

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE)
)
v.) No. E1998-00562-SC-R11-PD
) Death Penalty Case
HAROLD WAYNE NICHOLS)

HAROLD WAYNE NICHOLS' RESPONSE IN OPPOSITION TO THE
MOTION TO SET EXECUTION DATE

Harold Wayne Nichols, through undersigned counsel, pursuant to Tenn. S. Ct. Rule 12.4(A), opposes the State's motion to set an execution date. An execution date should not be set for two reasons. First, Mr. Nichols' post-conviction proceedings were reopened based on a new retroactive rule of Constitutional law that affects the validity of the death sentence and his claim has not received full judicial review. Second, Mr. Nichols should currently be sentenced to life in prison without the possibility of parole but for the post-conviction judge's rejection of the parties' settlement agreement. Mr. Nichols respectfully requests that the State's motion be denied.

I. An execution date should not be scheduled because the three-tier appeals process is not complete

The state's request for an execution date is premature because Nichols' post-conviction claims are pending in this Court. *See Nichols v. State*, No. E2018-00626-SC-R11-PD (Tenn. filed Dec. 6, 2019).

Long before the State decided to seek an execution date for Nichols,¹ the United States Supreme Court announced a new rule of Constitutional law. *Johnson v. United States*, 135 S. Ct. 2551 (2015). The new rule in *Johnson, supra*, altered the range of conduct that the law punishes, and therefore it applies to all criminal cases—even those cases (like Mr. Nichols’ case) that had previously reached a point of finality. *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). Both state and federal law authorize judicial review of a claim under these circumstances. Tenn. Code Ann. § 40-30-117(a)(1); 28 U.S.C. § 2244(b)(2)(A). State law also provides that judicial review of such a claim should proceed without the time constraints and additional burdens imposed by a pending execution date. Tenn. S. Ct. Rule 12.4(A).

By design and effect, Tenn. S. Ct. Rule 12.4(A) preserves and maintains an orderly system of carrying out sentences of death by preventing foreseeable conflicts between the legitimate functions of the executive branch of the State of Tennessee, the state courts of Tennessee, and the federal courts. Rule 12.4(A) accomplishes this goal by instructing that an execution date should not be sought until “the prisoner has completed the standard three-tier appeals process.” The “three-tier appeals process” is comprised of direct appeal, state post-conviction, and federal habeas corpus proceedings. Tenn. S. Ct. Rule 12.4(A). The Criminal Court for Hamilton County reopened Nichols’ state post-conviction proceeding—the second-tier of review—and

¹ The State controls the timing of its motion.

entered a merits-based decision. Nichols appealed that decision and the standard appeals process has not yet concluded. No execution date should be set.

A. Judicial review of the death sentence, unimpeded by an execution date, is warranted under a new, retroactive rule of Constitutional law and is authorized by state law.

After the United States Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), Nichols timely filed a Motion to Reopen Post-Conviction Proceedings asserting that, under the new retroactive constitutional right, the prior violent felony conviction aggravating circumstance is unconstitutionally vague. The post-conviction court determined that Nichols raised a “colorable claim” and the court reopened Nichols’ original post-conviction proceedings. (Attachment A, Preliminary Order on Motion to Re-Open Post Conviction Petition, *Nichols v. State*, No. 205863 (Hamilton Cnty. Crim. Ct. Oct. 7, 2016)). This had the effect of putting Nichols back in the position he was at the time of the original petition for post-conviction relief filed after the denial of direct appeal.

The post-conviction court directed Nichols to file an amended petition for post-conviction relief on the *Johnson* claim and to investigate and raise all other meritorious claims. *Id.* at pg. 13, *See also* Tenn. Code Ann. § 40-30-104 (providing for an amendment of a post-conviction petition). Nichols then filed an amended petition asserting his new and retroactive constitutional right under *Johnson*, as well as other claims. The post-conviction court ultimately denied Nichols’ post-

conviction petition. (Attachment B, Order, *Nichols v. State*, (Hamilton Cnty. Crim. Ct. Mar. 7, 2018) (*citing* Tenn. Code Ann. § 40-30-106)). Nichols perfected an appeal as of right to the Tennessee Court of Criminal Appeals. *See* Tenn. Code Ann. § 40-30-117(b). After briefing and argument, the Court of Criminal Appeals affirmed the post-conviction court’s denial of relief, but reached that result on different grounds. *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *6 (Tenn. Crim. App. Oct. 10, 2019). Nichols has timely sought review of that decision and his application for permission to appeal is pending before this Court. *Nichols v. State*, No. E2018-00626-SC-R11-PD (Tenn. Dec. 6, 2019).

