DEATH PENALTY CASE
EXECUTION DATE: AUGUST 5, 2025, 10:00 A.M.
Case No. M2004-01345-SC-R11-PD

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

BYRON LEWIS BLACK,
Appellant,

v.

STATE OF TENNESSEE,
Appellee.

Davidson County Criminal Court Case No. 88-S-1479

APPLICATION FOR A STAY OF EXECUTION

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INTRODUCTION

Pursuant to Tennessee Supreme Court Rule 12(4)(E), Mr. Black respectfully moves this Court for a stay of execution pending the outcome of a petition for writ of certiorari to the United States Supreme Court seeking review of this Court's July 8, 2025, decision denying his motion to recall the mandate. The petition was filed on July 28, 2025.

ARGUMENT

Tennessee Supreme Court Rule 12(4)(E) sets forth the operative standard for a stay of execution. It provides that this Court "will not grant a stay or delay of an execution date pending resolution of collateral litigation in state court unless the prisoner can provide a likelihood of success on the merits in that litigation." Tenn. S. Ct. R. 12(4)(E). Unlike the preliminary injunction standard, Tennessee Supreme Court Rule 12(4)(E) does not use the modifier of "strong" to describe the movant's burden to demonstrate likelihood of success on the merits. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Thus, Mr. Black's burden is less than that of preliminary injunction and instead is entitled to a stay based on a showing "'more than a mere possibility of success.'" *State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (quoting *Six Clinics Holding Corp. II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997)).

A stay of execution is a form of equitable relief and, as such, "[i]t is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Rather, the movant must show "that the balance of equities tips in his favor." *Ramirez v. Collier*, 595 U.S. 411, 421 (2022).

Mr. Black's petition for writ of certiorari sets forth his claim that he has been denied his constitutionally protected liberty interest to establish his innocence of the death penalty through the state-created procedure of Tenn. R. App. P. 42 (d)'s motion to recall the mandate. Mr. Black's petition has a likelihood of success on the merits where the issue presented is inextricably intertwined with the question presented in *Hamm v. Smith*, No. 24-872, 2025 WL 1603602, at *1 (June 6, 2025) (order granting certiorari review). The petitioner in *Hamm* specifically relied on Mr. Black's case to illustrate the conflict in the lower courts on the question of "Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim." *Id*. Thus, where the United States Supreme Court is already reviewing a related case, Mr. Black has shown likelihood of success on the merits.

Furthermore, the equities favor a stay of execution. The risk of imminent harm to Mr. Black is significant. Mr. Black has produced persuasive new evidence that he is a person with intellectual disability and therefore is constitutionally ineligible for the death penalty. Specifically, Mr. Black presented the report of the State's key expert, Dr. Susan Vaught, that:

> [I]n my professional opinion, Byron Black does meet criteria established in the 2021 changes to § 39-13-203 for diagnosis of intellectual disability. This represents a change in my 2003 opinion, based on new information in his record, the ability to review his performance at multiple points in time across multiple practitioners, changes in scientific knowledge and standards of practice, and changes in diagnostic criteria[.]

Ex. 2, Vaught Report at 6. Dr. Vaught further explained that it is important to consider both the standard error of measurement and the Flynn Effect when assessing intellectual functioning. Dr. Vaught wrote:

> In the intervening 18-19 years [since her testimony], the Flynn Effect has been even more thoroughly researched and repeatedly validated, is now included in most testing manuals, and in short, in 2022, considering the changes in population intelligence is a common and well-accepted scientific and clinical practice related to the measurement of IQ. As such, applying this correction to scores from older versions of tests, and older scores, in order to look at them through today's lens for clinical diagnosis, not only should be done, but must be done for accuracy's sake. This, coupled with the removal of strict number-based criteria, changes the interpretation of Mr. Black's prior known scores, and places them squarely in the range of Mild Intellectual Disability.

Id.

Mr. Black provided further support for the motion by presenting the expert opinion of Dr. Daniel Martell. Dr. Martell was the expert for the Commonwealth of Virginia in the *Atkins* case on remand from the United States Supreme Court. Ex. 3, Martell 2020 Report at 2. He regularly consults on *Atkins*-related cases for both the prosecution and defense. *Id.* Dr. Martell reviewed extensive records and testimony and conducted his own testing for seven hours over two days. *Id.* at 3-4. Dr. Martell tested for malingering and found that Mr. Black put "forth his best effort, and the test results obtained can be relied upon as valid[.]" *Id.* at 7.

Mr. Black's score on the Wechsler Adult Intelligence Scale-IV was 67 "which is a significantly subaverage score, falling more than two standard-deviations below the mean in the 'Extremely Low' range, and places him squarely in the range of Intellectual Disability." *Id.* Dr. Martell concluded that his testing showed convergent validity with the testing of other experts over time where Mr. Black had achieved IQ scores of 57, 69, 73, and 76. *Id.* at 7-15; Exhibit 4, Martell 2021 Supplemental Report at 6. Dr. Martell explained that it is improper to use group-administered tests in assessing IQ. *Id.* at 3-5. Such tests are imprecise measures, limited in scope, lack reliability, and "do not correlate well with standardized, individually-administered IQ tests." *Id.* at 4. Dr. Martell explained in detail the proof that Mr. Black's intellectual functioning was in the range of intellectual disability prior to age 18, concluding, "Both the record and my clinical examination indicate that the onset of Mr. Black's Intellectual Disability occurred during the developmental period, thus meeting the third prong of the diagnostic criteria." Ex. 3, Martell 2020 Report at 24.

After review of the expert opinions of Drs. Vaught and Martell, the State of Tennessee stipulated that Mr. Black is intellectually disabled. Ex. 1, State of Tennessee stipulation at 6. The State of Tennessee further concluded, "under current law and the medical reports before the Court, the State concedes that the Petitioner's capital sentence should be commuted to one of life in prison, consecutive to his other sentences." *Id.*

While the risk to Mr. Black is great, the risk of harm to the State of Tennessee is low. The State of Tennessee has not produced a single piece of evidence that contradicts the opinions of Drs. Vaught or Martell.

"Tennessee has no business executing persons who are intellectually disabled." *Payne v. State*, 493 S.W.3d 478, 486 (Tenn. 2016) (quoting *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012)).

Nor did Mr. Black unduly delay. Quite the opposite. He is only in this position because he was diligent. The State does not dispute that had Mr. Black sat on his rights, he would be removed from death row under the 2021 amendment to Tenn. Code. Ann. § 39-13-203.

CONCLUSION

Wherefore, this Court should stay Mr. Black's execution pending the outcome of his petition for writ of certiorari.

Respectfully submitted this the 28th day of July, 2025.

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

I, Marshall Jensen, certify that on July 28, 2025, a true and correct copy of the foregoing was served via electronic filing to opposing counsel, Nicholas Spangler, Asst. Attorney General, P.O. Box 20207, Nashville, Tennessee 37202.

BY: */s/ Kelley J. Henry*
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