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DEATH PENALTY CASE
EXECUTION DATE: AUGUST 5, 2025
Case No. M2025-01095-SC-RDO-CV

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

BYRON BLACK,
Respondent,

v.

FRANK STRADA, et. al,
Applicants.

Davidson County Chancery Court Case No. 25-0414-IV

MOTION TO STRIKE

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"An extraordinary appeal is sought by filing an application for an extraordinary appeal with the clerk of the appellate court." Tenn. R. App. P. 10(a). That application "shall be accompanied by an appendix containing," among other things, any "affidavits or other relevant documents, which also shall be contained in the appendix." Tenn. R. App. P. 10(c). When Applicants filed their Rule 10 application, it was accompanied by such an appendix. Now—after Mr. Black filed his Answer—Applicants have sought to file an additional "appendix" that did not "accompan[y]" the original application to which Mr. Black responded.

That supplementary "appendix" reveals that core facts on which both Mr. Black and the chancery court relied were, in fact, not accurately presented by Defendants. Defendants sought no leave or permission of this Court to file their procedurally improper appendix. As such, Defendants' Rule 10 Application is not in conformance with the Rules of Appellate Procedure. That deficiency, moreover, is not of merely technical importance; it involves the presentation of facts on issues both central to the underlying trial court ruling that Applicants seek to appeal and central to the application for appeal itself.

This Court, like nearly all American courts, has the "inherent power to control its docket and to enforce its rules," which "'includes the power to strike items from the docket.'" *Adobe Sys. Inc. v. Christenson*, 891 F. Supp. 2d 1194, 1201 (D. Nev. 2012) (quoting *Ready Transp., Inc. v. AAR Mfg., Inc.,* 627 F.3d 402, 404 (9th Cir. 2010)). It should do so here and strike the improperly filed appendix.

The Court, moreover, should take notice of the deficiencies in the original Application that the late-filed appendix has laid bare. TDOC has

known about Mr. Black's ICD since at least May 24, 2024, when they, having previously approved the procedure, transported Mr. Black to and from the hospital for its implantation. Mr. Black, moreover, requested answers regarding TDOC's plans for addressing the ICD nearly two months ago. Yet Defendants have come to this Court, characterizing Mr. Black's well-supported, timely motion for preliminary injunction as some kind of last-second tactical gamesmanship. As the recent revelations make clear, however, the impediment to solving this issue expeditiously has always been TDOC, which has not only taken only minimal efforts to address the underlying problem, but has, every step of the way, withheld key information about those efforts from the courts.

When Mr. Black filed his motion for preliminary injunction, Defendants first responded by refusing to present any evidence regarding the feasibility of Mr. Black's request. When that consciously chosen strategy proved unsuccessful, they sought dissolution or modification of the preliminary injunction, backed by a declaration revealing that TDOC had looked into the matter after all and could have Mr. Black's ICD deactivated the day before his execution. That declaration, for reasons that are still unclear, provided essentially no details regarding the underlying communications but did identify Nashville General Hospital, by name, as a participating entity.

Today, Defendants, without seeking leave of court, filed a "Notice of Supplemental Appendix," wherein they attached a new declaration from Jillian Bresnahan. That declaration revealed that, contrary to the State's prior representation, Nashville General Hospital *is not* presently willing to participate in the deactivation of Mr. Black's ICD on August 4

or August 5. Defendants filed this notice minutes before WPLN published an article with a statement from Nashville General, which Ms. Bresnahan alludes to in her declaration. *See* Def. App. 11 at 4. That WPLN article includes the following:

> The hospital now says it never agreed to deactivate the device at all. "Any assertion the hospital would participate in the procedure was premature," reads a statement sent to WPLN News from [Nashville General Hospital] spokesperson Cathy Poole. . . .
>
> Poole's statement said the agency failed to go through the proper channels and prematurely reported the hospital's agreement.
>
> "The correctional healthcare provider contracted by the Tennessee Department of Correction (TDOC), did not contact appropriate Nashville General Hospital leadership with its request to deactivate the implanted defibrillator," Poole's statement continued.
>
> She also wrote that even if Nashville General's leadership would have signed off on the deactivation, there would have been more work to do.
>
> "Our contract with the correctional healthcare provider is to support the ongoing medical care of its patients," she wrote. "This request is well outside of that agreement and would also require cooperation with

several other entities, all of which have indicated they are unwilling to participate."