Because Nichols is currently litigating his reopened post-conviction case, he has not had the full benefit of the three-tier appeals process contemplated by Tenn. S. Ct. Rule 12.4. Importantly, the amended petition that Nichols filed after the motion to reopen had been granted by the post-conviction court is not a “successor petition,” but as the name states, it is the original post-conviction proceeding which has subsequently been reopened. Tennessee law specifically authorizes a post-conviction claim based on a new constitutional right. Tenn. Code Ann. §§ 40-30-102(b)(1) (providing a separate statute of limitations for a petition that asserts such a claim), –106(g)(1) (clarifying that waiver does not apply to such a claim), –117(a)(1) (authorizing a motion to reopen the first post-conviction petition when such a claim is presented). Nichols’ pending state-court case should proceed without the time restrictions and added burden of an imminent execution date

because Tennessee law contemplates a stay of execution for the duration of a post-conviction action and a post-conviction action that has been reopened. Tenn. Code Ann. § 40-30-120. Here, Nichols simply seeks to delay the setting of an execution date until after he receives the review process as intended by Rule 12.1 and 12.3 on his newly arising constitutional claim.²

B. Judicial review will be disrupted if an execution date is set

The pending state court proceeding arose after the United States Supreme Court decided a new constitutional rule that is to be retroactively applied to cases on collateral review. *Johnson*, 135 S. Ct. 2551. Tennessee law provides a remedy for a new constitutional right that was not recognized as existing at the time of trial, Tenn. Code Ann. § 40-30-117(a)(1), and Nichols diligently pursued relief under the new rule announced in *Johnson* and timely filed his claim with the post-conviction court. Although these events occurred years before the State decided to request an execution date for Nichols, if the State's motion is granted, it will have deleterious consequences for the pending state court proceedings and Nichols' right to subsequent federal review (the third tier of appellate review).

An execution date would impact the pace of the current court proceedings. This is detrimental because the issue presented is based on new law and is far from settled. In front of the post-conviction court, the

² Nichols is not seeking a stay of execution, (because no execution date is currently scheduled), and he need not make any showing under § 40-30-120(c) that a stay is warranted.

State conceded error under *Johnson, supra*, and repudiated its notice of intention to seek the death penalty, in favor of a settlement agreement for a life without parole sentence. On appeal to the Court of Criminal Appeals, the State contradicted the post-conviction court's holding and conceded in its brief to the court below that Johnson *did* announce a new rule of constitutional law, which applies retroactively to Nichols' case:

Johnson announced a new rule; it is retroactive under federal law, *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016); and federal retroactivity principles govern state post-conviction procedure, *Montgomery v. Louisiana*, 136 S.Ct. 718, 731–32 (2016).

(Attachment C, State's Br. at 12, *Nichols v. State*, No. E2018-00626-CCA-R3-PD (Tenn. Crim. App. Nov. 1, 2018)).³

Because "states are bound by federal retroactivity analysis when a new federal rule is involved," *Meadows v. State*, 849 S.W.2d 748, 754 (Tenn. 1993), the retroactivity question in this case was answered by the United States Supreme Court's decision in *Welch, supra*, and should be straight-forward. The retroactivity doctrine, however, can be complicated and the post-conviction court got it wrong. The Court of Criminal Appeals applied the new rule in *Johnson*, but denied Nichols' claim. It reasoned that the state court's analysis of the prior violent felony conviction aggravating circumstance, the only aggravating factor

³ The State argued that the post-conviction court's alternative denial of the claim on its merits was correct. (Attachment C, State's Tenn. Crim. App. Br. at 12).

in this case, was not contrary to *Johnson's* new rule. *Nichols*, 2019 WL 5079357, at *6. Nichols' appeal to this Court requires careful and deliberate consideration as the Court applies the new rule in *Johnson* to the aggravating circumstance that resulted in Nichols' death sentence. An execution date would accelerate the decision-making process, because otherwise Nichols would be executed without an adjudication of his new constitutional claim. Judicial review of this important claim should not be hurried or truncated just because the State chose prematurely to request an execution date.

