

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

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

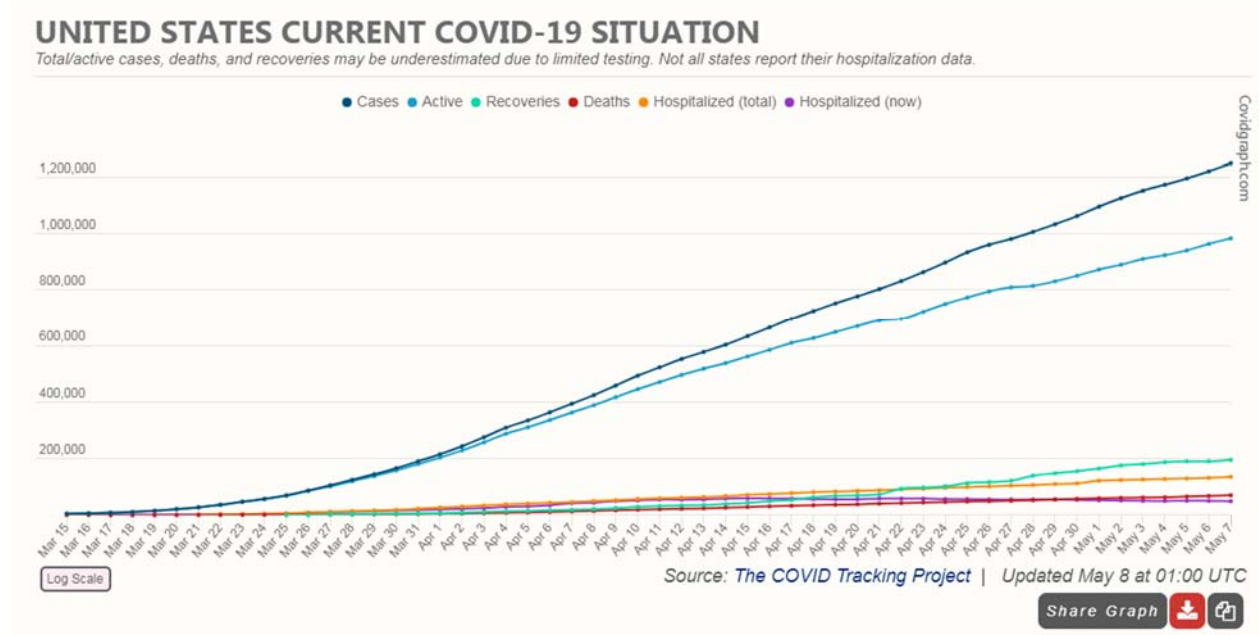
**REPLY TO RESPONSE TO NICHOLS’  
MOTION FOR A STAY OF EXECUTION DUE TO COVID-19 PANDEMIC**

Movant, Harold Wayne Nichols, requests this Court stay his execution date since the COVID-19 pandemic has created a dangerous environment in which to carry out an execution and prevents necessary work and the preparation of an application for executive clemency. The State does not dispute the factual circumstances resulting from the pandemic but points to the State of Tennessee’s “reopening” as a reason to deny Nichols’ motion. (Response p.4). The State nonetheless agrees that “[i]f public health circumstances worsen,” (Response p.4), this Court can delay the upcoming execution date.

**Conditions are worse now than before and Mr. Nichols continues to lose time**

Respondent asserts that the execution date should not be postponed because the state is “reopening.” Yet, the crucial metric for whether Mr. Nichols has an adequate opportunity to be heard, either in court or in a clemency request, is whether his legal team is able to carry out those functions necessary to his

representation. That metric—the health and safety of public travel, public interaction, and the ability to communicate in-person with Mr. Nichols—has not improved. Since the virus’s arrival in the United States, the number of active cases of COVID-19 has increased:<sup>1</sup>



Public health circumstances have worsened exponentially since this Court stayed the June 4th execution date for Oscar Smith. When this Court entered a stay of execution for Mr. Smith on April 17, 2020, there was confirmation that 6,589 Tennesseans were infected with the novel coronavirus, COVID-19.<sup>2</sup> It took 43 days to reach that number after the first COVID-19 case was reported on March 5, 2020. In the 22 days that have passed since the stay of Mr. Smith’s execution date, the number of confirmed COVID-19 cases has more than doubled; it increased by 7,507

<sup>1</sup> The COVID Tracking Project from *The Atlantic*, available at: <https://covidgraph.com/usa/> (last visited May 8, 2020).

<sup>2</sup> <https://www.tn.gov/health/cedep/ncov/data/downloadable-datasets.html> (last visited May 8, 2020)

to a total of 14,096.<sup>3</sup> When this Court previously acted to delay an execution there had been 142 deaths from COVID-19 in Tennessee. In less than half the time it took to reach that number there have been 95 new deaths.

**Mr. Nichols remains unable to adequately attend to legal matters.**

Respondent does not dispute the pandemic's adverse effects on Mr. Nichols' legal representation or on his ability to prepare himself for death. Mr. Nichols has already lost valuable time which cannot be recovered before June, when he would ordinarily present the Governor with a request for clemency.<sup>4</sup> Respondent instead proffers secondary arguments that fail to address two undeniable facts: first, Mr. Nichols has lost significant time to prepare a clemency request that would, under ordinary circumstances, be presented to the Governor within the next four or five weeks; and, second, his legal representatives remain in quarantine throughout May 31st and there are no indications that circumstances will prevent a further extension of a work-at-home mandate.<sup>5</sup>

Respondent's assertion that Mr. Nichols' execution date should not be postponed because the State of Tennessee is "reopening" is a non-starter because it

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<sup>3</sup> <https://www.tn.gov/health/cedep/ncov/data/downloadable-datasets.html> The totals used herein are less than the actual numbers as of this date because they are numbers reported as of yesterday. Today's number will not be available until tomorrow.

