

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,)	
)	CAPITAL CASE
Respondent,)	
)	
v.)	No. E1998-00562-SC-R11-PD
)	
HAROLD WAYNE NICHOLS)	
)	Execution Set for August 4, 2020
Movant.)	

REPLY TO RESPONSE TO NICHOLS'
RENEWED MOTION TO RESET EXECUTION DATE
DUE TO COVID-19 PANDEMIC

Movant, Harold Wayne Nichols, requests this Court reschedule his execution date since conducting an execution during the COVID-19 pandemic unnecessarily endangers the health of correction employees and the public, including Mr. Nichols' attorneys and witnesses to the execution, because the pandemic has substantially interfered with counsel's representation of Nichols during this critical time, and because the United States Supreme Court is about to decide the scope of a condemned inmate's right to access a religious advisor which is an issue that recently arose in this case when Mr. Nichols was denied such access.

The factual basis for rescheduling Mr. Nichols' execution date is undisputed

The State's response demonstrates that the following circumstances are not disputed:

- Throughout the time that Mr. Nichols has been facing the August 4th execution date the extraordinary global event of the COVID-19 pandemic has created a public health crisis and ongoing state of emergency in Tennessee.
- Tennessee's execution protocol does not include procedures for carrying-out an execution during a pandemic.
- Making preparations for an August 4th execution date and conducting an execution on that date will place the health and safety of persons involved in and attending the execution, corrections employees, the inmate population at RMSI, and the general public at unnecessary and avoidable risk.
- Throughout the time that Mr. Nichols has been facing the August 4th execution date he has been entitled to the assistance of counsel as well as investigative and expert services for all available post-conviction process, stays of execution, competency and clemency proceedings and other appropriate motions and procedures.¹
- Throughout the time that Mr. Nichols has been facing the August 4th execution date counsel has been unable to carry-out her duties and responsibilities on behalf of Mr. Nichols without violating government social distancing restrictions and workplace pandemic procedures and without placing herself and others at risk for contracting the virus that causes COVID-19.

¹ *Harbison v. Bell*, 556 U.S. 180, 184-85 (2009); 18 U.S.C. § 3599(e).

- Throughout the time that Mr. Nichols has been facing the August 4th execution date counsel has been unable to carry-out her duties and responsibilities on behalf of Mr. Nichols due to the prison's suspension of visitation and its subsequent limitations upon legal visits, and by the unwillingness of experts, witnesses, and others to place themselves at risk by meeting with counsel and/or Mr. Nichols.
- Throughout the time that Mr. Nichols has been facing the August 4th execution date, the Respondent has not asserted a reason why the execution cannot occur at another time nor shown that it will be harmed if the execution date is reset, as this Court has done in Oscar Smith and Byron Black's cases on the same grounds for stay sought here.

There is no legitimate distinction between the circumstances facing Mr. Nichols and the circumstances faced by Mr. Smith when he was set for execution on June 4, 2020, and Mr. Black when he was set for execution on October 8, 2020

Respondent's argument that Mr. Nichols "is not similarly situated to Smith or Black," (Response p.2), falls flat given that Respondent asserted the same arguments against rescheduling those execution dates that have now been asserted against rescheduling Mr. Nichols' execution date. Respondent's subsequent attempts to distinguish the circumstances under which the two execution dates bookending Mr. Nichols' August 4th date have been reset have no factual support. Mr. Smith, whose June execution date has been rescheduled for February 2021, requested a postponement due to impediments to his ability to seek clemency caused by the COVID-19 pandemic. Both Mr. Smith and Mr. Nichols' execution

dates were set by this Court on January 15, 2020. Both Mr. Smith and Mr. Nichols' attorneys are governed by professional obligations concerning the representation of a client facing an execution date, and both Mr. Smith and Mr. Nichols' attorneys have had their ability to fulfil these obligations and ensure their clients' rights stymied by the COVID19 pandemic. Mr. Black, whose October 2020 execution date has been rescheduled for April 2021, made a similar request for stay of execution on April 29, 2020, one day prior to the initial Motion filed in this case.