C. There is a likelihood of success on the merits of the pending litigation

The Court should delay setting an execution date because the three-tier appeals process has not been completed and Nichols "can prove a likelihood of success on the merits" of the pending state-court litigation. *See* Tenn. S. Ct. Rule 12.4(A). The pending litigation presents three substantive issues of constitutional error with respect to the death sentence and a cumulative error claim.⁴ The pending litigation also presents the due process denial which arose when the post-conviction court cancelled the hearing that had been scheduled for Nichols to argue the substantive claims contained in his amended post-conviction petition. There is a likelihood that the case will be remanded to the

⁴ Nichols' amended post-conviction petition argued: the death sentence was unconstitutional because it is based on a vague aggravating circumstance; all findings required for imposition of the death sentence were not found by the jury; the prosecutor's argument that a prison sentence would not prevent Nichols from re-offending violated due process; and, cumulative error warrants relief.

post-conviction court to reconsider the merit of the *Johnson* claim, as well as to reconsider its actions regarding the settlement agreement and/or to provide the hearing on the substantive issues that the court unexpectedly cancelled.

First, there is a likelihood of success because the post-conviction court abused its discretion when it rejected the settlement agreement. Courts may not interfere with the free exercise of a district attorney general's discretionary authority over cases in their district. *See State v. Banks*, 271 S.W.3d 90, 154-55 (Tenn. 2008), *see also State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995) (explaining that “[t]he district attorneys general for this state are officers with the executive branch of government” and a court’s interference with prosecutorial discretion implicates the constitutional separation of powers).

During post-conviction proceedings, the District Attorney General conceded the death penalty was imposed in violation of two different constitutional principles, thus repudiating the notice of intention to seek a death sentence. The parties reached an agreement whereby Nichols would withdraw his amended post-conviction petition in exchange for a sentence of life in prison without the possibility of parole. The decision to repudiate and not defend the death sentence was central to the executive power granted to the District Attorney General, who has sole authority to seek a death sentence. Nevertheless, in response to inquiry by the post-conviction court, the District Attorney General conceded relief on Nichols’ amended post-conviction petition. (Attachment D, Post-Conviction Transcript, pp. 9-11, *Nichols v. State*, No. 205863 (Hamilton Cnty. Crim. Ct.)).

Second, it is likely that the Court will find Nichols was denied due process when the post-conviction court cancelled the scheduled argument at which Nichols was to argue the merits of his claims. See *State v. Pearson*, 858 S.W.2d 879, 884 (Tenn. 1993) (citing *Matthews v. Eldridge*, 424 U.S. 313, 335 (1976) (the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner)). The post-conviction court reopened Nichols’ post-conviction proceedings based in part on the *Johnson* claim, stating: “The parties will be required to fully brief and argue this issue before this Court.” (Attachment A, Post-Conviction Prelim.Order at 10). After the post-conviction court rejected the settlement agreement it then cancelled the hearing that was Nichols’ opportunity to address the post-conviction court’s newly expressed concerns about the *Johnson* claim. The post-conviction court’s concerns arose from the issuance of an intervening and unreported order from the Court of Criminal Appeals.⁵ That order was the sole authority relied upon by the post-conviction court to deny the *Johnson* claim. Because Nichols’ opportunity to be heard on the issue was withdrawn by the post-conviction court, this Court is likely to find that Nichols was denied his substantive right to be heard.

⁵ The unreported order denied permission to appeal to a defendant who also raised a *Johnson* claim in a motion to reopen post-conviction proceedings, although his proceedings were not reopened. *Donnie Johnson v. State*, No. W2017-00848-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017) (“*Donnie Johnson* order”).

