

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE,)	
)	
Movant,)	CAPITAL CASE
)	
v.)	Case No. M2016-01869-SC-R11-PD
)	
OSCAR SMITH,)	EXECUTION DATE:
)	June 4, 2020
Respondent.)	

**MOTION FOR STAY OF EXECUTION
DUE TO COVID-19 PANDEMIC**

Oscar Smith, by counsel, requests this Court stay his execution date for six-months, given the COVID-19 Pandemic. In support, Mr. Smith states:

1. Under this Court's order, Mr. Smith is scheduled to be executed by the State of Tennessee on June 4, 2020.
2. These are unprecedented times. On March 11, 2020, the World Health Organization declared a world pandemic due to the spread of the novel coronavirus, COVID-19. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19* (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last checked March 17, 2020). At the time the pandemic was declared, there

were 118,000 cases in 114 countries. *Id.* 4,291 people had died. *Id.* By March 17, 2020, that number increased to 179,111 confirmed cases in 158 countries. *Coronavirus disease 2019 (COVID-19) Situation Report – 57* (March 17, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200317-sitrep-57-covid-19.pdf?sfvrsn=a26922f2_4 (last checked March 18, 2020). 7426 people had died. *Id.* The numbers change by the hour.

3. The Centers for Disease Control (CDC) reports 4,226 confirmed cases in 53 US jurisdictions with 75 deaths as of March 17, 2020. CDC, *Coronavirus Disease 2019 COVID-19* (March 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last checked March 18, 2020). The number is quickly rising.

4. Tennessee reported its first confirmed case of COVID-19 on March 5, 2020. By March 16, 2020 the number had grown to 52. On March 17, 2020 the number was 78. As of March 17, 2020, the Tennessee Department of Health confirmed 46 cases in Davidson County, where Mr. Smith and his legal team all reside. Laken Bowles, *78 Cases of COVID-19 confirmed in Tennessee* (March 17, 2020 6:45 PM), <https://www.newschannel5.com/news/31-cases-of-covid-19-confirmed-in-davidson-county> (last checked March 18, 2020).

5. President Donald Trump declared a National State of Emergency on March 13, 2020. Brooke Singman, *Trump Declares National Emergency Over Coronavirus, Enlists Private Sector* (March 13, 2020), <https://www.foxnews.com/politics/trump-declares-national-emergency-coronavirus> (last checked March 18, 2020). The Governor of Tennessee

declared a State of Emergency on March 12, 2020. Office of the Governor, *Governor Bill Lee Issues Executive Order Declaring State of Emergency in Response to COVID-19* (March 12, 2020, 2:20 PM) <https://www.tn.gov/governor/news/2020/3/12/gov--bill-lee-issues-executive-order-declaring-state-of-emergency-in-response-to-covid-19.html> (last checked March 18, 2020). The Metro Nashville Board of Health declared a public health emergency in Nashville on March 15, 2020. Ethan Illers, Blake Summers, *Metro Nashville Declares Public Health Emergency* (March 15, 2020, updated March 16, 2020), https://www.wsmv.com/news/metro-nashville-declares-public-health-emergency/article_431ee47e-66f7-11ea-8ffe-e397a3f3155d.html (last checked March 18, 2020).

6. This Court declared a judicial emergency on March 13, 2020. Rosana Hughes, *Tennessee, Georgia Supreme Courts Declare State of Emergency for Judicial Branch Due to COVID-19* (March 13, 2020, updated March 14, 2020 5:13 PM), <https://www.timesfreepress.com/news/breakingnews/story/2020/mar/13/tennessee-supreme-court-declares-state-emergency-judicial-branch/518119/> (last checked March 18, 2020).

7. The United States Judiciary predicts a three-month disruption of our nation's courts due to the virus. Jacqueline Thomsen, *Predicting 3-Month Interruption Over COVID-29, Judiciary Requests \$7 Million in Emergency Funds* (March 17, 2020, 2:50 PM), <https://www.law.com/nationallawjournal/2020/03/17/predicting-3->

[month-interruption-over-covid-19-judiciary-requests-7-million-in-emergency-funds/?kw=Predicting](#) (last checked March 18, 2020).

8. Courts around the country and within this state have implemented procedures designed to limit in person contact and encouraging remote working. *See generally, Coronavirus and Court Leadership*, <https://www.tncourts.gov/Coronavirus> (last checked March 18, 2020) (collecting orders and resources).

9. The CDC guidelines call for social distancing and limiting domestic travel to avoid spread of the virus. CDC, *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission*, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf> (last checked March 18, 2020). Everyone, even those without the virus, have a role to play in flattening the curve. Maria Goody, *Flattening a Pandemic's Curve: Why Staying Home Can Save Lives* (March 13, 2020, 7:21 PM), <https://www.npr.org/sections/health-shots/2020/03/13/815502262/flattening-a-pandemics-curve-why-staying-home-now-can-save-lives> (last checked March 18, 2020).

10. Dr. Anthony Fauci, director of the National institute of Allergy and Infectious Diseases, advises that Americans “should be prepared to hunker down significantly more than we as a country are doing.” Allan Smith, *Fauci: Americans are “Going to Have to Hunker Down Significantly More” to Fight the Coronavirus* (March 15, 2020) <https://www.nbcnews.com/politics/meet-the-press/fauci-americans-are->

[going-have-hunker-down-significantly-more-fight-n1159381](#) (last checked March 18, 2020).

