

No. 25-5261/25A136
CAPITAL CASE

IN THE
Supreme Court of the United States

BYRON LEWIS BLACK,
Petitioner,

v.

FRANK STRADA, ET. AL,
Respondent.

**SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI
EXECUTION SCHEDULED FOR AUGUST 5, 2025, AT 10:00 AM.**

OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DIST. OF TENNESSEE
CAPITAL HABEAS UNIT

KELLEY J. HENRY*
CHIEF, CAPITAL HABEAS UNIT

AMY D. HARWELL
FIRST ASST. FED. PUB. DEFENDER
ASST. CHIEF, CAPITAL HABEAS UNIT

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**Counsel of Record*

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RE: New Lethal Injection Protocol

From Cody N. Brandon <Cody.Brandon@ag.tn.gov>

Date Mon 1/13/2025 4:17 PM

To Kelley Henry <Kelley_Henry@fd.org>

Cc Miranda H. Jones <Miranda.Jones@ag.tn.gov>; Scott C. Sutherland <Scott.Sutherland@ag.tn.gov>; Katherine Dix <Katherine_Dix@fd.org>; Drew Brazer <Drew_Brazer@fd.org>; Eli Swiney <Eli_Swiney@fd.org>; Satyra Deaver <Satyra_Deaver@fd.org>; Megan Wartner <Megan_Wartner@fd.org>

 1 attachment (2 MB)

Signed Final Protocol-Redacted.pdf;

Kelley,

We cannot agree that constitutional challenges to the execution protocol are not subject to the grievance process, nor can we agree to waive any affirmative defense based on exhaustion. The Supreme Court and other courts have determined that exhaustion of administrative remedies is mandatory under the Prison Litigation Reform Act of 1995, even in the execution context. *See Ramirez v. Collier*, 595 U.S. 411, 421 (2022).

I have attached a redacted copy of the lethal injection protocol, which you can share with your clients.

Cody N. Brandon

Managing Attorney

Phone: (615) 532-7400

Email: Cody.Brandon@ag.tn.gov



From: Kelley Henry <Kelley_Henry@fd.org>

Sent: Monday, January 13, 2025 11:27 AM

To: Cody N. Brandon <Cody.Brandon@ag.tn.gov>

Cc: Miranda H. Jones <Miranda.Jones@ag.tn.gov>; Scott C. Sutherland <Scott.Sutherland@ag.tn.gov>; Katherine Dix <Katherine_Dix@fd.org>; Drew Brazer <Drew_Brazer@fd.org>; Eli Swiney <Eli_Swiney@fd.org>; Satyra Deaver <Satyra_Deaver@fd.org>; Megan Wartner <Megan_Wartner@fd.org>

Subject: New Lethal Injection Protocol

Good morning,

I write to you on behalf of not only Donald Middlebrooks, but also Oscar Smith, Byron Black, Tony Carruthers, Henry Hodges, Farris Morris, Jon Hall, Kevin Burns, Anthony Darrell Hines, William Glenn Rogers, and Kennath Henderson. As of today we have not received a copy of the new protocol from the State or TDOC. We (the lawyers) have seen the

Suppl. App. 1

redacted protocol that was posted in the media. Our clients have not been provided with a copy. From what we have seen and based on our experience, we intend to file a constitutional challenge to the protocol on behalf of our clients, and in the instance of Mr. Middlebrooks, to amend our complaint raising our claims for constitutional relief. As a predicate matter, we need to know whether the State will agree that constitutional challenges to the execution protocol are not subject to the administrative grievance process. Secondly, will the State agree not to raise failure to grieve as an affirmative defense to a constitutional challenge to the protocol.

I know that Cody is on parental leave until the 21st, but as the administrative grievance procedure imposes strict timelines, we are hoping that one of the three of you can answer this question as soon as possible, hopefully by the close of business today.

Thank you for your consideration.

Kelley

****Please Note New Cell Number****

Kelley J. Henry
(she/her/hers)
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“...AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.”

RE: SERVICE PURSUANT TO TRCP 5.02 (2): Plaintiff Byron Black's Interrogatory to Defendants (Expedited Response Requested)

From Cody N. Brandon <Cody.Brandon@ag.tn.gov>

Date Mon 6/9/2025 2:51 PM

To Kelley Henry <Kelley_Henry@fd.org>; Matthew Kubicek <Matthew.Kubicek@ag.tn.gov>; David Wickenheiser <David.Wickenheiser@ag.tn.gov>; Mary E. McCullohs <Mary.McCullohs@ag.tn.gov>

Cc Eli Swiney <Eli_Swiney@fd.org>; Kit Thomas <Kit_Thomas@fd.org>; Katherine Dix <Katherine_Dix@fd.org>; Drew Brazer <Drew_Brazer@fd.org>; Megan Wartner <Megan_Wartner@fd.org>; Satyra Deaver <Satyra_Deaver@fd.org>; Ben Leonard <Ben_Leonard@fd.org>; Aly Finn <Aly_Finn@fd.org>; Samantha Morris <Samantha.Morris@ag.tn.gov>

Kelley,

Could you let me know why a response is necessary 28 days before the normal deadline? I could have missed something, but it is not clear to me from the document you sent what the emergency is.

