

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

**MOTION FOR EXTENSION OF TIME TO RESPOND
TO MOTION TO SET EXECUTION DATE**

The State of Tennessee has filed motions pursuant to Tenn. S. Ct. R. 12.4(A) to set execution dates for Harold Wayne Nichols and Gary Wayne Sutton, both of whom are represented by the Capital Habeas Unit of Federal Defender Services of Eastern Tennessee, Inc. (FDSET CHU or CHU). Defendant Harold Wayne Nichols, through undersigned counsel, respectfully moves for a 90-day extension of time to respond to the State's motion up to and including Monday, December 30, 2019.¹ This additional time will not prejudice the State but it will prevent irreparable harm that would result from forcing Defendant to file a response without affording an adequate opportunity to explain why an execution date should not be scheduled. Because the State is seeking a date certain to carry out Defendant's execution, there is no more critical time period in the course of his legal representation than now. Every day counts towards counsel's efforts to adequately protect Defendant's

¹ Ninety days from the present due date of Monday, September 30, 2019, falls on Sunday, December 29, 2019, therefore the Defendants will file their response by Monday, December 30, 2019.

constitutional rights. As shown below, the present facts and circumstances require additional time for counsel to adequately discharge their duties and competently respond to the State's motion.

Rule 12.4(A) directs that a response should assert "any and all" legal and factual reasons why an execution date "should be delayed, why no execution date should be set, or why no execution should occur," including a claim that the prisoner is not competent to be executed, a request for certificate of commutation pursuant to Tenn. Code. Ann. § 40-27-106, or proof of a likelihood of success on the merits in pending state court collateral litigation. A response under Rule 12.4 requires substantial time and energy to prepare adequately since it can include significant considerations never before brought to this Court's attention.

I. Circumstances have deprived Mr. Nichols of the full amount of time contemplated by Rule 12.4 to respond to the State's motions

On Friday, September 20, 2019, the State filed nine motions to set execution dates pursuant to Tenn. S. Ct. R. 12.4(A), including requests for dates to carry out the execution of the CHU's clients, Mr. Nichols and Mr. Sutton. The State placed the motions in the U.S. Mail for delivery to undersigned counsel's office—FDSET—and did not provide contemporaneous notice to counsel of record of the filing by email or facsimile transmission.²

On Monday, September 23, 2019, copies of the State's motions were received in FDSET's mail. By the time the motions were received, effectively four days had

² Rule 12.4(C) provides that "copies of all filings shall be served" upon opposing counsel "contemporaneously with their filing, either by hand delivery, facsimile, or E-mail."

passed of the ten days allowed by Rule 12.4(A) for a response. On that day (Monday), undersigned counsel was working on another case out of state and she was not able to return to the office until Wednesday, September 25, 2019.

Given these circumstances, if the time to respond began to run on the date the State filed the motions without contemporaneous notice to counsel, less than half of the response time under the Rule remains and FDSET's CHU must expend double the effort to respond on behalf of two clients.

II. Counsel for Mr. Nichols is unable to provide a careful, well-prepared response in the few days remaining of the original response time and counsel requires time above and beyond ten days to do so

Capital defendants are entitled to adequate and continuous representation as set forth in 18 U.S.C. § 3599(a)(1)(B) & (a)(2) & (e). This statutory right to legal representation includes the assistance of counsel for “all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and ... competency proceedings and proceedings for executive or other clemency[.]” 18 U.S.C. § 3599(e). The right to counsel is meaningless without sufficient time for counsel to meaningfully prepare and present a defendant's case. *McFarland v. Scott*, 512 U.S. 849, 857-58 (1994); *see also Harbison v. Bell*, 556 U.S. 180, 193 (2009) (observing that “the work of competent counsel ... may provide the basis for a persuasive clemency application”); *Holiday v. Stephens*, ___ U.S. ___, 136 S. Ct. 387, 388 (2015) (Statement of Sotomayor, J., respecting the application for stay of execution and denial of certiorari) (noting that the defendant's clemency application “likely would have benefited from additional preparation”). Due Process, therefore, requires that counsel for Mr. Nichols be

afforded an adequate amount of time to present a thoughtful response explaining “any and all” reasons why an execution date should not be set or why a certificate for commutation should issue.

