

HAROLD WAYNE NICHOLS VS. STATE OF TENNESSEE

DECLARATION OF JAMES E. AIKEN

STATE OF NORTH CAROLINA

COUNTY OF TRANSYLVANIA

I, James E. Aiken, do hereby declare under penalty of perjury the following is true to the best of my knowledge, information, and belief:

I am over the age of eighteen (18) years, am competent to make this Declaration, and have personal knowledge of the facts contained herein.

I reside in Transylvania County, North Carolina.

1. I have spent the last 48 years working in the prison profession. Since 1994, I have been the president of James E. Aiken & Associates Inc., a correctional consulting firm based in North Carolina. Prior to 1994, I worked in various correctional systems throughout the country in numerous supervisory capacities to include final responsible authority at the facility and agency levels. This includes serving as: Director and Consultant to the Bureau of Corrections, United States Virgin Islands (1992-1994); Commissioner of the Department of Correction, Indiana Department of Correction (1989-1992); Deputy Regional Administrator of the South Carolina Department of Corrections (managing 16 prisons from 1987-1989); Warden of the Central Correctional Institution of the South Carolina Department of Corrections (1982-1987); and Warden of the Women's Correctional Institution of the South Carolina Department of Corrections (1979-1982).
2. Throughout my career, I have been responsible for the security and safety of scores of prisons and tens of thousands of prison staff members, inmates and visitors. This includes the overview and supervision of death row units and execution chambers in Indiana and South Carolina. Additionally, as a Warden in South Carolina, I was responsible for the execution of two inmates.
3. I have provided consultation to the Federal Bureau of Prisons, National Institute of Corrections and numerous departments of corrections throughout the United States including the State of Tennessee and I am very familiar with the Tennessee Department of Correction ("TDOC") system, having reviewed its history and operation as a result of my work evaluating and assessing prison systems



throughout the United States. My areas of expertise include, but are not limited to, issues pertaining to prison security systems, assessment of security protocols and security operational performance, inmate classification, riot and gang management, emergency response and preparedness, corrections leadership development, managing violent inmates, executive training for both new and experienced Wardens, and management of super-maximum prisons.

4. In 2004, the United States Congress appointed me to the National Prison Rape Elimination Commission. This Commission conducted "comprehensive hearings and examine[d] all penological, economic, physical, mental, and medical and social issues relating to prison rape in America." The Commission issued a comprehensive report on the subject, including a set of recommended national standards to reduce and eliminate prison rape.
5. I have received various awards for my service to corrections, such as the highest award the State of Indiana could bestow upon a citizen at the time, "Council of the Sagamores of the Wabash" presented personally by the Governor, the Roscoe Pound Award for Outstanding Leadership in Corrections from the National Council on Crime and Delinquency, and the Indiana Correctional Association's Presidential Citation Award. I have also received recognitions from the West Central Warden's and Superintendents Association, the National Association of Blacks in Criminal Justice, and the Indiana Alliance for Better Child Care, among many others.
6. I have been qualified to testify as an expert in the fields of corrections, prisons and criminal justice in state and federal courts in Alabama, Arizona, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming, as well as, the Court of Queen's Bench, Canada. My testimony has addressed future danger posed to inmates, staff and the community by defendants, the ability of inmates to adjust to prison/confinement settings, classification of inmates to determine proper confinement levels, prison conditions, and other topics generally relating to prisons, jails, and criminal justice matters.
7. The attorneys for death row inmate Harold Wayne Nichols have asked me to offer my professional opinion about the security, safety and health concerns presented by proceeding with his execution, which is



presently scheduled for August 4, 2020, at Riverbend Maximum Security Institution ("RMSI") in Nashville, Tennessee. In order to render my opinions, I reviewed some media accounts and TDOC data regarding the COVID-19 outbreak in the State of Tennessee and its prison system, and the Tennessee lethal injection and electrocution execution protocols.

8. Prison officials must manage normal prison operations on a daily basis. This is constant: 365 days a year, 7 days a week, 24 hours a day. The examples of these tasks and activities include, but are not limited to: sight and sound supervision of the inmate population, criminal investigations, contraband searches, classification transactions, inmate rule violations, inmate counts, use of force transactions, perimeter system and security, gang intelligence, visitation, internal investigations, medical (sick call), telephone monitoring, transportation, vehicle traffic control, staff meetings, action planning, escape prevention, food service, educational, recreational and other programming, maintenance, sanitation, industry, mail services, key control, tool control, commissary, and laundry.
9. These tasks all require an intense level of face-to-face interactions with the inmate population as a fundamental security and safety measure. Specifically, the purpose of this close contact is proactively preventing, detecting, responding and containing misinterpretations, resolving conflict, gathering security information, ensuring that directives and mandates are completed, as well as, reinforcing that the governance of the prison is maintained by authorities. These issues must be immediately addressed before they can devolve into critical events which pose a threat to the safety and well-being of everyone inside the prison's walls and the surrounding areas.
10. The COVID-19 pandemic presents unprecedented challenges to the prison community. There have been outbreaks at multiple prisons across the State of Tennessee. TDOC data demonstrates just how quickly COVID-19 has spread within the prison system. In March 2020, the TDOC only tested 22 inmates for COVID-19. None of them tested positive. But as of May 10, 2020, the TDOC had tested more than 14,000 inmates. Almost 16 percent of the inmates who were tested were positive for COVID-19. That is a total of 2,195 inmates who have been infected. According to TDOC data, 1,577 of those inmates are still positive and 618 have recovered. Two inmates have died, and the TDOC is awaiting autopsy results before determining whether COVID-19 contributed to or caused their deaths. Moreover, 80 TDOC employees have tested positive for COVID-19. 55 of those

