

**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.)	

**NOTICE OF SUPPLEMENT TO NICHOLS’
MOTION FOR A STAY OF EXECUTION DUE TO COVID-19 PANDEMIC**

Movant, Harold Wayne Nichols, hereby supplements his Motion for a Stay of Execution Due to COVID-19 Pandemic and his subsequent reply with updated information about the ongoing public health emergency, the impediments to Mr. Nichols’ right to legal representation and to seek executive clemency, and the public health dangers of conducting an execution on August 4, 2020.

The pandemic persists – a COVID-19 update

About 30 days ago, Mr. Nichols requested a stay of execution due to the COVID-19 pandemic. The number of reported COVID-19 cases in Tennessee since that time has more than doubled, to 24,375 cases and 381 deaths.¹ Davidson County, where Mr. Nichols is imprisoned and his execution is scheduled to occur, has 5,323 cases (compared to 2,454 cases) and 64 deaths (compared to 25 deaths).²

¹ TN Dept. of Health, *Coronavirus Disease (COVID-19)*, available at: <https://www.tn.gov/health/cedep/ncov.html> (last visited June 3, 2020)

² TN Dept. of Health, *Epidemiology and Surveillance Data, Cases and Labs by County*, available at: <https://www.tn.gov/content/tn/health/cedep/ncov/data.html> (last visited June 3, 2020)

On June 2, there were 118 new cases.³ Davidson County leads the state in numbers of confirmed cases. It has a higher infection fatality rate than New York City. Attachment A, Dr. Aronoff declaration ¶9. Hamilton County, where the crime occurred, has become a new COVID-19 “hot spot” with 910 cases (compared to 152 cases) and 15 deaths (compared to 13 deaths).⁴ Knox County, where Mr. Nichols’ legal team is located, has 441 cases (compared to 221 cases) and the number of deaths remains the same at 5.⁵

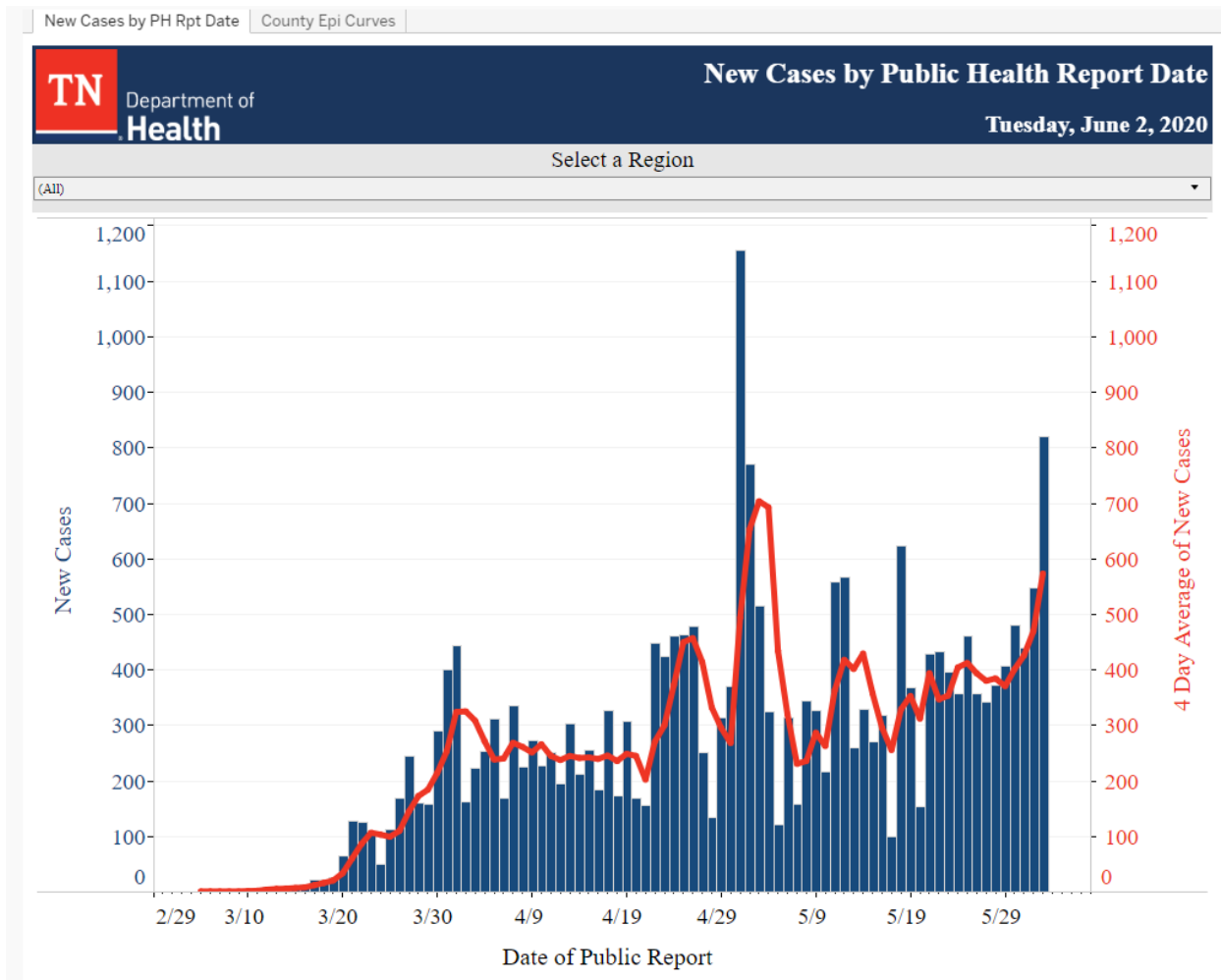
The number of daily new cases in Tennessee is trending upward and has yet to consistently decrease.⁶