A. Steps to be taken before a competent response can be filed on behalf of Mr. Nichols

Before a response can be filed, counsel must meet and consult with her client as well as assess any need for a mental health evaluation, a task that requires an entire day given the travel time from counsel’s office in Knoxville to the prison in Nashville, and the drive back to Knoxville.³ In addition, counsel requires some time to conduct fact investigation and consult with any experts on matters that are relevant to meeting the obligations set forth in Rule 12.4. An adequate investigation into matters relevant to the rule cannot be conducted unless additional time is granted.

Mr. Nichols has case-specific grounds that will support his request for a certificate of commutation, and those grounds must be developed, prepared and presented in his response. In addition, he has litigation pending in state court on a case he timely filed long before the State sought his execution date. His case presents two independently strong claims for relief and sufficient time is needed so he can demonstrate to this Court that he has a likelihood of success on the merits and an execution date should not be scheduled unless he ultimately loses that litigation.

³ There are logistics involved with meeting a client who is in prison. Counsel must contact the prison in advance to schedule legal visits and there is no guarantee that a visitation room will be available on the earliest date that counsel can make the trip to Nashville.

As a final consideration, any response time allotted should compensate for the fact that Rule 12.4 does not allow for a mailbox rule. The response must be received by the Court *in Nashville* and *on the due date*. Undersigned counsel will attempt to file this motion with the Court electronically but she has been advised that the electronic filing system may not be available for this case. Should electronic filing be unavailable, time is required to drive to Nashville in order to deliver the response to the Court for filing on the day it is due. Defendant should not be penalized with less time (in the amount of one day) simply because his counsel is not located in the same geographic area of the state as the Court.

B. Counsel's existing case responsibilities

The FDSET CHU is staffed by four attorneys, each of whom is responsible for cases as either a lead attorney or second-chair attorney. In accordance with professional standards, no CHU attorney works alone on a case. The CHU's caseload is ordinarily heavy but currently it is unusually active due to the extraordinary number of clients with pending execution dates as well as complex litigation in two § 1983 lawsuits in two different jurisdictions (Tennessee and Ohio). Because the FDSET CHU is a small unit, it cannot manage a substantial increase in work load without notice and planning. The State's two motions for execution dates constitute a substantial and unexpected increase in the CHU's work load.

Undersigned counsel, Dana Chavis, is the FDSET CHU's supervising attorney and in that capacity has the responsibility to oversee the CHU's 23 capital cases, as well as to litigate several of the cases as either lead attorney or second-chair attorney. Counsel Chavis is lead counsel for Mr. Nichols and second-chair

attorney for Mr. Sutton. CHU attorney Susanne Bales is lead counsel for Mr. Sutton and second-chair attorney for Mr. Nichols. The State has sought execution dates for Mr. Nichols and Mr. Sutton and, because their responses to the States' motions will be due the same day, each lead attorney will be working largely without the assistance of the second-chair attorney.

In addition to submitting a response to the State's recent motion, counsel have pre-existing case deadlines. For example, two of the CHU's other clients must file initial federal habeas petitions before the one-year statute of limitations expires in October and November, respectively. Attorney Bales is lead counsel in a capital habeas case pending in the Middle District of Florida, and attorney Chavis is the second chair. *Gill v. Secretary, Florida Department of Corrections*, No. 3:18-cv-725 (M.D. Fla.). That case involves review of the state court records and extra-record facts, legal research and preparation of a habeas petition within a short time frame. Specifically, the client has a life-long history of mental illness and institutionalizations and counsel must review and synthesize several thousand pages of complex mental health records, as well as locate and consult with experts. This is an enormously time-consuming task for which counsel Bales is required to devote most of her working hours in order to complete this task so that the petition may be timely filed in November.

In addition, attorney Bales is co-counsel on a capital habeas case with an appellate brief due on a second extension in the Fifth Circuit Court of Appeals on October 21, 2019. *Gamboa v. Davis, Director*, No. 16-70023, ECF No. 00515108320,

(5th Cir. Sept. 6, 2019). Counsel Bales is also the lead attorney for Mr. Sutton and must now respond to the State's motion for an execution date.