Respondent contends: "This Court stayed Smith's execution at a time when the Court was limiting certain judicial proceedings and Governor Lee was limiting business and travel in the State," (Response p.2), but those government- and court-ordered limitations were also in place when Mr. Nichols moved to have his execution date rescheduled. In fact, COVID-19 conditions were worse when Mr. Nichols moved this Court to reschedule his execution date on April 30, 2020, less than two weeks after Mr. Smith's June execution date was rescheduled, and conditions were even worse when the Court denied Mr. Nichols' motion on June 4, 2020.² (Nichols' motion dated 4/30/2020 p.6 n.29 & 30 (relying on the same executive orders), p.9 n.39, 40 (relying on the same court orders); Reply dated 5/8/2020 pp.1-3 (demonstrating increased numbers of new COVID-19 cases in

² On June 12, 2020, the Governor signed Executive 49 which reaffirms "that a state of emergency continues to exist in Tennessee," p.2, and that "measures remain necessary to limit community spread and facilitate containment of COVID-19 in order to protect the health and safety of Tennesseans[.]" Executive Order p.1, available at: <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee49.pdf>. This executive order amended requirements concerning long-term care facility visitation. Notably, visitation at RMSI, where Mr. Nichols is housed, remains suspended. Indeed, attorneys for Mr. Nichols have only been able to visit him once since visitation was suspended at the prison in March 2020, despite the clear importance of such visits in the months and weeks prior to a planned execution date.

Tennessee), pp.3-6 (discussing the actual dictates of the Governor’s executive orders regarding social distancing versus the political rhetoric of “reopening”); Motion dated 6/15/2020 p.5 (comparing new COVID-19 cases in Tennessee at the time the other two execution dates were rescheduled)).

Respondent’s assertion that Mr. Nichols’ execution date alone should not be postponed because the State of Tennessee or the courts are “reopening” is a non-starter, since Respondent does not even attempt to explain how any asserted “reopening” makes up for the months of time lost to Mr. Nichols and his counsel while the State was under stay-at-home orders and the ordinary course of representation of a prisoner under execution warrant was rendered impossible. Nor does such a response take into account the fact that neither the prison where Mr. Nichols is housed nor the offices where Mr. Nichols’ attorneys are employed have returned to normal operational capabilities, completely changing the circumstances under which Mr. Nichols—and now, only Mr. Nichols—will face a 2020 execution date in Tennessee. Mr. Nichols has not been permitted to visit with his friends, family, or spiritual advisers since March 12, 2020, even though he was already facing execution at that time. He has only been permitted one legal visit in the six months since his execution date has been set. Counsel (and all staff at FDSET) remain on telework status with travel restrictions at least through the middle of July. Counsel’s ability to represent Mr. Nichols in a manner consistent with the representation counsel would provide to any client under execution warrant were it *not* for the COVID-19 crisis has been irreparably impaired.

Respondent also states: “this Court is now permitting in-court proceedings and anticipates restarting jury trials after July 3, 2020,” (Response p.2, *citing In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. May 26, 2020)). Not only is this irrelevant to the many months lost to Mr. Nichols and his legal team as a result of COVID-19, but that was also true weeks before this Court rescheduled Mr. Black’s October execution date. Prior to this Court’s Order in Mr. Black’s case, Respondent had argued that Mr. Black’s October execution date should not be rescheduled because his competency petition “is not due to be filed until July 24, to July 28, 2020, and a competency hearing would not occur until August 2020.” (*State v. Black*, No. M2000-00641-SC-DPE-CD, Response of the State p.1 (Tenn. May 5, 2020)). Now, however, Respondent seems to concede that the ongoing crisis created by COVID-19 would harm Mr. Black’s ability to pursue these and other claims prior to his scheduled execution.

