberts, *Vanderbilt: Tennessee COVID-19 cases to peak in mid-June, hospitalize 5,000 without further intervention*, Johnson City Press (Apr. 11, 2020) <https://www.johnsoncitypress.com/Health-Care/2020/04/10/Vanderbilt-study-Tennessee-COVID-19-cases-to-peak-in-mid-June-without-further-intervention.html>

⁶² See Lethal Injection Execution Manual Execution Procedures for Lethal Injection (“Protocol”), pp. 2, 8, 31, 64, <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

accomplish the task of putting a prisoner to death at RMSI in Nashville.⁶³ Before any scheduled execution, the execution protocol requires that execution team members participate in training for at least one hour every month and additional training is held within two weeks of the execution.⁶⁴ According to state statute, regulations and the execution protocol, more than ten people witness an execution: seven news media representatives, a defense counsel, a prosecutor, the victim's family members, a sheriff of the county in which the crime was committed, the prisoner's family members.⁶⁵ More people may gather both inside and outside the institution. Members of the victim's extended family and other interested persons or support persons may be present for, but not witness, the execution.⁶⁶ These various groups remain together and are escorted to and from room to room according to the execution protocol schedule.⁶⁷ The medical examiner's staff and the physician wait in the capital punishment garage to perform their tasks.⁶⁸ Dozens of people gather outside to protest the execution.⁶⁹ Immediately after an execution, a news

⁶³ For example, three members of the Execution Team are stationed in the small "Executioner's Room," *compare* Protocol p.10 (diagram of the Capital Punishment Unit) *with* Protocol pp.44-45 (describing tasks carried out by the Execution Team from the Executioner's Room),

<https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

⁶⁴ Protocol p.32 <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

⁶⁵ See Protocol pp. 71, 80, 81, 95, 98

<https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

<https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>; Tenn. Code Ann. §40-23-116.

⁶⁶ See Protocol p.71 <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

⁶⁷ See Protocol pp.64-67 <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

⁶⁸ See Protocol p.64 <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

⁶⁹ See, e.g., Adam Tamburin, *et al.*, *Tennessee Executes Stephen Michael West by Electric Chair*, *Tennessean* (Updated Aug. 16, 2019) (reporting that more than 30 protestors gathered),

<https://www.tennessean.com/story/news/2019/08/15/tennessee-execution-stephen-michael-west-dies->

conference must be held with other news media representatives and the news media witnesses must make themselves available for questions and must remain at the news conference until it is complete.⁷⁰ In the days preceding and hours throughout and subsequent to an execution, an unknown but sizeable number of security officers, including Tennessee Highway Patrol members, are present on, and moving around, the prison grounds.⁷¹

23. The risk of spreading the coronavirus inside a penal institution is enormous. An execution takes prison staff away from their day-to-day duties. Every staff member who is pulled away from his or her primary responsibility of keeping the prison safe and every non-essential person who enters RMSI represents an opportunity for the virus to infiltrate the institution. Once inside a prison environment, the virus will spread like wildfire.⁷² One corrections expert has described the spread of disease within a prison as worse than on a cruise ship.⁷³ In Tennessee, more than 750 prisoners have tested positive for COVID-19 (out of approximately 3800 prisoners tested in 7 facilities).⁷⁴ An execution is a “high risk”

[electric-chair/2009390001/](https://www.nashvillescene.com/news/pith-in-the-wind/article/21117655/the-execution-of-nick-sutton); Steven Hale, *The Execution of Nick Sutton*, Nashville Scene (Feb. 21, 2020) (reporting that a few dozen protestors “gathered in their normal spot in a field outside”), <https://www.nashvillescene.com/news/pith-in-the-wind/article/21117655/the-execution-of-nick-sutton>

⁷⁰ See Protocol p.96 <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

⁷¹ Information on perimeter security prior to, during, and subsequent to an execution is confidential. See Protocol p.73 <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

⁷² Associated Press, *US Prisons Called a Coronavirus “Tinderbox.”* Courthouse News Service (Mar. 19, 2020) <https://www.courthousenews.com/us-prisons-called-a-coronavirus-tinderbox/>