Catherine Sweeney, *Nashville General Hospital won't disable death row inmate's implant, contradicting state's account in court*, WPLN (July 30, 2025), https://wpln.org/post/nashville-general-hospital-wont-disable-death-row-inmates-implant-contradicting-states-account-in-court/. (last checked July 30, 2025).

Notably, Ms. Bresnahan's second declaration contains facts not previously disclosed by Defendants, including that: (1) TDOC, through its medical vendor, Centurion, had scheduled Mr. Black for an appointment with the Nashville General Hospital Meharry Cardiology on August 4 at 9:15 AM to have his ICD deactivated;[1] (2) this appointment was rescheduled to August 5 at 4:00 AM, following the chancery court's revised order on Tuesday, July 22; and (3) TDOC became aware on Thursday, July 24 that "Centurion's legal team did not recommend that they further engage in any activity associated with Mr. Black's execution." Def. App. 11 at 5.

The only appropriate course of action for addressing Applicants' improperly filed appendix is to strike it. The appropriate course of action for dealing with the litigation conduct revealed by the application, in turn, is to add that conduct to the already substantial list of reasons why

[1] Despite requesting (and receiving) an expedited hearing to present evidence not provided to the chancery court a week prior, Defendants' counsel failed to inform Chancellor Perkins of this fact at the hearing.

Applicants have failed to carry the burden of establishing entitlement to the extraordinary relief of Rule 10. This Court has made clear that Rule 10 relief is reserved for the most exceptional cases. As this Court has explained:

> An appellate court should grant a Rule 10 extraordinary appeal only when the challenged ruling represents a fundamental illegality, fails to proceed according to the essential requirements of the law, is tantamount to the denial of a party's day in court, is without legal authority, is a plain and palpable abuse of discretion, or results in either party losing a right or interest that may never be recaptured.
>
> . . . .
>
> Unlike Rule 9 appeals, Rule 10 appeals are reserved only for *extraordinary* departures from the accepted and usual course of judicial proceedings.

Gilbert v. Wessels, 458 S.W.3d 895, 898 (Tenn. 2014) (citations omitted) (emphasis in original). This Court cautioned the use of restraint in granting Rule 10 appeals and pointed to Rule 9 appears as the appropriate vehicle for interlocutory appeals when "there is a need 'to prevent irreparable injury,' 'to prevent needless, expensive, and protracted litigation,' and 'to develop a uniform body of law.'" *Id.* (quoting Tenn. R. App. P. 9(a)); *see also Kaur v. Singh*, No. W2016-02058-COA-R10-CV, 2017 WL 445149, at *7 (Tenn. Ct. App. Feb. 2, 2017) (citing *Gilbert*, 458 S.W.3d at 898–99) (determining that the Rule

10 application was "improvidently granted" because the trial court "considered the proper statute, the relevant facts, and the arguments advanced by the parties").

As Mr. Black explained in his Answer, Applicants have never cleared that bar. The deficiencies of their efforts, however, are only compounded by the fact that it has now been revealed that key evidence that Applicants presented to the chancery court was inaccurate. Allowing Rule 10 review in these circumstances would, moreover, reward Applicants for their decision to refuse to present relevant evidence at the trial court level, only to try to improperly insert it into the record before this Court. The Supplemental Appendix should, therefore, be stricken, and the Rule 10 Application should be denied.

Respectfully submitted this 30th day of July, 2025.

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CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that on July 30, 2025, a true and correct copy of the foregoing was served via the Court's electronic filing system to opposing counsel, Nicholas Spangler, Associate Solicitor General.

/s/ Kelley J. Henry
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