Cody N. Brandon

Deputy Attorney General

Phone: (615) 532-7400

Email: Cody.Brandon@ag.tn.gov



From: Kelley Henry <Kelley_Henry@fd.org>

Sent: Monday, June 9, 2025 1:49 PM

To: Cody N. Brandon <Cody.Brandon@ag.tn.gov>; Matthew Kubicek <Matthew.Kubicek@ag.tn.gov>; David Wickenheiser <David.Wickenheiser@ag.tn.gov>; Mary E. McCullohs <Mary.McCullohs@ag.tn.gov>

Cc: Eli Swiney <Eli_Swiney@fd.org>; Kit Thomas <Kit_Thomas@fd.org>; Katherine Dix <Katherine_Dix@fd.org>; Drew Brazer <Drew_Brazer@fd.org>; Megan Wartner <Megan_Wartner@fd.org>; Satyra Deaver <Satyra_Deaver@fd.org>; Ben Leonard <Ben_Leonard@fd.org>; Aly Finn <Aly_Finn@fd.org>

Subject: SERVICE PURSUANT TO TRCP 5.02 (2): Plaintiff Byron Black's Interrogatory to Defendants (Expedited Response Requested)

Importance: High

Cody,

Attached please find Byron Black's Interrogatory to Defendants. We are requesting that Defendants voluntarily agree to shorten the time for response to COB, Wednesday, June 11, 2025. If this is not acceptable, please let me know immediately and we will seek relief from the court to shorten the time for response.

Thank you.

Kelley J. Henry
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“...AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.”

DEATH PENALTY CASE
EXECUTION DATE: AUGUST 5, 2025
Case No. M2025-01095-SC-RDO-CV

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

BYRON BLACK,
Respondent,

v.

FRANK STRADA, et. al,
Applicants.

Davidson County Chancery Court Case No. 25-0414-IV

NOTICE OF FILING

FEDERAL PUBLIC DEFENDER
MIDDLE DIST. OF TENNESSEE
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Email: Kelley_Henry@fd.org

Byron Black gives notice of filing the attached declaration.

Respectfully submitted this 1st day of August, 2025.

Kelley J. Henry, BPR #21113
Chief, Capital Habeas Unit

Amy D. Harwell, BPR #18691
First Asst. Federal Public Defender
Asst. Chief, Capital Habeas Unit

Eli Swiney, BPR #026626
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/s/ Kelley J. Henry
Kelley J. Henry, BPR #21113
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that on August 1, 2025, a true and correct copy of the foregoing was served via the Court's electronic filing system to opposing counsel, Nicholas Spangler, Associate Solicitor General.

/s/ Kelley J. Henry

Kelley J. Henry, BPR #21113
Counsel for Respondent

Declaration of Kelley J. Henry

Kelley J. Henry, being of lawful age and duly sworn, declares as follows:

1. I am the Chief of the Capital Habeas Unit for the Federal Public Defender, Middle District of Tennessee and lead counsel for Byron Lewis Black who is scheduled to be executed on August 5, 2025.

2. On July 31, 2025, I filed a motion for stay of execution for Mr. Black in Case Number M2025-01095.

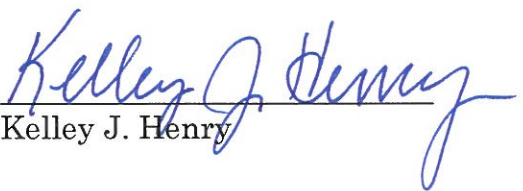
3. On August 1, 2025, at 10:07 a.m. I received a phone call from Mary Beth Lindsey, Chief Deputy Clerk, Tennessee Appellate Courts. Ms. Lindsey told me that the Court had instructed her to call me to tell me that the motion for stay of execution that I had filed on July 31, 2025, was filed under the wrong case number. Ms. Lindsey told me that she was told to tell me that Rule 12.4 requires all motions for stay of execution be filed under the case caption in which the order for execution was issued. She was told to instruct me to re-file the motion for stay of execution in Case No. M2000-0641-SC-DPE-CD and that the motion would need to be filed over the counter, not electronically, because the Court's ECF filing system will not accept filings in Case No. M2000-0641-SC-DPE-CD.

4. Rule 12 contains no such provision. But rather than argue with a member of court staff who has been nothing but kind and professional in all dealings throughout a stressful time, I merely complied with what I took to be an order from the Tennessee Supreme Court to re-file the motion for stay of execution with a different case number.

5. I immediately complied with the Court's directive. The motion was re-filed and brought to the Court in less than thirty minutes from the phone call.

I declare under penalty of perjury and the laws of the State of Tennessee that the foregoing is true and correct.

Dated this 1st day of August, 2025.


Kelley J. Henry

DEATH PENALTY CASE
EXECUTION DATE: AUGUST 5, 2025
Case No. M2000-00641-SC-DPE-CD

FILED AUG - 1 2025 Clerk of the Appellate Courts REc'd By _____

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

BYRON BLACK,
Applicant,

v.