Third, Nichols is likely to succeed on the question of *Johnson*'s retroactive application. The post-conviction court, believing it was bound by the unreported order in *Donnie Johnson* ("*Donnie Johnson* order"), denied relief, but the *Donnie Johnson* order erroneously determined that the rule in *Johnson v. United States* did not apply retroactively to post-conviction proceedings in Tennessee. In the Court of Criminal Appeals, Nichols prevailed on the issue of retroactivity because "states are bound by federal retroactivity analysis when a new federal rule is involved," *Meadows v. State*, 849 S.W.2d at 754. See *Nichols*, 2019 WL 5079357 at *5. The Supreme Court in *Welch v. United States*, 136 S. Ct. 1257, held that *Johnson* has retroactive effect, and therefore, it applies to Nichols' case. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 731–32 (2016). The State conceded this point in its brief to the court below. (Attachment C, State's Tenn. Crim. App. Br. at 12).

Fourth, Nichols is likely to succeed on the merits of the *Johnson* claim because the death sentence rests on an unconstitutionally vague aggravating circumstance. The language of the prior violent felony aggravator that supports Mr. Nichols' death sentence is materially the same as the language of the federal sentencing statute in *Johnson* that failed to provide fair notice to defendants and failed to prevent arbitrary application by judges. The prior violent felony aggravator in effect at the time Nichols committed the capital offense in this case read: "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. 39-13-203(i)(2) (repealed and replaced 1989).

The aggravator’s “involve” language is materially the same as language of the federal statute at issue in *Johnson, supra*, which defined a prior conviction as “violent” if it “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court in *Johnson* held that a sentencing court’s after-the-fact determination of the type of conduct “involved” in a prior conviction fails to provide notice that the conduct could be used to enhance a sentence, and it fails to provide a standard that avoids arbitrary application of the enhancement. *Johnson*, 135 S. Ct. at 2556. The inquiry under Tennessee’s aggravator as to whether a prior conviction “involves” violent conduct is just as indefinite as the inquiry under the federal statute as to whether a prior conviction “involves” violent conduct.

Moreover, Tennessee courts read the language of the aggravator like federal courts had read the residual clause, and the courts look beyond the elements of the prior conviction to determine if it qualifies for the enhancement. *See State v. Sims*, 45 S.W.3d 1 (Tenn. 2001). To determine whether a defendant’s prior conviction was a “violent felony,” a judge engages in the impermissible exercise of “reconstruct[ing], long after the original conviction, the conduct underlying that conviction.” *Johnson*, 135 S. Ct. at 2652.

The Tennessee aggravator, like other unconstitutionally vague federal sentencing enhancements, requires an examination of the nature of a defendant’s past conduct, asks whether violence is “involved,” and requires a judge to determine, after the fact, whether a prior conviction qualifies as a sentencing enhancement. For these

reasons, the Court is likely to reverse the lower court's decision and an execution date should not be scheduled.

II. An execution date should not be scheduled because the District Attorney General has repudiated the death sentence and Mr. Nichols should be sentenced to life in prison without parole.

Tenn. S. Ct. Rule 12.4(A) instructs that the response to a motion for an execution date “shall assert any and all legal and/or factual grounds why ... no execution date should be set, or why no execution should occur[.]” In this case, the motion should be denied because the parties below agreed the death sentence was unconstitutional and unjust. They presented a settlement agreement to the post-conviction judge to resentence Nichols to life in prison without parole.⁶ But for the post-conviction judge's rejection of the settlement agreement Nichols would now be serving a sentence of life imprisonment without the possibility of parole.⁷

Tennessee's district attorneys general have almost “unlimited discretion” when deciding whether to seek a defendant's execution, and

⁶ In particular, the District Attorney General conceded sentencing relief due to constitutional errors involved with the sole aggravating circumstance and the basis for the death sentence. (Attachment D, Post-Conviction Tr. pp. 3-4, 9-11).