⁷³ Linda So & Grant Smith, *In four U.S. state prisons, nearly 3,300 inmates test positive for coronavirus – 96% without symptoms*, Reuters (Apr. 25, 2020) <https://news.yahoo.com/four-u-state-prisons-nearly-180100661.html>

⁷⁴ Kimberlee Kruesi & Adrian Sainz, *Coronavirus cases in Tennessee prisons rise to more than 750, testing ramps up*, Associated Press (Apr. 28, 2020) <https://www.wate.com/news/tennessee/coronavirus->

event and scores 3 out of 4 on the World Health Organization’s Mass Gathering Risk Assessment Tool: the event occurs at a place with documented, active, local transmission of the virus; the event includes a significant number of participants at higher risk of severe disease (for example, prisoners with poorer overall health, older people, and people with underlying health conditions); and the event will be primarily indoors and people will be in close contact with one another for a prolonged period.⁷⁵ An execution places prisoners, state employees, and private citizens at risk.

24. The execution protocol does not address the carrying out of executions in the time of any pandemic, including aspects that will promote the spread of COVID-19. To the contrary, an execution requires many persons to enter inside RMSI or remain on the grounds of the prison. Conducting an execution during a pandemic presents needless additional risk to the staff, contractors, volunteers, other state employees, almost 800 prisoners at RMSI, the dozens of people involved in carrying-out the execution, as well as, media reporters, witnesses and demonstrators at the execution. Postponing Mr. Nichols’ execution will protect the health and lives of many people. A postponement of Mr. Nichols’ execution date will provide equal treatment as the Court extended the execution date of Oscar Smith who was scheduled for execution in May, just sixty days before Mr. Nichols

[cases-in-tennessee-prisons-rise-to-more-than-750-testing-ramps-up/](#) (reporting, “Riverbend Maximum Security Institution has seen one positive case after testing just two inmates.”).

⁷⁵ Questions and answers on mass gatherings and COVID-19 <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/points-of-entry-and-mass-gatherings> (last visited Apr. 30, 2020)

execution date. Re-scheduling the execution to a later date when counsel is not constrained from adequately representing Mr. Nichols and when he is able to make counseled decisions (both legal and spiritual) regarding the execution protocol and end-of-life matters will also help ensure that Governor Lee receives adequate information to make a well-informed decision regarding clemency.

25. Undersigned has consulted with counsel for the State regarding this request for a stay of execution. The State does not presently take a position on this request and will make its position known in a response.

WHEREFORE, Movant Harold Wayne Nichols respectfully submits this Court should stay his execution because the COVID-19 pandemic has created a dangerous environment in which to carry out an execution and prevents counsel from performing necessary work and preparing a competent application for executive clemency.

Respectfully submitted this 30th day of April, 2020.

/s/Dana C. Hansen Chavis
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CERTIFICATE OF SERVICE

I, Dana C. Hansen Chavis, certify that on April 30, 2020, a true and correct copy of the foregoing Motion for a Stay of Execution was served via United States Mail to opposing counsel, Amy Tarkington, Associate Solicitor General, P.O. Box 20207, Nashville, Tennessee 37202 and John Bledsoe, Deputy Attorney General, P.O. Box 20207, Nashville, Tennessee 37202.

/s/Dana C. Hansen Chavis
Dana C. Hansen Chavis

DECLARATION OF EMILY OLSON-GAULT, ESQ.