<sup>4</sup> Respondent compares the constitutional need for the resumption of jury trials to proceeding with an execution, stating, "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." (Response p.4). Whether Mr. Nichols has been afforded a fair opportunity to seek clemency is not measured by conditions in August, but by the restrictive conditions of the past several months and up to the time he would ordinarily seek clemency (in June). Mr. Nichols is deprived a fair opportunity to exercise his right to seek executive clemency as long as he is not afforded access to his attorneys and his attorneys are unable to adequately perform those duties required for seeking clemency.

<sup>5</sup> On April 28, 2020, staff at Federal Defender Services of Eastern Tennessee, Inc., were informed the telework policy and travel restrictions would remain effective through May 31st.

does not impact those two critical considerations. Respondent does not even attempt to explain how the so-called “reopening” returns Mr. Nichols and his legal team to normal operational abilities. It does not.

Respondent points to the Governor’s Executive Order Number 30 as proof of a “reopening.” (Response p.4). Although that Order “allow[s] more Tennesseans to return to work” it also “trust[s]” and “expect[s]” individuals to “limit non-essential activity[,]” work from home “whenever possible,” and employers are to implement policies “in accordance with state and federal guidance to facilitate social distancing, ... and reduced business travel,” as well as permit employees to work remotely from home.<sup>6</sup> Accordingly, staff at Federal Defender Services of Eastern Tennessee, Inc., have been informed that telework policies and travel restrictions will remain effective through May 31st. Counsel has been unable to travel, find and speak with witnesses, conduct other investigation, meet with the Governor’s representatives in preparation for submitting a clemency application or meet with and advise Mr. Nichols. Mr. Nichols and his attorneys are unable to meet because the prison remains closed to the public and legal visits are suspended.<sup>7</sup> Any recent “reopening” of the state has not improved Mr. Nichols’ circumstances.

Tennessee remains in a state of emergency over COVID-19. One day after issuing Executive Order Number 30, and in light of the continuing state of emergency, the Governor entered Executive Order 31 prohibiting non-emergency

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<sup>6</sup> Executive Order No. 30 pp.1-2, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee30.pdf>

<sup>7</sup> Tennessee Department of Correction, *Frequently Asked Questions Regarding COVID-19*, Questions 1 & 11, <https://www.tn.gov/correction/frequently-asked-questions-regarding-covid-19.html>

dental procedures.<sup>8</sup> Subsequently, in light of the continuing state of emergency and the recognized need to take “additional measures to limit the opportunities for community spread” of COVID-19, the Governor further suspended the operation of certain state laws.<sup>9</sup> On May 5th and May 6th, the Governor took further actions, declaring a continuing state of emergency and providing for “governing bodies to meet electronically regarding essential business” through June 30, 2020, to “avoid[] creating gathering of tens or hundreds of persons.”<sup>10</sup> By lifting the stay-at-home order, the Governor simply allowed—not all—but “more Tennesseans to return to work to support their families” if necessary and essential.<sup>11</sup> Tennesseans who can remain employed by working at home (such as Mr. Nichols’ counsel) are trusted to do so and discretionary, non-essential activities remain strongly discouraged.<sup>12</sup>

Respondent also argues that this Court should not alter the execution date it set because it “has no role in clemency proceedings,” and the Governor can enter a reprieve for the safety of prison staff and those gathering for the execution and to provide Mr. Nichols a fair opportunity to seek clemency. (Response p.2). Executions, however, are not critical or essential activities and are not exempt from the Governor’s Executive Orders regarding the COVID-19 emergency. Social gatherings

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<sup>8</sup> Executive Order No. 31, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee31.pdf>

<sup>9</sup> Executive Order No. 32, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee32.pdf>

<sup>10</sup> Executive Order 34, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee34.pdf>

<sup>11</sup> Executive Order 30 p.1, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee30.pdf>

<sup>12</sup> Executive Order 30 pp.1-2, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee30.pdf>

of ten or more people remain prohibited in Tennessee and all other gatherings are strongly discouraged.<sup>13</sup> And while the Governor has the power to grant a reprieve, it is appropriate for Mr. Nichols to first request that this Court to modify its order before asking the Governor to act. Indeed, this Court's order scheduling Mr. Nichols' execution date was entered at a time when the current state of emergency was unforeseen. The extraordinary circumstances which have arisen warrant a stay of Mr. Nichols' execution date.

WHEREFORE, based on the foregoing and his initial motion for a stay of execution, Petitioner, 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 has prevented counsel from performing necessary work and the preparation of a competent application for executive clemency.

Respectfully submitted this 8th day of May, 2020.

/s/ Dana C. Hansen Chavis  
Dana C. Hansen Chavis  
Asst. Federal Community Defender  
Capital Habeas Unit Supervisor  
Federal Defender Services of  
Eastern Tennessee, Inc.  
800 S Gay St., Ste. 2400  
Knoxville TN 37929  
(p) 865.637.7979  
(f) 865.637.7999  
Dana\_Hansen@fd.org

Counsel for Harold Wayne Nichols

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<sup>13</sup> Executive Order 30 p.3, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee30.pdf>

## CERTIFICATE OF SERVICE

I, Dana C. Hansen Chavis, certify that a true and correct copy of the foregoing Reply to Response to Nichols' Motion for a Stay of Execution was served on May 8, 2020, via United States Mail to opposing counsel, Zachary T. Hinkle, Associate Solicitor General, P.O. Box 20207, Nashville, Tennessee, 37202.

/s/ Dana C. Hansen Chavis