The second CHU client who must file an initial federal habeas petition in about a month is represented by one of the other two CHU attorneys with counsel Chavis as the second-chair attorney. The lead attorney in that case also has a filing deadline for a petition for writ of certiorari in the United States Supreme Court in a different case and the two deadlines contribute to the attorney's unavailability to assist in Mr. Nichols' response to this Court.

The other two attorneys in the FDSET CHU have substantial pre-existing case obligations, including proceedings for clients with execution dates and are unable to help with the responses for Mr. Nichols and Mr. Sutton. The CHU currently represents four clients with execution dates scheduled throughout 2020-2023.⁴ At a minimum, preparation for clemency proceedings are underway in those four cases. In particular, clemency is being sought for Nicholas Sutton who is scheduled to be executed by the State of Tennessee on February 20, 2020. In addition to clemency matters, counsel is currently perfecting an expedited appeal to, and drafting an appellate brief for, the U.S. Court of Appeals for the Sixth Circuit. Attorney Chavis is the second-chair attorney on the appellate brief. Also, counsel are seeking clemency for Gregory Lott, a condemned inmate scheduled to be executed by the State of Ohio on March 12, 2020. (Attachment A, *Ohio v. Lott*, No. 1989-0846, Warrant of Reprieve filed Mar. 7, 2019; Attachment B, *Lott v. Bagley*,

⁴ Nicholas Sutton 2/20/2020; Gregory Lott 3/12/2020; Tim Hoffner 8/11/2021; Keith LaMar 11/16/2023

No. 1:04-cv-822, ECF No. 100, Marginal Entry Order (N.D. Ohio Apr. 1, 2013); Related Case No. 1:95-cv-02642, ECF No. 156). Ohio has a structured clemency process, including an inmate interview with the Ohio Parole Board followed by a clemency hearing before the Board that takes place approximately one month before the execution date. Counsel Chavis is the second-chair attorney for Mr. Lott.

Preparing for the clemency process is time consuming. The work 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. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.15.2: Duties of Clemency Counsel (Feb. 2003). Counsel must also ensure that consideration of a client's clemency application is substantively and procedurally just. *Id.* As indicated above, the clemency process in Ohio includes two appearances before the Parole Board for which counsel must prepare their client for questioning and present information in support of the client's clemency application. Although the clemency process in Tennessee is less formal, the nature and extent of the work involved is similar.

The current workload of the CHU also includes complex civil litigation in two different federal district courts. One of the CHU's clients with an execution date has a lawsuit pending in an Ohio federal district court, and will soon be engaged in a preliminary injunction hearing. *In re Ohio Lethal Injection Protocol (Gregory Lott)*, No. 2:11-cv-1016 (S.D. Ohio). Another of the CHU's clients is engaged in an active litigation schedule in a Tennessee federal court. *King v. Mays*, No. 13-6387 (6th

Cir.). These cases have required the full-time attention of one of the other two CHU lawyers which contributes to his unavailability to assist in the response to this Court, as well as prevents him from attending to his other individual case responsibilities, including as second-chair attorney in Mr. Nichols' and Mr. Sutton's cases. As a result, attorney Bales has assumed second-chair responsibilities for Mr. Nichols' case and attorney Chavis has assumed second-chair responsibilities for Mr. Sutton's case.

III. An extension of time will not prejudice the State

Counsel for the State was consulted about this request but could not consent to an extension of 90 days. Nevertheless, an extension of the time for filing a response will not impact the State's interest in seeking an execution date for Mr. Nichols. The timing of the State's motion was solely within its discretion and control, as was the State's decision not to provide advance notice to undersigned counsel. The reality is that there are already execution dates in Tennessee scheduled into the year 2020. Should the Court decide to grant the State's motion, any execution date would not be scheduled until months after the date Defendant seeks to file his response.