employees are still positive and 25 have recovered. TDOC revealed that two inmates have tested positive for COVID-19 at RMSI, which houses the execution chamber. Hence, the TDOC is operationally home to one of the largest COVID-19 prison outbreaks in the country.

11. The current public health crisis poses a myriad of obstacles to daily prison operations. COVID-19, a highly contagious, debilitating and deadly viral infection has been introduced into the TDOC system, infecting the inmate population and workforce. This will adversely impact the normal operation of the prisons to include security and orderly operation. There is an increased danger and risk of the loss of life, suffering, over-extending the medical system, reduction in work force availability, litigation, and straining the overall security of the prison operations.
12. Adverse inmate population perceptions must be managed. Examples include: fear of the unknown, unfair treatment (restrictive measures of inmate movements, medical treatment, food service, staff informal comments, forced transfers, and inability to receive health and hygiene items, i.e., masks, hand sanitizers, toilet paper, soap, and house cleaning supplies), and disruption of in-person social interactions (other inmates, staff, and visitors). Any of these issues can deteriorate into a critical event resulting in death, serious bodily injury and/or loss of property. Thus, the pandemic will have an adverse impact upon the cost of prison operation and, without proper intense management oversight, can trigger inmate panic, riots, hostage taking, murder, hunger strikes, racial violence, fires, vandalism, escape attempts, and gang retaliation.
13. It is imperative that the prisons incorporate protocols which would reasonably: (1) prevent; (2) detect; (3) respond to; and (4) contain and /or lessen the effects of the COVID-19 pandemic through social distancing, suspending visitation, restricting non-essential persons from entering the facilities, significantly decreasing person-to-person interactions, providing masks and cleaning supplies, testing all staff and inmates, evaluating staff and others prior to their admission to the prisons, and promptly providing adequate medical treatment. This abatement strategy reduces the required basic intensive person-to-person communication between staff and inmates. These are the security tools which are essential to prevent, detect, respond to and contain issues before they rise to a level of critical events which threatens the safety of the institution and the well-being of everyone inside the prison's walls and the surrounding areas. This strategy,

however, must be taken as a “necessary evil” and an operational “tight rope.”

14. TDOC management and prison staff must understand the complexities of the viral pandemic and the multi-perils posed by the current public health crisis. Given the constant threat that COVID-19 poses to TDOC staff and the inmate population, an execution scheduled for August 2020 would have to be carried out within these restraints and regardless of the threat posed by the virus. When a prison carries out an execution, as I have overseen on two occasions, the execution must be the priority. An execution, however, cannot take precedence over attempting to control the infection rate within the prison and the revised daily operations implemented in response to the pandemic. The threat to human life and the safety of the institution is of paramount importance and must be placed ahead of conducting an execution. Furthermore, any attempts to carry out an execution during this pandemic will overextend and put undue stress on the prison system, potentially endangering the health, safety and welfare of a vast number of people.
15. When carrying out an execution, basic institutional security requires an extreme level of face-to-face interactions with staff, internal and external entities. The purpose of this is to proactively prevent, detect, respond to and contain security perils surrounding an execution. These issues must be addressed before the issues devolve into critical events.
16. No matter how many executions have been carried out at a particular institution, every execution must be treated as if it is the first execution. This requires extensive preparation and the involvement of scores of prison staff members and officials. In Tennessee, it takes more than twenty people just to carry out the execution. Executions involve a substantial number of people functioning in various roles. Preparing for an execution includes intense physical person-to-person interactions among staff (planning meetings, hands-on training, paper drills, staff briefings, problem solving, media briefings, and work group special projects). Examples of tasks and threats that require additional staff and increased face-to-face interactions, internal and external to the prison, include, but are not limited to: traffic management, crowd control, natural disasters (including thunderstorms and tornadoes), escape prevention, external attacks, perimeter security, contraband introduction, information technology, ventilation issues, power failures, internal communications, external communications, food service (increase in production), religious (increased interactions with clergy), medical emergency, fire/rescue, chain of command interactions

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(internal, Governor's office, Attorney General, courts, defense counsel, witnesses, media), restroom availability and sanitation, air traffic control (emergency medical evacuation from the prison, inbound back-up tactical security personnel and equipment, unauthorized private flybys, media in air space, and chopper escapes), legal rulings (on a 24-hour basis), SWAT, active shooter (response and containment), implementing death watch procedures, restraining the inmate, and administering the lethal injection or electrocution.

