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IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

ORIGINAL

STATE OF TENNESSEE,	)	
	)	
	)	DAVIDSON COUNTY
v.	)	No. M2000-00641-SC-DPE-CD
	)	
	)	CAPITAL CASE
BYRON LEWIS BLACK,	)	Execution Date: Apr. 8, 2021
	)	
Defendant.	)	

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**RESPONSE OF THE STATE OF TENNESSEE IN OPPOSITION  
TO BLACK'S SECOND MOTION TO STAY EXECUTION**

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This Court originally scheduled Byron Black ("Black") to be executed on October 8, 2020. *State v. Black*, No. M2000-000641-SC-DPE-PD (Tenn. Feb. 24, 2020) (Order Setting Execution Date) (per curiam). In June 2020, this Court granted Black's motion to stay his execution due to the onset of the novel coronavirus disease COVID-19; reset his execution for April 8, 2021; and ordered that he file his petition alleging incompetency for execution between January 20 and January 22, 2021. *See Order Resetting Execution Date* (Tenn. June 12, 2020).

On November 13, 2020, Black filed a second motion to stay his execution. He alleges generally that the presence of the virus will affect his ability to prepare for his competency-to-be-executed hearing (Motion, pp. 1, 9-10), and he asserts that four specific developments support his allegation. But Black's motion—filed more than two months before his competency petition can be filed and more than three months before his competency hearing would take place—is premature. There is time for

the first two asserted developments to resolve themselves, and none compels a delay in Black's execution at this time. Particularly in light of Governor Lee's willingness to grant reprieves to capital defendants for COVID-related reasons closer in time to their scheduled executions, this Court should deny this prematurely filed motion.

Regarding the first development, Black's lead counsel, Kelley Henry, and her co-counsel, Amy Harwell, contracted COVID-19 the first week of November and developed adverse symptoms that prevent them from working on his case. (Motion, pp. 2-3; Ex. 1 to Motion (Declaration of Kelley Henry); Ex. 3 to Motion (Declaration of Amy Harwell)). But with no intention of diminishing the seriousness of the virus or of their particular symptoms, the average recovery time from COVID-19 is estimated to be two to six weeks. See <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/diagnosed-with-covid-19-what-to-expect> (last visited November 18, 2020) ("Those with a mild case of COVID-19 usually recover within one to two weeks. For severe cases, recovery can take six weeks or more. . . .") It would be reasonable to anticipate that the virus would have time to run its course well before Black's competency petition can be filed or his hearing takes place.

Further, according to Ms. Henry's and Ms. Harwell's declarations, Assistant Federal Public Defender Richard Tennent assumed direct responsibilities in Black's state-court proceedings—including his competency and clemency proceedings—after Ms. Harwell relinquished her responsibilities in 2018. (Declaration of Kelley Henry, p. 1, ¶5; Declaration of Amy Harwell, p. 1, ¶4.) Black has not established that Mr. Tennent, or others from the Federal Public Defender's Office, would be

unable to adequately represent him in the event Ms. Henry or Ms. Harwell experience an above-average recovery time.<sup>1</sup>

Regarding the second development, at the filing of his motion Black had tested negative for COVID-19. (Motion, p. 4.) He states that the death-row inmates testing positive were quarantined. (Motion, p. 4.) And at this point, it is not possible to say that death-row officials will be unable to prevent further infections through quarantine and other safety protocols.

Regarding the third development, concurrent with the increased number of COVID-19 cases is an increased knowledge of effective safety protocols, months of experience implementing the protocols, and readily available testing. Black re-asserts his earlier claims that a radiology department would not likely permit him to visit for his mid-December brain scans and that TDOC could not safely transport him. (Motion, p. 9.) He also surmises that his experts will not travel to Nashville to evaluate him. (Motion, p. 10.) But first, he does not consider all the actors' experience in applying COVID-19 protocols and employing testing to render their operations and activities safe. Further, as stated in the

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<sup>1</sup> Moreover, as the State noted in its response to Black's first motion to stay his execution, Black is not entitled to months of preparation with certainty about how his competency hearing will transpire. Indeed, when this Court remanded for a competency proceeding in *State v. Irick*, 320 S.W.3d 284, 287 (Tenn. 2010), it ordered that the trial court begin proceedings "expeditious[ly]." The trial court granted the petition for a competency determination just 11 days later and, following a hearing, found the petitioner competent to be executed 32 days after this Court's remand order. *Id.*

State's response to Black's first motion to stay, Black does not have a right to out-of-state experts, or to any particular expert who will not travel at the appropriate time. State v. Reid, 213 S.W.3d 792, 828 (Tenn. 2006) (noting that, even when a capital defendant is entitled to expert services, he is not entitled to an expert of his choice). And he has not asserted that he would be unable to prepare for his competency hearing using local experts.

