

**CAPITAL CASE
IN THE TENNESSEE SUPREME COURT
AT NASHVILLE**

STATE OF TENNESSEE,)	
)	
Movant,)	EXECUTION DATE:
)	October 8, 2020
v.)	
)	Case No. M2000-00641-SC-DPE-CD
BYRON LEWIS BLACK,)	
)	
Respondent.)	

**Reply to Response in Opposition
Motion to Reset Execution Date
Due To COVID-19 Pandemic**

The State Attorney General argues that Black's motion is premature. Respectfully, it is not. If Black had waited until the eve of the deadline to submit his petition to file this motion, the State would undoubtedly accuse him of intentional delay. In fact to comply with this Court's order of February 24, 2020, work must be done now. Work must be done in June, July, and August. And it is reasonably foreseeable that the pandemic will be an insurmountable obstacle to Mr. Black's ability to present his claim of incompetency to be executed and his ability to seek executive clemency. Because it is reasonably foreseeable, Black asks this Court to act now, obviating the need for attorneys, investigators, and

experts to weigh their own safety, the safety of those incarcerated with Mr. Black, the safety of the guards who work at the prison that houses Mr. Black against Mr. Black’s right to having his competency fairly adjudicated.

The State Attorney General correctly states that the COVID-19 pandemic is rapidly evolving. In fact, when Mr. Black filed his motion, the IHME model predicted approximately 60,000 deaths by August 4, 2020. Today, that prediction has more than doubled to 147,040.



<https://covid19.healthdata.org/united-states-of-america> (last visited May 13, 2020). Cases in Tennessee continue to rise. Nashville has seen surges in the number of outbreaks.¹ Dr. Anthony Fauci predicts that the nation can expect spikes throughout the summer. *Fauci Warns of ‘Little Spikes’*

¹Jonathan Allen, Phil McCausland, and Cyrus Favrivar, *White House Report Shows Coronavirus Spiking in the Heartland*, Yahoo News (May 11, 2020) <https://news.yahoo.com/white-house-report-shows-coronavirus-235200812.html> (last visited May 13, 2020) (“The 10 top areas recorded surges of 72.4 percent or greater over a seven-day period compared to the previous week, according to a set of tables produced for the task force by its data and analytics unit. They include Nashville, Tennessee; Des Moines, Iowa; Amarillo, Texas; and — atop the list, with a 650 percent increase — Central City, Kentucky.”)

Becoming Outbreaks, NBC News (May 13, 2020, 12:39 PM) <https://www.nbcnews.com/health/health-news/live-blog/2020-05-12-coronavirus-news-n1204961/ncrd1205351#blogHeader> (last visited May 13, 2020).

The State Attorney General does not deny that Mr. Black has established a likelihood of success on the merits of his competency to be executed claim. Nor does he argue any equitable factor which weighs against resetting Black's execution date.

The State Attorney General does not suggest that the interests of the public weigh against Black's motion.

The reality is that the public interest weighs in favor of rescheduling Black's execution. A competency hearing held this summer would be a threat to public health as a full and fair adjudication of Black's competency will require numerous attorneys, investigators and experts to enter the prison and will require Mr. Black, along with attendant guards, to travel to a hospital for brain scans. Recent testing in Tennessee prisons has revealed numerous "hot spots" for COVID-19 outbreaks. Steven Hale, *Mass Testing Reveals Two More COVID-19 Hot Spots in Tennessee Prisons*, Nashville Scene (May 12, 2020)

<https://www.nashvillescene.com/news/pith-in-the-wind/article/21132948/mass-testing-reveals-two-more-covid19-hot-spots-in-tennessee-prisons> (last checked May 13, 2020). It is no secret that the inmate population is vulnerable. However the threat posed by increased movement within the prison is not only to the prisoners. The threat is also to the officers, the families of the officers, the neighbors of

the officers, the people at the grocery stores, drug stores, and restaurants where the officers travel.

It is true that the economy and the courts are *beginning* the process of reopening. But the emphasis is rightly placed on caution. If people do not have to leave home, they are urged to stay home. Emergency court proceedings must take place. This is obvious. It is not obvious that an October execution of a hobbled man with severe mental illness and 67 IQ is “essential” given the current crises.

The need to protect the public’s health and the need for a short delay to protect Mr. Black’s constitutional rights are not in opposition. They are complimentary.

WHEREFORE, the motion should be granted.

Respectfully submitted this 13th day of May, 2020.

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BY: /s/ Kelley J. Henry
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CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that a true and correct copy of the foregoing was served via email, on this the 13th day of May, 2020, to opposing counsel, Kathy Decker, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202 and District Attorney General Glenn Funk, Washington Square, Suite 500, 222 2nd Avenue North, Nashville, Tennessee 37201.

BY: /s/ Kelley J. Henry
Counsel for Mr. Black