³ TN Dept. of Health, *New Cases by Public Health Report Date*, Davidson County (June 2, 2020), available at: <https://www.tn.gov/health/cedep/ncov/data/epi-curves.html> (last visited June 3, 2020)

⁴ TN Dept. of Health, *Epidemiology and Surveillance Data, Cases and Labs by County*, available at: <https://www.tn.gov/content/tn/health/cedep/ncov/data.html> (last visited June 3, 2020); Sarah Grace Taylor, *New York Times report: Chattanooga in top 5 nationally for new coronavirus cases, as deaths and cases continue to rise*, Chattanooga Times Free Press (May 26, 2020), available at: <https://www.timesfreepress.com/news/local/story/2020/may/26/chattanooga-top-5-nationally-new-coronavirus-ca/523884/>

⁵ TN Dept. of Health, *Epidemiology and Surveillance Data, Cases and Labs by County*, available at: <https://www.tn.gov/content/tn/health/cedep/ncov/data.html> (last visited June 3, 2020); Knox County Health Dept., *Knox County COVID-19 Data*, available at: <https://covid.knoxcountyttn.gov/case-count.html> (last visited June 3, 2020)

⁶ TN Dept. of Health, *New Cases by Public Health Report Date*, available at: <https://www.tn.gov/health/cedep/ncov/data/epi-curves.html> (last visited June 3, 2020)



On Tuesday, June 2, 2020, coronavirus cases across the state increased by 821 cases in 24 hours, with 133 new cases occurring in Davidson County.⁷

Tennessee remains in a State of Emergency.⁸ State and local governments have implemented economic reopening plans while encouraging continued social distancing and use of personal protective equipment. Phase Two of Nashville’s reopening plan includes public health guidelines urging all residents age 65 and

⁷ Andy Humbles, *Coronavirus in Tennessee: Cases in Nashville up 133 in past 24 hours*, Tennessean (June 1, 2020, updated June 3, 2020), available at: <https://www.tennessean.com/story/news/2020/06/01/coronavirus-tennessee-latest-updates-cases-across-state/5306482002/>

⁸ TN Dept. of Military, *Current Status*, <https://www.tn.gov/tema/current-status.html>

older or at high risk to stay home, other residents are asked to work from home if possible, wear masks in public, and maintain social distancing with no gatherings over 25 people.⁹ As Nashville was scheduled to begin Phase Two of the city's reopening plan on May 25, 2020, the state health department reported an increase in over 400 new COVID-19 cases in 24 hours.¹⁰ On June 2, 2020, an additional 821 Tennesseans tested positive for COVID-19.¹¹ Tennessee's neighboring states have recorded record numbers of new COVID-19 cases as they, too, have begun reopening.¹²

The Nashville Convention & Visitors Corporation has taken the unprecedented step of cancelling the city's annual Independence Day concert and closing the city parks to fireworks spectators due to the pandemic. Attachment A, Dr. Aronoff declaration ¶12. These events were scheduled for July 4, just one month prior to Mr. Nichols' scheduled execution date.