An extension of time will not prejudice the State but it is critical to Defendant's ability to provide an adequate response. A 90-day extension will allow counsel to meet the pre-existing, unmovable deadlines set in the next two months in an effective manner. After those deadlines are met, and with the requested 90-day extension to respond, counsel will have a few weeks to prepare the responses for this Court.

IV. Conclusion

For the reasons stated above, it is respectfully requested that the Court grant this motion and permit an additional 90 days, up to and including Monday, December 30, 2019, for Defendant to file his response to the State's motion to set an execution date.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

BY: /s/Dana C. Hansen Chavis
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Designation of Attorney of Record

Undersigned attorney of record prefers to be notified of any orders or opinions of the Court by email to the following email addresses: Dana_Hansen@fd.org, Susanne_Bales@fd.org, Melinda_Christian@fd.org and Bridget_Stucky@fd.org.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded by United States mail, first-class postage prepaid and email on September 26, 2019, to the following:

Amy L. Tarkington
Associate Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
Phone: (615) 741-2216
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/s/ Dana C. Hansen Chavis
Dana C. Hansen Chavis
Assistant Federal Community Defender &
Capital Habeas Unit Supervisor

STATE OF OHIO
Executive Department

OFFICE OF THE GOVERNOR

Columbus

1989-0846

WARRANT OF REPRIEVE

WHEREAS, Gregory Lott, Inmate #198-547, is currently incarcerated in the custody of the Ohio Department of Rehabilitation and Correction under sentence of death; and

WHEREAS, an execution date for said inmate has been set for August 14, 2019, and has not been stayed by any court; and

WHEREAS, Ohio Revised Code Section 2967.08 provides that the Governor may grant a reprieve for a definite time to a person under sentence of death, with or without notices or application; and

WHEREAS, circumstances exist justifying the grant of a temporary reprieve;

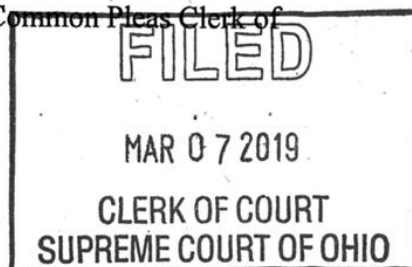
THEREFORE, by virtue of the authority vested in the Governor by the Constitution and the laws of this state, I do hereby direct that the said sentence of death be reprieved for Gregory Lott until March 12, 2020. This inmate is to remain incarcerated on Death Row at the Chillicothe Correctional Institution. Said sentence is to be carried out at 10:00 a.m., March 12, 2020, unless further reprieve or clemency is granted.



IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed, at Columbus, this 7th day of March in the year Two Thousand and Nineteen.

Mike DeWine, Governor

Filed this ___ day of _____, 2019, with the Cuyahoga County Common Pleas Clerk of Court by _____.



Attachment A

Appellate Court Clerk

Motion granted 4/1/13. Attorney Stephen A. Ferrell and Dana Hansen Chavis shall enter an appearance upon receipt of this order.

s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GREGORY LOTT,

Petitioner,

v.

MARGARET BAGLEY, Warden,

Respondent.

Case No. 1:04cv822

Related to Case No.

1:95cv02642

DEATH PENALTY CASE

**PETITIONER LOTT'S MOTION TO WITHDRAW COUNSEL
FROM THE OHIO PUBLIC DEFENDER'S OFFICE
AND TO APPOINT COUNSEL FROM THE CAPITAL HABEAS UNIT
OF THE FEDERAL DEFENDER'S OFFICE IN
THE EASTERN DISTRICT OF TENNESSEE**

Now comes Petitioner Lott, and moves this court to permit his current counsel, Gregory W. Meyers, Senior Assistant Ohio Public Defender, to withdraw from representing Petitioner and to appoint new counsel for him. Petitioner respectfully asks this Court to appoint Stephen A. Ferrell and Dana Hansen Chavis of the Capital Habeas Unit, Federal Public Defender's Office of Eastern Tennessee. The reasons for this motion are set forth in the attached Memorandum.

Respectfully submitted,
OFFICE OF THE OHIO PUBLIC DEFENDER

/s/ Gregory W. Meyers
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