1. I, the undersigned declarant, Emily Olson-Gault, am over eighteen years of age and competent to testify to the statements contained in this Declaration. I am an attorney licensed to practice law in the State of New York and the U.S. Supreme Court. I am the Director and Chief Counsel of the American Bar Association Death Penalty Representation Project, which is based in Washington, D.C.
2. The American Bar Association (“ABA”) created the Death Penalty Representation Project (the “Project”) in 1986 to address the lack of qualified counsel available to those facing a death sentence.
3. The ABA and the Project do not take a position on the death penalty itself. The Project is committed to ensuring that basic constitutional protections have been provided to all individuals who are charged with a capital crime or sentenced to death. To this end, the Project promotes policies and procedures that will guarantee that all those facing execution are represented at every stage of the proceedings.
4. The ABA has promulgated Guidelines that govern the appointment and performance of defense counsel in death penalty cases. The Project is sometimes asked to provide affidavits in death penalty cases about the ABA Guidelines and standards for representation, and it does so not to advantage a particular litigant but to ensure that basic constitutional protections and due process have been provided to all individuals under a death sentence.
5. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter “ABA Guidelines” or “Guidelines”), first adopted in 1989, were revised and updated in 2003 so that they would accurately reflect current death penalty law and practice. 31 HOFSTRA L. REV. 913 (2003), *available at* <http://ambar.org/2003guidelines>. The Death Penalty Representation Project led the effort to revise and update the Guidelines. The ABA House of Delegates approved the revised ABA Guidelines in February 2003.
6. After the revision of the ABA Guidelines in 2003, the Project and other organizations developed the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (hereinafter “Supplementary Guidelines”) to address the urgent need to help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team, the mitigation specialist. The Supplementary Guidelines are a complementary extension of the ABA Guidelines. They serve to spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together effectively to uncover and develop evidence that humanizes the client. *See* Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 679 (2008).
7. The ABA Guidelines and Supplementary Guidelines have been cited favorably in nearly 400 state and federal capital appellate decisions, including the United States Supreme Court.

See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) (“We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ...’” (citing *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam)); *Florida v. Nixon*, 543 U.S. 175, 191, 191 n.6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). See also ABA Death Penalty Representation Project, *List of Cases Citing the Guidelines* (Mar. 27, 2020), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf.

8. The Guidelines have been adopted in substantive part or officially acknowledged as an accurate description of the standard of care for defense representation in death penalty cases by organizations such as the State Bar of Texas, the Department for Public Advocacy for the Commonwealth of Kentucky, the Idaho Public Defender Commission, the Georgia Public Defender Standards Council, and numerous others. The ABA Guidelines have also been adopted in substantive part by state legislative action or court rule in Louisiana, Nevada, and Arizona. See ABA Death Penalty Representation Project, *Implementation Fact Sheet* (Jul. 2018), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/ImplementationFactSheetJul2018.pdf.
9. The ABA Guidelines did not themselves create the national standard of care for capital representation; rather they simply codified long-standing norms of capital defense practice in the United States. See *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) (“the [ABA Guidelines] merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.”).
10. They are intended to provide guidance to judges and capital defense counsel regarding the skills and training death penalty counsel must possess when representing a person charged with a capital crime or sentenced to death.
11. The professional norms encapsulated by the ABA Guidelines govern every stage of capital proceedings. See Guideline 1.1(B) (“These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, postconviction review, clemency proceedings and any connected litigation.”). In a capital case, “every stage” includes litigation in the context of an issued execution warrant, see Guideline 10.15.1, “Duties of Post-Conviction Counsel,” Commentary, at 1081 n.335, as well as “advocacy outside the confines of the capital case itself,” such as systemic and administrative challenges. Guideline 1.1, Commentary, at 923-24.
12. Underlying much of the ABA Guidelines is the recognition that defending capital cases requires extraordinary time and effort at every stage of a capital proceeding, including post-conviction, habeas corpus, and once an execution warrant has issued. See Guideline 1.1, Commentary (“‘Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.’ . . . Due to the extraordinary and irrevocable nature of the penalty, at every stage of the

proceedings counsel must make ‘extraordinary efforts on behalf of the accused’” (quoting, first, Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995) and, second, ABA Standards for Criminal Justice: Defense Function, Standard 4-1.2(C), (3d ed. 1993)). The need for time and resources to prepare the defense is due in part to the tremendous amount of investigation that the capital team must complete to adequately represent a person under a death sentence.