Moreover, the number of persons put at risk of becoming infected by the coronavirus due to involvement in Mr. Black’s August court proceeding is no greater than the number of persons that would be involved in an execution on August 4, 2020. (*See Nichols’ motion*, pp.14-18 (filed 4/30/2020) (delineating persons in attendance at an execution in Tennessee)). And, the number of persons involved in an execution exceeds the number of persons allowed to congregate under both Phase Two and Phase Three of Nashville’s economic reopening plan.³ This does not even

³ Both Phase Two and Phase Three recommend gatherings to be kept at 25 people or fewer, work from home should continue whenever possible, and cloth face coverings or masks should be worn in public. *Roadmap for Reopening Nashville: Phase 3 Guidance and Resources*, available at: <https://www.asafenashville.org/phase-3-roadmap-for-reopening/> .

take into account the increased risk of exposure to coronavirus created by the need for prison personnel to rehearse for the scheduled execution and to conduct all the necessary security and other checks that are standard leading up to the execution date. The risk posed to members of the public—including prison personnel and Mr. Nichols’ attorneys—also goes beyond the risk posed at the execution itself. As coronavirus cases continue to increase in Tennessee even today,⁴ counsel for Mr. Nichols must begin to redouble efforts to conduct advocacy and outreach on Mr. Nichols’ behalf as his execution date nears. Doing this work is not discretionary; capital defenders’ professional obligations require that “[i]f an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.”⁵ This work includes making all efforts to “ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.”⁶

Further with respect to Mr. Black’s request to reschedule his October execution date, Respondent initially took the position that there was no way to know any effect “the virus will have on Black’s ability to prepare for a competency hearing three months from now[,]” and argued that Black was not entitled “to months of preparation with certainty about how the hearing will transpire.” (*State*

⁴ Jack Lail, *Coronavirus in Tennessee: 686 new cases, up 2.1%*, WATE (June 18, 2020) available at: <https://www.wate.com/health/coronavirus/coronavirus-in-tennessee-686-new-cases-up-2-1/>.

⁵ Guideline 10.15.1, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter “ABA Guidelines” or “Guidelines”), 31 Hofstra L. Rev. 913, 1079 (2003), also available at <http://ambar.org/2003guidelines>.

⁶ Guideline 10.15.2(C), *supra* ABA Guidelines, note 5.

v. Black, No. M2000-00641-SC-DPE-CD, Response of the State p.2 & n.1 (Tenn. May 5, 2020)). Respondent’s argument against rescheduling Mr. Black’s execution date did not persuade the Court, and Respondent’s current argument against rescheduling Mr. Nichols’ execution date should likewise be rejected.

At this point, but for the COVID-19 pandemic, counsel for Mr. Nichols already would have been meeting with him at the prison regularly to confer about his case for clemency and help him prepare mentally for his upcoming execution. But for the COVID-19 pandemic, Mr. Nichols would have been meeting regularly with his spiritual adviser. But for the COVID-19 pandemic, Mr. Nichols would have already submitted a clemency petition to the Governor and scheduled an in-person meeting with the Governor’s counsel. The effects of the virus on Mr. Nichols’ legal representation, as well as his ability to prepare for his death, are known and are undisputed.⁷ (*See Nichols’ renewed motion pp.2-7*). Mr. Nichols is entitled to legal, investigative, and expert assistance in the time leading to his execution date just as much as Mr. Smith and Mr. Black. It is wholly arbitrary to deny Mr. Nichols—and only Mr. Nichols—the opportunity to prepare his case for mercy and prepare himself mentally and spiritually for execution outside of the novel and unprecedented constraints of a global pandemic.

⁷ Respondent’s assertion that “there is no evidence that all of the many competent mental health experts residing in Nashville are unwilling to evaluate him[,]” (Response p.3), could also have been made against Mr. Black’s request to have his execution date rescheduled. Respondent, however, has no standing to dictate which experts should assist Mr. Nichols especially when particular experts are already involved in this case.

Respondent’s final argument, that the Court should not reschedule Mr. Nichols’ execution because it “has no role in clemency proceedings,” (Response pp.3-4), misses the mark. This Court maintains jurisdiction over its orders and it is appropriate for the Court to reconsider the date it initially selected for Mr. Nichols’ execution given the new and unanticipated circumstances that have arisen—including the substantial risk to the health of corrections employees, RMSI prisoners, and the public if the Court does not reschedule the August execution date.