The local courts continue under emergency operation procedures. The Federal District Court for the Middle District of Tennessee has acknowledged the four-phase plan to gradually reopen Nashville's economy but continues to operate under

⁹ *Roadmap for Reopening Nashville, Phase Two*, available at:

<https://www.asafenashville.org/roadmap-for-reopening-nashville/>

¹⁰ TN Dept. of Health, *New Cases by Public Health Report Date* (May 29, 2020), available at:

<https://www.tn.gov/health/cedep/ncov/data/epi-curves.html>

¹¹ TN Dept. of Health, *New Cases by Public Health Report Date* (June 2, 2020) available at:

<https://www.tn.gov/health/cedep/ncov/data/epi-curves.html> (last visited June 3, 2020)

¹² See, e.g., Matthew Impelli, *Alabama, Mississippi Coronavirus Cases Hit All-Time High as States Move Through Phased Reopening*, Newsweek (May 29, 2020), available at: <https://www.newsweek.com.SSL+alabama-mississippi-coronavirus-cases-hit-all-time-high-states-move-through-phased-reopening-1507470>; Soo Kim, *12 U.S. States where Coronavirus Cases Are Rising*, Newsweek (May 28, 2020), available at: <https://www.newsweek.com.SSL+us-states-coronavirus-cases-rising-1506734>

restrictive measures in accordance with the continuing public health emergency in Nashville, Davidson County, as well as in Tennessee and across the nation.¹³ All grand jury proceedings, criminal trials, petty offense dockets, and courthouse ceremonies are continued through June 30, 2020.¹⁴ Four days after entering its latest order regarding court operations, the court implemented a requirement that a face covering or mask is required to be worn by all individuals entering the courthouse.¹⁵

This Court has extended, until further order, the state of emergency for the State of Tennessee's Judicial Branch.¹⁶ Jury trials are suspended through July 3, 2020, and alternate means of conducting business are preferred over in-person court proceedings.¹⁷

Since April 30, 2020, when Mr. Nichols first requested a stay of execution, the number of total active COVID-19 cases and deaths in the United States increased from 851,874 to 1,259,204:¹⁸

¹³ *In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, Third Amended Admin. Order No. 209 (M.D. Tenn. May 22, 2020), available at: <https://www.tnmd.uscourts.gov/sites/tnmd/files/AO%20209%20Third%20Amended%20-%20COVID-19.pdf>

¹⁴ *Id.* at pp.2-4.

¹⁵ *Building Access and Face Mask Notice Regarding Coronavirus (COVID-19)*, available at: <https://www.tnmd.uscourts.gov/sites/tnmd/files/Kefauver%20Mask%20Notice%20%20%28002%29.pdf>

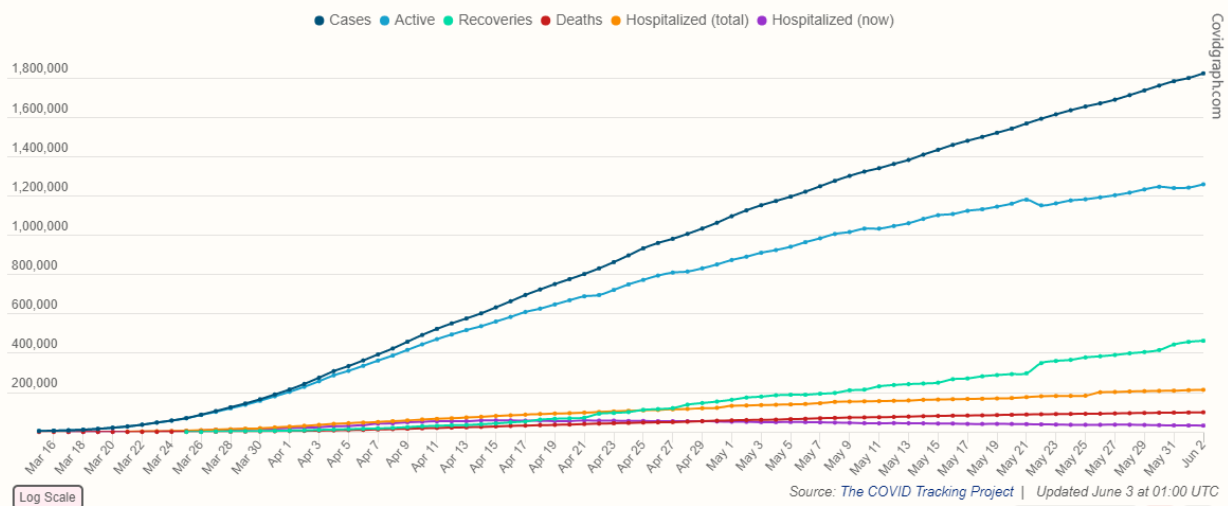
¹⁶ *In re: Covid-19 Pandemic*, No. ADM2020-00428 (Tenn. May 26, 2020).