11. Schools have closed. Churches, gyms, movie theaters, restaurants, bars and other places where people gather are closing or strictly limiting in person contact. Joel Ebert, *Mayor John Cooper, City Close All Bars on Lower Broadway, Impose Limits on Restaurant Capacity* (March 15, 2020, updated March 16, 2020),

<https://www.tennessean.com/story/news/2020/03/15/coronavirus-nashville-mayor-john-cooper-closes-bars-lower-broadway/5054917002/>

(last checked March 18, 2020). The city of San Francisco has ordered its citizens to shelter in place. Dominic Fracassa, *Bay Area Coronavirus Shutdown: How Life Will Change With the New Shelter-in-place Order* (March 18, 2020), <https://www.sfchronicle.com/bayarea/article/Bay-Area-to-shelter-in-place-What-you-need-15135087.php>.

12. Middle Tennessee has the largest cluster of COVID-19 cases in the State of Tennessee. Staff and Wire Reports, *Coronavirus News: 46 confirmed cases in Davidson County, Up 21 Over Past 24 Hours* (March 18, 2020, 10:56 AM),

<https://www.tennessean.com/story/news/2020/03/18/coronavirus-news-tennessee-gov-lee-boost-economic-aid/5074643002/>. The Tennessean

reports “Agencies anticipate widespread transmission will occur in the U.S. in coming months and recommend social distancing among other measures to slow the spread.” *Id.* The popular music festival, Bonnaroo, has postponed its event from mid-June to September. Dave Paulson, *Bonnaroo 2020 postponed to September* (March 18, 2020),

<https://www.tennessean.com/story/entertainment/music/2020/03/18/bonaroo-2020-postponed-september/2865187001/>.¹

13. Businesses and communities are losing millions, if not billions, of dollars due to the need for American citizens to take remedial measures to “flatten the curve.” These businesses and institutions would not be taking these extraordinary steps unless it was absolutely necessary to protect the public health.

14. Riverbend Maximum Security Institution where Mr. Smith is housed has cancelled visitation. Tennessee Department of Correction, <https://www.tn.gov/correction/sp/visitation.html#> (last checked March 18, 2020) (“Visitation cancelled until further notice”).² Introduction of the virus into the prison could lead to catastrophic results for inmates and corrections officers.

15. The Federal Public Defender’s Office has directed its staff to work remotely and to severely limit domestic travel. Only a skeleton crew remains on site. Working remotely presents several challenges for representation of men under a sentence of death whose case files are voluminous. Further, the office is not designed to operate with remote staff. Technological obstacles are to be expected.

¹ Similar news flashes about closures and hourly press conferences ensure that this motion will not reflect the newest data even as it will be filed a few short hours from completion. The crisis is so massive that it is impossible to collect all relevant citations.

² Legal Visitation has not yet been cancelled.

16. Daily life is severely disrupted. These disruptions are expected to continue into the summer, possibly longer.

17. These disruptions are negatively impacting Mr. Smith's ability to prepare his case for clemency.

18. Mr. Smith has a right to seek clemency from Governor Lee. As this Court is aware, Mr. Smith has always maintained his innocence. He has not been provided an adequate judicial forum to demonstrate his innocence because of rules of procedural default and ineffectiveness of appointed counsel. "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera v. Collins*, 506 U.S. 390, 415 (1993). "Executive clemency [provides] the 'fail safe' in our criminal justice system." *Id.*, quoting K. Moore, *Pardons: Justice, Mercy, and the Public Interest* 131 (1989).

19. In addition to proof of his innocence, a case for clemency also includes information from family, friends, co-workers, and other third parties who have information that courts cannot consider, but which is of particular relevance in making the case for mercy. This investigation is entirely separate from the investigation performed in post-conviction court proceedings. A typical clemency effort consumes hundreds of hours of staff time, extensive travel as witnesses relocate over time, and face to face interviews.

20. It would be irresponsible and against the public's interest to conduct the necessary investigation during this pandemic. Mr. Smith's team cannot conduct the work necessary to fulfill their obligation to him without putting themselves and others at risk. There is a tension

between counsels' obligation to Mr. Smith and to their own personal safety and that of their families and coworkers.

21. Clemency plays a vital role in our system of capital punishment. An inadequate investigation and presentation deprives the condemned of his rights and deprives the Governor of critical information necessary to carry out his most solemn duty.

22. Further, Mr. Smith has ongoing legal challenges and continues to explore other possible judicial remedies. This effort requires substantial collaboration with members of the legal team that cannot effectively take place while each team member is working from makeshift home offices.

23. None of these efforts can, or should, be accomplished without frequent consultation with Mr. Smith. While the prison has not, yet, banned legal visits, it is not advisable for staff to visit the institution at this time. Staff could inadvertently introduce the virus into the institution. Telephone access is difficult to arrange while staff are working remotely.

24. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

25. An execution is irreversible. It is only the order of this Court that demands that the execution be carried out on June 4, 2020. With the stroke of a pen, this Court has the authority to stay the execution for six

months to permit the virus outbreak to run its course and allow for Mr. Smith's legal team to conduct its crucial work in representing him.

WHEREFORE, the motion should be granted.

Respectfully submitted this 18th day of March, 2020.

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BY: /s/ Kelley J. Henry
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CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that a true and correct copy of the foregoing Response in Opposition to Request to Set Execution Date was served via email and United States Mail to opposing counsel, Amy Tarkington, Associate Solicitor General, P.O. Box 20207, Nashville, Tennessee, 37202.

BY: /s/ Kelley J. Henry
Counsel for Oscar Smith