13. In my position as Director of the Project, I am in frequent contact with capital defenders and pro bono attorneys to discuss and assist with issues related to capital representation.
14. During the month of March 2020, I have spoken with capital defenders and pro bono attorneys all over the United States as they attempt to cope with the unprecedented situation created by the COVID-19 global pandemic. My understanding from these conversations is that most capital defense teams are unable to conduct the large majority of the investigation and expert work required in capital representation (*see* ¶¶18-31, *infra*). This is due to restrictions set in place by state and local governments, as well as departments of corrections and institutional defender offices and law firms, out of a concern for public health and the welfare of employees. As a result, the already extremely limited time available to capital teams has been truncated significantly because of health concerns related to COVID-19.
15. Time is a scarce resource in all capital representation, and never more so than at the post-conviction or habeas corpus stages, or when an execution warrant has issued. *See* Guideline 1.1, Commentary (“Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases. Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client’s execution.”); Guideline 10.15.1, Commentary, n.335 (“When a capital case enters a phase of being ‘under warrant’—i.e., when a death warrant has been signed—time commitments for counsel increase, “due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.””).
16. When the already limited time is further truncated, whether by operation of the legal system or by something wholly external like a natural disaster, counsel will not have adequate time to prepare their case and this, in turn, jeopardizes due process and fairness in capital cases. *See* Guideline 6.1, Commentary (“Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.”).
17. The Guidelines’ description of the nature of investigation required at every stage of a capital proceeding provides insight into the extraordinary need for time in all capital proceedings.

18. Capital defense counsel and their teams *at every stage of a capital proceeding* must conduct thorough, independent investigations related to both the guilt and penalty phases of the trial. *See* ABA Guideline 10.7(A); Guideline 10.15.1(E)(4) (post-conviction counsel must “continue an aggressive investigation of all aspects of the case”). Because “the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case,” post-conviction investigation must be “thorough” and “independent.” Guideline 10.15.1, Commentary, at 1085-86.
19. Additionally, investigation in post-conviction proceedings poses specific challenges and unique obligations, as it requires a reinvestigation of “the facts underlying the conviction and sentence,” a re-investigation of the client to put together a more thorough and up-to-date social history, and additional investigation into “trial counsel’s performance, judicial bias, or prosecutorial misconduct.” Guideline 10.15.1, Commentary, at 1086. The ABA Guidelines make clear that this obligation – like the other requirements of capital defense counsel – is “on-going” and contemplates all phases of litigation subsequent to the trial. Guideline 10.15.1(E).
20. As part of the requisite investigation, capital cases also require comprehensive, multi-generational psychosocial history construction based on “exhaustive investigation.” ABA Guideline 4.1, “Defense Team and Supporting Services,” Commentary, at 959. These histories must extend back at least three generations in the defendant’s family. *See also* Supplementary Guideline 10.11(E)(2)(a).
21. The areas for investigation include (1) medical history, including “hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage;” (2) family and social history; (3) educational history; (4) military service; (5) employment and training history; and (6) prior juvenile and adult correctional experience. Guideline 10.7, Commentary, at 1022-23. *See also* Supplementary Guideline 10.11(B) (listing the same areas enumerated by the ABA Guidelines and further adding “multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; . . . religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.”).
22. The areas for investigation listed in ABA Guideline 10.7 are not intended to be exhaustive, and the Guidelines explicitly contemplate additional investigation for other legal issues: “Additional investigation may be required to provide evidentiary support for other legal issues in the case . . . Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.” Guideline 10.7, Commentary, at 1027. *See also* Supplementary Guideline 10.11(B) (“The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client’s character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death.”).
23. The ABA Guidelines outline a dual-track approach to conducting this investigation, requiring both witness interviews and records collection. *See* Guideline 10.7, Commentary,

at 1024 (“It is necessary to locate and interview the client’s family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers and others” and “[r]ecords—from courts, government agencies, the military, employers, etc. . . . should be requested concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.”).