Furthermore, while Respondent is correct that this Court is not empowered to intervene in the Governor’s ability to grant clemency, it is not correct that the courts have absolutely no interest in seeing Mr. Nichols’ rights in clemency protected.⁸ Asking this Court to reset Mr. Nichols’ execution date, as it has done for Mr. Smith and Mr. Black, is not asking the judiciary to improperly intervene in the clemency process. It is asking the judiciary to exercise a power wholly within its control—the setting of an execution date—and to do so in a manner that does not infringe on Mr. Nichols’ rights to have full and equal access to the clemency process.⁹ Finally, whether Mr. Nichols’ has a fair and equal opportunity to seek

⁸ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288, 289 (1998) (“I do not, however, agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards[,] ... some *minimal* procedural safeguards apply to clemency proceedings.”) (O’Connor, J., concurring in part) (internal citations omitted).

⁹ See *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) (finding a stay necessary to make the “right to counsel meaningful”); see also *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (finding a due process violation where state officials frustrate access to the state-created clemency process).

executive clemency is not the only issue arising from difficulties posed by the COVID-19 pandemic.

Because Mr. Nichols has been denied visitation with his spiritual adviser, and because the United States Supreme Court is poised to decide the scope of a condemned inmate's right to access a religious advisor, this Court should reset Mr. Nichols' August 4, 2020 execution

All visits to RMSI have been suspended since March 12, 2020, including visits from spiritual advisers to the men on death row. As stated in Mr. Nichols' renewed motion (Renewed Motion p.4), Mr. Nichols was denied religious visitation fewer than ten days ago, presumably in light of the prison's ongoing concern over the spread of COVID-19. (Attachment A, email dated 6/10/2020). Such denial when Mr. Nichols is under execution warrant directly affects his ability to prepare for his death: a fundamental interest that has been protected throughout American history, including when the First Amendment was adopted. *See* Stuart Banner, *The Death Penalty: An American History* 1 (2002) (recounting early nineteenth century execution where the condemned asked a clergyman to read his final words for him). Proceeding with Mr. Nichols' August 4th execution date despite the fact that he has been unable to visit with his religious adviser on account of COVID-19 arbitrarily infringes on his right to free exercise of religion under the First Amendment to the U.S. Constitution and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5.

In addition, the United States Supreme Court just three days ago granted a stay of execution to Ruben Gutierrez over a claim that Texas's denial of a spiritual adviser in the execution chamber would constitute a denial of his religious rights.

Gutierrez v. Saenz, No. 19-8695, 2020 WL 3248349 (Jun. 16, 2020). The order also specified, “[t]he District Court should promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution[.]” signaling the Court’s interest in the rights of the condemned to access a spiritual adviser. Because the Court’s ruling in that case is likely to have significant implications for Mr. Nichols’ claims here, this Court should reset the scheduled execution date.

At this time, not only does Tennessee not permit a spiritual adviser in the execution chamber, but by seeking to proceed with the scheduled August 4, 2020 execution, the State is unconstitutionally limiting Mr. Nichols’ free exercise rights. Mr. Nichols should have been able to visit regularly with his spiritual adviser in the months prior to his execution, based on historical practice, as would any other condemned prisoner were it not for the pandemic. Mr. Nichols cannot take steps he sincerely believes necessary to prepare himself for death without meeting with his spiritual adviser and he has been without such visitation for months. Given the gravity of his impending death, there is no valid, rational reason for this deprivation. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). Importantly, this Court cannot remedy this violation simply by allowing Mr. Nichols to resume religious visits now. Such a response would not address the deprivation of time and opportunity to exercise his religion that has already occurred.

The rights Mr. Nichols seeks to protect as he faces death are not new. When the United States adopted the Free Exercise Clause, clergy participation in executions was an indispensable civic and religious tradition. Among other things, this tradition sought to give the condemned every opportunity to repent and seek spiritual forgiveness before death. This clerical role “was so routine that in 1791 William Smith could publish a guide-book for ministers [that contained] suitable devotions before, and at the time of Execution.” S. Banner, *The Death Penalty: An American History* at 18.¹⁰ These traditions were passed on for many generations. See, e.g., Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 *Buffalo L. Rev.* 461, 471 n.25, 480, 505 n.187 (1995). Execution ministry was an “exercise” of religion then, and it remains so now.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000cc–1(a). RLUIPA defines “‘religious exercise’ capaciously to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’” *Holt v. Hobbs*, 574 U.S.