¹⁷ *Id.* at pp.1-2.

¹⁸ <https://covidgraph.com/usa/> (last visited June 3, 2020)

UNITED STATES CURRENT COVID-19 SITUATION

Total/active cases, deaths, and recoveries may be underestimated due to limited testing. Not all states report their hospitalization data.



Overall, there have been 1,802,470 confirmed cases in the United States with 105,157 deaths.¹⁹

In short, conditions have worsened since the Court rescheduled the June 2020 execution date for Oscar Smith²⁰ and have further deteriorated since Mr. Nichols first requested a stay of his execution date scheduled for August 4, 2020. It is highly unlikely that, before August 4th, conditions will improve from the conditions which were present when Mr. Smith's execution date was stayed.

Mr. Nichols had been denied access to counsel and his right to legal assistance and to seek executive clemency is severely impaired

The State intends to conduct Mr. Nichols' execution on August 4th, and in the days leading up to the execution—through the night of the execution—numerous non-essential staff, non-employees, and private citizens will be permitted on the grounds and inside Riverbend Correctional Institution (including Mr. Nichols'

¹⁹ Centers for Disease Control, *Cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited June 3, 2020)

²⁰ See Mr. Nichols' Reply pp.2-3 (filed May 8, 2020).

attorney).²¹ Undersigned counsel, however, has been denied access to Mr. Nichols before his execution. Legal visitation is not allowed and counsel cannot communicate in person with Mr. Nichols about grave and sensitive matters which must be attended to before the execution.²² Attachment B, email thread dated May 28-29, 2020.

Undersigned counsel has been denied a legal visit with Mr. Nichols for June 9, 2020, which is less than 60 days from the scheduled execution.²³ Attachment B, email thread dated May 28-29, 2020. Prison authorities, instead, offered to schedule a legal phone call.²⁴ *Id.* Counsel explained that a phone call is not sufficient due to the sensitive matters which must be discussed with Mr. Nichols before his execution date. *Id.* Counsel has received no further communication from the prison.

It is fair to infer that the prison deems legal visitation with Mr. Nichols too great a risk of introducing the novel coronavirus to staff and inmates. “The current public health crisis poses a myriad of obstacles to daily prison operations.”

Attachment C, Aiken declaration ¶11. In addition to obvious health risks, an outbreak in the prison “can trigger inmate panic, riots, hostage taking, murder, hunger strikes, racial violence, fires, vandalism, escape attempts, and gang

²¹ See Mr. Nichols’ Motion for Stay pp.14-17 (filed April 30, 2020) (discussing the many people involved in, and present for, an execution).

²² See ABA *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“Supplementary Guidelines”), Supplementary Guideline 10.11(C); ABA Guideline 10.5 & Commentary, at 31 Hofstra L. Rev. 913, 1005-11.

²³ In light of the COVID-19 pandemic, counsel requested a legal visit in the non-contact room where a wall containing a pane of glass divides counsel and client.

²⁴ TDOC has suspended family, friend, and legal visitation during the COVID-19 pandemic. See Frequently Asked Questions Regarding COVID-19, TDOC, questions 1 & 11, <https://www.tn.gov/correction/frequently-asked-questions-regarding-covid-19.html>. Additionally, Mr. Nichols has been denied contact with a spiritual advisor.

retaliation.” Attachment C, Aiken declaration ¶12. If a legal visit for the purposes of conferring with Mr. Nichols about decisions to be made prior to his execution does not take precedence over attempting to control the infection rate within the prison and the revised daily operations implemented in response to the pandemic, certainly an execution—which involves dozens more individuals entering the prison grounds—cannot take precedence over the same. *See* Attachment C, Aiken declaration ¶14.