⁷ The post-conviction court abused its discretion when it rejected the parties' agreement. This response to the State's motion for an execution date does not raise this issue for final disposition, however, it is noteworthy that the post-conviction court was “obligated to defer to the prosecutor's discretion” because there are valid grounds supporting the prosecutor's decision. *See State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

the discretionary action of the District Attorney General, upon finding constitutional problems with Nichols' death sentence, to renounce the death sentence in favor of a life sentence weighs heavily in favor of rejecting the motion to set an execution date. *See State v. Brimmer*, 876 S.W.2d 75, 86 (Tenn. 1994). This Court has "consistently held that [it] should not invade the province of the prosecutor in deciding whether to seek the death penalty in a first degree murder case." *State v. Pruitt*, 415 S.W.3d 180, 216 n.25 (Tenn. 2013). Rather than just be an advocate for the State's victory at any cost, the District Attorney General has the inherent responsibility and duty to seek justice:

He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge of circumstances, and, according to their true complexion, to combine the public welfare and the saf[e]ty of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions, and individual malevolence, when he can not use them for the advantage of the public; he is to lay hold of them where public justice, in sound discretion, requires it.

Foute v. State, 4 Tenn. 98, 99 (1816). The District Attorney General's judgment—that a life sentence without the possibility of parole in this case is just—should not be easily cast aside to set an execution date.

What, then, is the Court to make of the State Attorney General's recent request for an execution date, which is at odds with the District Attorney General's judgment that in this case a sentence of life without parole satisfies the interests of justice? This Court has deferred to the

autonomous prosecutorial discretion exercised by locally elected district attorneys general because that discretion “provides a vehicle for individualized justice.” *State v. Banks*, 271 S.W.3d 90, 155 (Tenn. 2008) (citing *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987)).

Tennessee’s district attorneys general are elected by the voters of their districts. Tenn. Const. art. VI, § 5; Tenn.Code Ann. § 8–7–102 (2002). Local control over prosecutors is a core component of the American criminal justice system because prosecutors reflect the values of their local communities. The fact that they are elected by the voters of their districts assures their accountability. Simply stated, “no one else is in a better position to make charging decisions which reflect community values as accurately and effectively as the prosecutor.”

Banks, 271 S.W.3d at 154-55 (footnotes omitted). Thus, the General Assembly enacted the statutory framework that confers such decision-making in locally elected district attorneys general. *Id.* at 155. Absent a violation of law, the courts may not interfere with the free exercise of their discretionary authority over cases in their respective districts. *Banks*, 271 S.W.3d at 154-55. *See also Gilliam*, 901 S.W.2d at 389 (explaining that “[t]he district attorneys general for this state are officers with the executive branch of government” and a court’s interference with prosecutorial discretion implicates the constitutional separation of powers).

Here, the Court should weigh heavily, and not interfere with, the District Attorney General’s judgment and free exercise of discretionary authority. The State Attorney General’s boilerplate motion for Nichols’ execution date does not trump the District Attorney General’s

judgment. The sole basis for the motion is the procedural history of the case. In contrast, the District Attorney General has carried out his duty as the locally elected prosecutor to judge between the people and the government. The District Attorney General has determined—based on all the circumstances, including that the death sentence violates the Constitution—that Nichols’ execution would not further the interests of justice nor reflect the values of the local community.⁸ The District Attorney General’s fully-informed judgment that Nichols should serve a sentence of life in prison without parole instead of being executed should be afforded great deference.⁹ For this reason, an execution date should not be set.

⁸ For example, Nichols’ trial attorneys failed to investigate and present mitigating evidence described by one court as comprising “a very compelling argument designed to persuade a jury to spare petitioner’s life[.]” *Nichols v. Bell*, 440 F.Supp.2d 730, 789 n.21 (E.D. Tenn. 2006). A different court, a three-judge panel of the Sixth Circuit Court of Appeals, found: “By any measure, Wayne Nichols had an oppressive and forlorn childhood, due to his father’s abuse, his mother’s illness, their poverty, and the church-dominated society into which he was born.” *Nichols v. Heidle*, 725 F.3d 516, 520 (6th Cir. 2013). Nichols’ mother died when he was young and his father physically, emotionally and sexually abused Nichols and his sister to such an extent that they were taken from their father and placed in an orphanage. Unfortunately, the orphanage was not a safe place. Staff inflicted violent and sadistic punishment for the smallest infractions or for no reason at all. Nichols escaped by joining the military. Three jurors from Nichols’ trial would not have voted for a death sentence had they known this information. (Attachment E, Juror sworn statements).