Regarding the fourth development, Black seems to suggest that his execution be stayed until a COVID-19 vaccine "ends this plague." (Motion, p. 6-7.) But he acknowledges that experts such as Dr. Anthony Fauci have stressed that measures such as wearing masks, avoiding crowds, keeping social distance, and washing hands can be effective in stemming the spread of the virus. (Motion, p. 7.) Black has not established that his competency hearing could not be carried out safely using those measures. Additionally, it appears that the vaccine will be available—and will be nearly 95% effective—from at least two pharmaceutical companies by the end of 2020. See <https://www.nytimes.com/2020/11/18/health/pfizer-covid-vaccine.html>; <https://www.nytimes.com/2020/11/16/health/Covid-moderna-vaccine.html>. It is premature to grant Black a stay of his execution at this time knowing the real possibility that the risk of contracting the virus could be significantly reduced at the relevant times

before his February 2021 competency hearing and his April 2021 execution.<sup>2</sup>

Finally, Black claims that his clemency application will be affected by the continued presence of COVID-19. (Motion, p. 9.) But the Governor has authority to grant a reprieve at any time if he believes COVID-19 has impeded Black's ability to adequately prepare a clemency application. *See* Tenn. Const. art. III, § 6. And in recent months the Governor has indicated his willingness to grant reprieves of impending executions for COVID-related reasons, granting Harold Wayne Nichols a reprieve from his August 4, 2020 execution on July 17, 2020, and granting Pervis Tyrone Payne a reprieve from his December 3, 2020 execution on November 6, 2020. *See State v. Nichols*, No. E1998-00562-SC-R11-PD, Notice of Reprieve (filed July 17, 2020); *State v. Payne*, No. M1988-00096-SC-DPE-DD, Notice of Reprieve (filed Nov. 6, 2020). 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 Black's execution date. *Black*, No. M2000-000641-SC-DPE-PD.

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<sup>2</sup> Black's competency hearing would not take place until February 2021 because, after he files his competency petition between January 20 and January 22, 2021, as this Court has ordered, the State has 3 days to file a response; the trial court then has 4 days to determine whether a hearing is warranted and to appoint a mental health expert to evaluate him; the mental health expert has 10 days to file his written report; and the trial court has another 10 days to hold the hearing. *Van Tran v. State*, 6 S.W.3d 257, 268-70 (Tenn. 1999).

Finally, the State is aware of this Court's recent order extending the state of emergency due to the COVID-19 pandemic. *In re: COVID-19 Pandemic*, Order No. ADM2020-00428 (Tenn. Nov. 17, 2020). That order states that "all court matters should be conducted by means such as video conferencing and telephonic conferences, if possible, as an alternative to in-court proceedings." *Id.* at 2. But it also states that "the courts of Tennessee remain open," and it encourages, to the extent possible, that "courthouses remain accessible to carry out essential constitutional functions and time-sensitive proceedings." *Id.* If this Court has not lifted the state of emergency by Black's February 2021 competency hearing and if the hearing could not take place by alternative means to in-court proceedings, then the hearing would certainly fall within the exception allowing in-court proceedings for essential constitutional functions.<sup>3</sup> Neither Black's motion to stay nor this Court's November 17 order compels a stay of Black's execution at this time, and this Court should deny the motion.

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<sup>3</sup> The State notes as well that this Court has suspended jury trials only through January 31, 2021. If a jury trial could proceed in February, then a competency hearing before a judge should also be able to proceed.

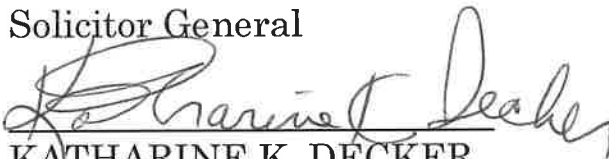
## CONCLUSION

Black 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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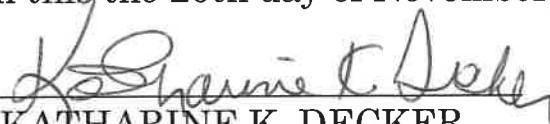
A handwritten signature in cursive script, appearing to read "Katharine K. Decker".

KATHARINE K. DECKER  
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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first-class mail, postage prepaid, to Kelley Henry, 810 Broadway, Suite 200, Nashville, TN 37203 on this the 20th day of November, 2020.

  
KATHARINE K. DECKER  
Assistant Attorney General