17. The risk of spreading the virus within RMSI is great, especially in light of the increased tasks and face-to-face interactions involved in conducting an execution. Every one of these interactions presents an opportunity for the virus to infiltrate and spread throughout RMSI, endangering the safety and well-being of thousands of people. Carrying out an execution during the pandemic poses needless and unnecessary risk to the staff and the almost 800 inmates housed at RMSI. Also put at risk will be anyone who enters RMSI or is on the prison's grounds on the day of the execution. This include victim's family members, victim's rights advocates, spiritual advisers, lawyers for the state and defense, members of the media, and protestors (both in favor of and in opposition to the execution). Furthermore, the members of the public who will enter the prison on the day of the execution will present additional risks and could infect the prison staff, inmate population and each other. It is not sound correctional practice to bring execution witnesses, spiritual advisers and other people into the prison and possibly expose them to infection or introduce the virus in the prison population. In Tennessee, more than ten people witness an execution. The viewing room for the execution does not appear to allow for the six feet of space that federal health officials and medical experts recommend between people. Gathering all of these persons in one location presents a substantial risk of transmission if anyone happens to be infected. In a prison operational context, officials must prepare for the certainty that a person will transmit the virus during this transaction. One of the most troubling features of COVID-19 is that someone may be infected with the virus or carrying it for up to two weeks without realizing he or she is ill. The delay in validation of an individual's infection allows (prison operationally) for a possible 14-day continuous spread of the virus and the chain reactions that follow. This presents an even more catastrophic and deadly outcome in a prison environment.

18. There is the constant risk that COVID-19 can be introduced (and re-introduced) into a prison at any time. As a result, the possibility of an outbreak at RMSI remains a continuing and ever-present threat.

Furthermore, the demands of planning for and conducting an execution requires the assistance of large number of prison staff members. Those tasks will pull staff away from their day-to-day duties, the very duties that are intended to keep RMSI safe and help to control the spread of the virus. Accordingly, every prison staff member pulled away from his or her primary responsibility of trying to keep RMSI safe represents an opportunity for the virus to infiltrate and spread throughout the institution. Given the threat posed within any prison by COVID-19 and noting the fact that Tennessee has seen such outbreaks at Bledsoe County Correctional Complex and Trousdale Turner Correctional Center, the risks involved in carrying out an execution during this pandemic is operationally unacceptable. The life endangerment perils are a prison specific certainty and prison officials must face this reality if the execution is allowed to proceed as scheduled.

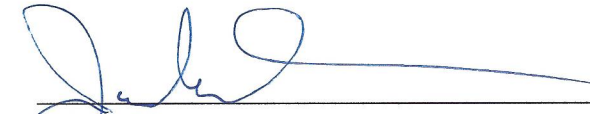
19. Given the spread of the virus in the United States and within the TDOC, and the particular vulnerability of the prison staff and inmate population, it is critical that TDOC has a plan to combat the spread of COVID-19. The execution protocols, however, do not address conducting an execution during the time of global pandemic. RMSI staff will require additional training in providing safeguards to attempt to protect witnesses to the execution, spiritual advisers, the media, lawyers for the state and defense, and others who will enter the prison and be within close proximity of the prison on the day of the execution. At the present time, there appears to be no plan in place to provide such training or any details about what that training might entail.
20. The health of many people would needlessly be jeopardized if an execution is conducted in August 2020. This virus does not respect prison walls. COVID-19 presents a more complex life endangerment issue to the TDOC because the inmate population is more closely confined in comparison to most living accommodations outside of the prison and these risks could be eliminated by delaying Mr. Nichols' execution. Introducing unnecessary risks into RMSI endangers everyone present, not only inmates but also staff—and in the case of an execution, all of the additional witnesses and parties involved. There is a heightened risk of infection for anyone remotely involved in or connected to an execution that is carried out in the State of Tennessee during the current public health crisis. Delaying an execution set for August 4, 2020 should be a part of the COVID-19 public health response. Thus, it is my professional opinion that Mr. Nichols' execution should be delayed until the spread of the COVID-19



infection is brought under control and abatement in the State of Tennessee and within the TDOC system.

I declare the foregoing under penalties of perjury.

Dated: May 11, 2020



James E. Aiken
James E. Aiken & Associates, Inc.