Fair-minded people would agree that conducting an execution in August 2020 will exponentially increase the risk of staff and inmates becoming infected with the virus that causes COVID-19. Mr. Nichols has provided this Court with the declarations of prison expert, James Aiken, and infectious diseases expert, Dr. David M. Aronoff, who corroborate that risk. The structure and functioning of prisons make it virtually impossible for personnel and inmates to abide by the social distancing and hygiene standards set in place by the CDC. Attachment A, Dr. Aronoff declaration ¶17. Tennessee’s execution protocols do not address conducting an execution during a pandemic, Attachment C, Aiken declaration ¶19, and its requirements create a risk of spreading COVID-19 throughout the prison that “is operationally unacceptable,” *id.* at ¶18, and can result in a “catastrophic and deadly outcome.” *Id.* at ¶17. There are many “instances [in the execution protocol] of a high volume of individuals in a confined space that occur during the course of the execution.” Attachment A, Dr. Aronoff ¶23.

It would be extremely difficult for individuals to avoid intermittent, if not constant, contact in these cramped spaces. At the very least, they

are unable to adhere to the CDC's recommendation of remaining at least six feet apart from one another. ... With each of these instances comes the risk of COVID-19 transmission, and, if one thing is clear from observation of the virus, it only takes a single interaction with a single infected individual to spark a wildfire of disease engulfing entire communities in the span of days. Anyone involved in the execution or who enters RMSI in the days and weeks leading up the execution can be shedding the virus and not know it.

Attachment A, Dr. Aronoff ¶23. "This virus does not respect prison walls."

Attachment C, Aiken declaration ¶20. "The health of many people would needlessly be jeopardized if an execution is conducted in August 2020." *Id.*; *see also*

Attachment A, Dr. Aronoff declaration ¶¶24-26.

Despite the pandemic and its associated risks to public health, Mr. Nichols must make various decisions before his execution date and he is entitled to adequate time and legal counsel to help him make those decisions. *See, e.g.*, 18 U.S.C. § 3599 (providing for the assistance of counsel); *see also* Attachment D, Declaration of Emily Olson-Gault, Director and Chief Counsel of the ABA Death Penalty Representation Project ¶¶11-12, 31. Tennessee's execution protocol involves several issues for Mr. Nichols to resolve including a choice concerning the method of execution, the selection of a defense counsel witness and a spiritual advisor, and whether to permit an autopsy of his body.²⁵ It is not appropriate to set forth in this public document all legal and end-of-life questions and all matters facing Mr. Nichols before the execution date. Counsel must be able to fully inform Mr. Nichols about those issues and choices, and such discussions cannot occur by telephone.

²⁵ Lethal Injection Execution Manual Execution Procedures for Lethal Injection ("Protocol"), pp.49, 68, 92, 98 available at: <https://files.deathpenaltyinfo.org/legacy/files/pdf/TN%20LI%20Protocol%207-5-18.pdf>

Attachment D, Olson-Gault Declaration ¶¶25-31. In addition, counsel must personally observe and interact with Mr. Nichols to screen his cognitive and emotional competency to make sound decisions. Attachment D, Olson-Gault Declaration ¶28. Counsel cannot render adequate representation without meeting in-person with Mr. Nichols. Attachment D, Olson-Gault Declaration ¶32 (“The norms of practice reflected in the ABA Guidelines are not aspirational. *See* Guideline 1.1, ‘Objective and Scope of Guidelines,’ Commentary, at 920. They represent the minimum requirements for adequate representation.”).

About 60 days remain before the execution scheduled for August 4th and there is no dispute that the pandemic has adversely affected Mr. Nichols’ legal representation and his ability to prepare himself for death. Counsel has been unable to conduct the investigation and out-of-home work required to adequately represent Mr. Nichols, and counsel has been denied face-to-face communication with Mr. Nichols. No Tennessee prisoner has faced such circumstances before an imminent execution date. Mr. Nichols should not be deprived adequate legal assistance and a fair opportunity to seek clemency before the State puts him to death. In this situation, the principles of Due Process and Equal Protection cannot countenance the August 4th execution date. A stay of execution should be granted.

Respectfully submitted this the 3rd 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 Notice of Supplement to Nichols' Motion for a Stay of Execution Due to COVID-19 Pandemic was served on June 3, 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
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