⁹ Nichols argues that the Court should consider the quality of, and values advanced by, each authority’s decision-making process and conclude that

III. A certificate of commutation should issue.

If an execution date is set, the Court should issue a certificate of commutation. Complementing the Governor’s constitutional clemency power, Tenn. Const. art. III, § 6, Tennessee law directs this Court, with its unique expertise and familiarity with death penalty cases, to play an important role in the clemency process. The Court is to certify that clemency is appropriate when uncontroverted, extenuating circumstances are present in a particular case. Tenn. Code Ann. § 40-27-106; *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000); *id.* at 816-17 (Birch, J., concurring in part and dissenting in part).¹⁰ The Court’s certification under Tenn. Code Ann. § 40-27-106, “serves, simply, as a vehicle through which the Court may ethically and on the record communicate with the Governor in aid of his exclusive exercise of the power to commute sentences.” *Workman*, 22 S.W.3d at 817 (Birch, J., dissenting).

The Court should advise the Governor that Mr. Nichols is deserving of clemency because the death sentence rests only on one, constitutionally questionable aggravating circumstance. In addition,

the judgment of the District Attorney General is dispositive of the current question before the Court.

¹⁰ Clemency is not “entirely distinct from judicial proceedings.” *Harbison v. Bell*, 556 U.S. 180, 192 (2009). It “is deeply rooted in our Anglo-American tradition of law,” and “[f]ar from regarding clemency as a matter of mercy alone” it is “the ‘fail safe’ in our criminal justice system.” *Id.*, quoting *Herrera v. Collins*, 505 U.S. 390, 411-12, 415 (1993). Clemency operates to address the “unalterable fact that our judicial system, like the human beings who administer it, is fallible[.]” *Herrera*, 505 U.S. at 415.

there are four uncontroverted extenuating circumstances. First, the District Attorney General believes justice is served with a sentence of life in prison without parole.

Second, three jurors from Nichols' trial would not have voted for a death sentence had they heard mitigating evidence that trial counsel failed to discover and present to the jury. (*See* Attachment E). Nichols' trial attorneys failed to investigate and present mitigating evidence described by one court as comprising "a very compelling argument designed to persuade a jury to spare petitioner's life[.]" *Nichols*, 440 F.Supp.2d at 789 n.21. A different court, a three-judge panel of the Sixth Circuit Court of Appeals, found: "By any measure, Wayne Nichols had an oppressive and forlorn childhood, due to his father's abuse, his mother's illness, their poverty, and the church-dominated society into which he was born." *Nichols*, 725 F.3d at 520. The federal courts were restricted from granting relief and this is sufficient basis for the Governor to exercise the clemency power.

Third, even without knowledge of the "very compelling" mitigation evidence that was presented to the federal courts, two Tennessee Supreme Court Justices dissented from the death sentence. On direct appeal, Chief Justice Reid found that Nichols is not among the worst of the bad who are deserving of the death penalty. He explained:

The second reason for dissenting on this issue is that the evidence is not sufficient to support a finding that the defendant is among the worst of the bad. The circumstances of the offense in this case are egregious and could qualify the defendant for the ultimate sanction if only the criminal act is considered. However, T.C.A. § 39-13-206(c)(1)(D) requires that reviewing courts consider both the nature of the crime

and the character of the offender. The evidence regarding the character of the defendant is not conclusive. Expert evidence shows that the defendant suffered from substantial mental and emotional problems. The other evidence shows that he lived a normal and productive life, except for the criminal episodes. In the absence of objective criteria whereby the defendant's conduct and character can be adjudged dispassionately, I cannot say that the penalty of death is not disproportionate to the penalty imposed in similar cases in which the death penalty was rejected. See *State v. Cazes*, 875 S.W.2d 253, 270 (Tenn.1994), (Reid, C.J., concurring and dissenting); *745 *State v. Middlebrooks*, 840 S.W.2d 317, 354–55 (Tenn.1992) (Reid, C.J., concurring and dissenting).

State v. Nichols, 877 S.W.2d 722, 744-45 (Tenn.1994).