¹⁰ Unsurprisingly, these American traditions were similar to English practices during the colonial era. See, e.g., Randall McGowen, *The Body and Punishment in Eighteenth-Century England*, 59 *J. Mod. Hist.* 651, 651 (1987) (“The condemned . . . were accompanied by a clergyman who shadowed their last moments urging them to repent or consoling them with the offer of divine forgiveness.”).

352, 358 (2015) (quoting § 2000cc–5(7)(A)). And Congress specified that RLUIPA “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc–3(g).

The denial of religious visits during the time period leading to execution has substantially burdened Mr. Nichols’ religious exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (religious exercise is substantially burdened when the prison “prevents the plaintiff from participating in an activity motivated by his sincerely held religious belief”). The State cannot “meet the daunting compelling interest and least-restrictive-means test,” *Cavin v. Mich. Dep’t of Corr.*, 927 F.3d 455, 458 (6th Cir. 2019) (citing *Holt v. Hobbs*, 574 U.S. at 863), because there is no reason why the State must proceed with the August 4, 2020 execution date. Mr. Nichols’ execution need not occur during the period of time when he is without access to his religious adviser.

The Supreme Court’s recent action in *Gutierrez, supra*, suggests, at a minimum, that fact-finding is required to determine whether the prison’s denial of spiritual visits is the least restrictive means of furthering a compelling governmental interest. This new circumstance further supports rescheduling Mr. Nichols’ August execution date.

For these reasons, and those previously brought before the Court, the August 4, 2020 execution date should be rescheduled.

Respectfully submitted this 19th day of June 2020.

/s/ Dana C. Hansen Chavis
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CERTIFICATE OF SERVICE

I, Dana C. Hansen Chavis, certify that a true and correct copy of the foregoing Reply to Response to Nichols' Motion for a Stay of Execution was served on June 19, 2020, via United States Mail to opposing counsel, Zachary T. Hinkle, Associate Solicitor General, P.O. Box 20207, Nashville, Tennessee, 37202.

/s/ Dana C. Hansen Chavis
Dana C. Hansen Chavis

Hansen.Dana

From: Melissa A. Hood <Melissa.A.Hood@tn.gov>
Sent: Wednesday, June 10, 2020 4:18 PM
To: Hansen.Dana
Subject: RE: religious visits for Harold Wayne Nichols #146457

Good afternoon,

The Warden has stated that this request is not approved at this time. He will advise when visits will resume.

Thank you,



Melissa Hood

Executive Secretary to the Warden
Riverbend Maximum Security Institution
7475 Cockrill Bend Blvd. Nashville, TN 37243
p. 615-350-1109 c. 615-306-1712 f. 615-350-3400

From: Hansen.Dana <Dana_Hansen@fd.org>
Sent: Wednesday, June 10, 2020 3:11 PM
To: Melissa A. Hood <Melissa.A.Hood@tn.gov>
Subject: [EXTERNAL] religious visits for Harold Wayne Nichols #146457

***** This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. *****

Hello Ms. Hood,

As you know, yesterday was my first legal visit with Mr. Nichols since the COVID-19 pandemic and I have a follow-up request. Mr. Nichols' spiritual adviser is J.R. Davis. Before visitation was suspended at RMSI due to the pandemic, Mr. Davis met with and counseled inmates at the institution several days every week. Mr. Davis has also been a spiritual adviser for two inmates on Unit 2 who were executed in the recent past.

Mr. Nichols has not been able to meet with Mr. Davis since approximately March 12, 2020 when RMSI suspended visitation. There are now less than 60 days until Mr. Nichols' execution date and he requests permission to visit with Mr. Davis on at least a weekly basis. Mr. Davis is willing and able to visit with Mr. Nichols and help guide him on spiritual matters at this important time.

Please advise as to the earliest date that a religious visit can be scheduled.

Thank you,
Dana

Dana C. Hansen Chavis

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