24. Simply locating a single source for this information is often insufficient. The Guidelines recognize that “[t]he collection of corroborating information from multiple sources—a *time-consuming task*—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.” Guideline 10.7, Commentary (emphasis added).
25. The Guidelines also make clear that in-person interviews with the client, witnesses, and family members are at the core of any adequate investigation: “Team members must conduct *in-person, face-to-face, one-on-one* interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.” Supplementary Guideline 10.11(C) (emphasis added). *See also* ABA Guideline 10.5, Commentary, at 1008 (“Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls.”). Remote technology options such as video conferencing and phone calls do not provide an adequate alternative for capital defenders, mitigation specialists, experts, or investigators.
26. This time-intensive, in-person contact is essential for establishing a relationship of trust with the client, client’s family, and other witnesses, which is indispensable to effective representation. *See* Supplementary Guideline 10.11(C) (“Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.”); ABA Guideline 10.5 and Commentary (“Client contact must be ongoing, and *include sufficient time spent at the prison to develop a rapport between attorney and client.*”) (emphasis added); ABA Guideline 10.15.1(E)(1)-(2) (Post-conviction counsel must “maintain close contact with the client” and “monitor the client’s mental, physical, and emotional condition [.]”).
27. In-person visits with the client and client’s family are also a crucial tool in dictating the defense team’s choices regarding necessary mental health screening and experts, which are especially important given the near-ubiquity of mental health issues in capital cases. Defense counsel’s observations of the client’s mental state are a necessary piece of the puzzle, as are the observations of a member of the defense team specifically trained to screen for disorders and recommend follow-up investigation and appropriate experts. *See* ABA Guideline 4.1, Commentary, at 956. In many cases, the results of such observation render a “psychologist or other mental health expert [] a needed member of the defense team.” Guideline 10.4, Commentary, at 1004.

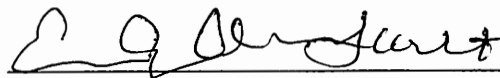
28. The mental health services provided as a result of observations and screenings are also oftentimes necessary to ensure that a client is “cognitively and emotionally competent to make sound decisions concerning his case.” Guideline 4.1, Commentary, at 959. Moving capital proceedings forward while in-person visits cannot take place prevents counsel from ensuring that the client is competent.
29. Additionally, expert evaluations of the client are time-consuming, particularly for issues related to intellectual disability and mental illness or competency. *See* Guideline 4.1, Commentary (“Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.”). In order to ensure the heightened reliability of such evaluations, a thorough investigation must first be conducted. *Id.* (“Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.”); *see also* Guideline 4.1, Commentary, at 959 (the mitigation specialist “provides social history information to experts to enable them to conduct competent and reliable evaluations”). Judgment calls regarding which expert evaluations are recommended are necessarily the product of in-person visits between the client and the defense team, *see* ¶¶27-28, *supra*, and are informed by a comprehensive and thorough investigation.
30. The investigation is also a necessary precursor to making key strategic decisions and preparing pleadings. *See* ABA Guideline 10.7, Commentary, at 1021 (“Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client’s competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.”).
31. In addition to the above-described duties and decisions, cases with an active execution warrant require additional urgent, time-consuming tasks that cannot be completed prior to the issuance of the warrant, such as the preparation of petitions for executive clemency, seeking stays of execution, and arranging for expert evaluations regarding the clients’ competency to be executed. *See* Guideline 1.1, Commentary at 937 (“Recent advances in the use of DNA technologies, combined with restrictions on the availability of post-conviction review, have elevated the important role that clemency has played as the “fail-safe” of the criminal justice system, and *increased the demands on counsel*”) (emphasis added); Guideline 10.15.1(B) (“If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.”); Guideline 10.15.2(B)-(D) (detailing duties of clemency counsel, including duty to “conduct an investigation in accordance with Guideline 10.7”).
32. The norms of practice reflected in the ABA Guidelines are not aspirational. *See* Guideline 1.1, “Objective and Scope of Guidelines,” Commentary, at 920. They represent the minimum requirements for adequate representation. If counsel lacks adequate time to prepare their case, or if defense counsel, mental health experts, investigators and mitigation

specialists are unable to conduct in-person meetings and interviews to discharge the duties outlined in ¶¶18-31 above, fundamental fairness and accuracy are put at risk.

33. As the Guidelines have recognized, there is an indispensable need for “effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency. Because each of those proceedings has a unique role to play in the capital process, because both legal and social norms commonly evolve over the course of a case, and because of ‘the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,’ jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines, as outlined in Subsection B, ‘at all stages of the case.’” Guideline 1.1, Commentary at 929-30. The Guidelines “recognize[] the simple truth that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.” *Id.* at 930.
34. The ABA Guidelines are the most authoritative and up-to-date articulation of the investigative and other responsibilities of capital defense counsel. The American Bar Association believes that meeting these responsibilities is essential to ensuring justice in capital cases.

I hereby swear under penalty of perjury that the above and foregoing is a true and correct statement.

Dated this 3rd day of April, 2020.



Emily Olson-Gault