On post-conviction review, Justice Birch also disagreed with the imposition of the death penalty in this case. *Nichols v. State*, 90 S.W.3d 576, 608 (Tenn. 2002). He believed the court's review was "inadequate to shield defendants from the arbitrary and disproportionate imposition of the death penalty." *Id.*

For these reasons, the Court should issue a Certificate of Commutation.

IV. Mr. Nichols will be denied the meaningful assistance of counsel if his legal team is overwhelmed by multiple, overlapping, consecutive execution dates

If this Court decides to schedule Mr. Nichols' execution date, then it is respectfully requested that the Court account for the inordinate burden placed upon Mr. Nichols' counsel as a result of representing multiple clients with execution dates, and, consequently, the detrimental effect upon the adequacy of Mr. Nichols' legal

representation. The scheduling of any execution date should take into account the realities of the present circumstances. The State has sought execution dates for two clients represented by undersigned's office, the small Capital Habeas Unit of Federal Defender Services of Eastern Tennessee, Inc. (FDSET CHU). The FDSET CHU currently represents four other clients who have pending execution dates.¹¹ Each client is entitled to adequate representation in clemency proceedings.

Representing clients with overlapping warrant periods presents extreme challenges. Undoubtedly, representing clients with pending execution dates is part and parcel of undersigned counsel's "job." The State, however, was not required nor compelled to request execution dates for two clients represented by counsel's office. The effect of the State's action directly affects counsel's workload and counsel's ability to adequately represent Mr. Nichols in clemency proceedings. The additional burden created by the State's unnecessary action should not be borne by Mr. Nichols.

Preparing for the clemency process requires a thorough examination of all prior phases of the case and independent investigation to tailor the clemency presentation to the characteristics of the client, case and jurisdiction. Counsel must also ensure that consideration of Mr. Nichols' clemency application is substantively and procedurally just. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.15.2: Duties of

¹¹ Nicholas Sutton 2/20/2020, Gregory Lott 3/12/2020, Tim Hoffner 8/11/2021, Keith LaMar 11/16/2023.

Clemency Counsel (Feb. 2003). With respect to Mr. Nichols, adequate preparation of the case for clemency is especially important because he has never faced an execution date not subject to an automatic stay and this will be his first, and likely last, opportunity to request clemency from the Governor. The demand for clemency in this case is great especially in light of the District Attorney General's judgment that justice is better served in this case with a life sentence, and the affidavits of three jurors who would have imposed a life sentence had Mr. Nichols' trial attorney investigated and presented the mitigating evidence only recently learned by the jurors. "[T]he clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider." *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting). Thus, it is imperative that counsel be afforded sufficient time to prepare and present Mr. Nichols's case for clemency.

Scheduling Harold Wayne Nichols's execution less than four months from any current execution date for a FDSET CHU's client would: (a) unduly strain the resources of counsel's office; (b) require an inordinate amount of counsel's time; and, (c) significantly decrease the quality of representation afforded Mr. Nichols. Accordingly, counsel prays that any execution date for Harold Wayne Nichols be scheduled no earlier than four-months' time after the execution dates scheduled for other clients which are set for February 20, 2020, March 12, 2020, August 11, 2021, and November 16, 2023.

V. Relief requested

For these reasons, Mr. Nichols respectfully requests that the Court deny the State's motion.

In the alternative, Mr. Nichols respectfully requests that the Court hold the motion in abeyance until he has received full review of the issues pending before this Court.

Further in the alternative, if the Court grants the motion and schedules an execution date, the Court should issue a certificate of commutation to the Governor.

Also, if the Court grants the motion, it is requested that Harold Wayne Nichols's execution date be scheduled no earlier than four-months' time after February 20, 2020, March 12, 2020, August 11, 2021, and November 16, 2023.

Respectfully submitted,

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Designation of Attorney of Record

Dana C. Hansen Chavis is Mr. Nichols' attorney of record and the attorney who should receive service. Counsel's contact information is:

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Undersigned attorney of record prefers notification of any orders or opinions of the Court by email to the following email addresses:

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Certificate of Service

I hereby certify that a copy of the foregoing *Response in Opposition to Motion to Set Execution Date* is electronically filed with the Court, and sent via email to:

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