FRANK STRADA, et. al,
Respondents.

Davidson County Chancery Court Case No. 25-0414-IV

MOTION FOR STAY OF EXECUTION

FEDERAL PUBLIC DEFENDER
MIDDLE DIST. OF TENNESSEE
CAPITAL HABEAS UNIT

KELLEY J. HENRY
Chief, Capital Habeas Unit

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Over two days of live evidence, Byron Black established that he was entitled to have his ICD deactivated prior to his execution, lest he be subject to the severe pain and suffering of having his heart repeatedly shocked back into rhythm during his execution. On July 31, 2025 (mere days before his execution), this Court vacated the preliminary injunction that granted that relief—not because of any deficiency in Mr. Black’s showing but because this Court concluded, on an issue of first impression, that a Tennessee trial court cannot issue a preliminary injunction bearing on the logistical issues surrounding an execution. The result is that Mr. Black faces an imminent execution without his ICD having been deactivated, due entirely to newly propounded procedural law. If Mr. Black has no course for relief in the trial court, then he is entitled to the opportunity to present his request for relief to this Court directly. Because there is no feasible way for him to do so prior to his scheduled execution on August 5, 2025, Mr. Black requests a stay.

The standard governing a stay of execution depends on the nature of the stay under consideration. A movant requesting an indefinite stay “pending resolution of collateral litigation in state court” must show that he “can prove a likelihood of success on the merits in that litigation.” Tenn. R. Civ. P. 12.4(E). Because Mr. Black demonstrated a likelihood of success on the merits during the chancery court’s evidentiary hearing, he believes that he is entitled to, and would welcome, such a stay. Mr. Black’s current procedural predicament, however, can likely be addressed with a more modest, targeted stay.

A delay that is not tied to the resolution of collateral litigation would not require this Court to resolve any issues related to the

likelihood of Mr. Black's success in his pending chancery court litigation. *Cf. State v. Irick*, 556 S.W.3d 686, 689 (Tenn. 2018) (applying the "likelihood of success on the merits" standard only after holding that the request was based on collateral state court litigation). Nor would such a stay implicate any of the other fixed standards or processes set out in Rule 12—for example, the *Van Tran* process governing competence issues or the *Workman* standard governing commutation requests. *See* Tenn. Sup. Ct. R. 12.4(A) (citing *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000); *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999)). Rather, a limited stay to accommodate the need to resolve this issue would fall within this Court's broad power to modify its own previous Order setting the execution date—the same power that this Court cited, in its Opinion, as the exclusive mechanism for addressing Mr. Black's concerns. *Black v. Strada*, Op. of July 31, 2025 at 6–7.

This Court, in its Opinion, noted the possibility that the parties may be able to "reach an agreement" to resolve this issue, despite the Court's vacating of the injunction granting Mr. Black the relief he requested. *Id.* at 7. It is entirely possible that such an agreement could be reached. Based on the history of this case, however, Mr. Black believes that any such agreement is almost certainly impossible in the absence of a stay. As Mr. Black detailed at length in his Answer and his Motion to Strike, TDOC's approach to the issue of Mr. Black's ICD has been one of consistent foot-dragging and obfuscation. *Black v. Strada*, Answer at 4–13, 36–39; Motion to Strike at 2–3. It does not seem likely that the agency

will become more amenable to collaboration now that this Court has freed it from any enforceable obligation to address Mr. Black's concerns.

A stay would, moreover, afford this Court the opportunity to establish a structure for permitting Mr. Black—and other, future individuals facing execution—to raise secondary and collateral concerns related to executions that, due to the Court's ruling, the state's trial courts are now powerless to address. Tennessee's death row has an elderly population, with all of the medical complications attendant to aging. This will not be the last time that an execution in this State raises questions other than when it will be performed or what the method of execution will be. There is now, however, no mechanism for presenting those considerations to this Court short of a full litigation of a claim on the merits, followed by an appeal. While that option might be sufficient in some instances, sometimes it will not be (e.g., due to time constraints). That was the case here, where Mr. Black's execution date was set by this Court while his grievance regarding this issue was pending. Mr. Black has been diligently litigating this case on an expedited basis, but it was simply not plausible for him to have obtained a full, final judgment in the few months he would have had to do so. If Mr. Black is not afforded the opportunity to present his claims to this Court, he will have been deprived of the opportunity to present them to any court with power to help him at all—despite the fact that the one court that considered these issues on the merits found that Mr. Black was entitled to relief.

Although this Court's jurisdiction is appellate only, Tenn. Const. Art. VI, § 2, and the Court therefore cannot entertain an original action on this issue, there are various approaches that this Court could take to

considering Mr. Black's arguments—whether through a special master, *see In re Burson*, 909 S.W.2d 768, 769 (Tenn. 1996) (appointing a special master to develop a factual record and make conclusions of law in a case challenging the constitutionality of a Tennessee statute after determining the case could not be resolved “without an underlying factual foundation”), a special scheduling order, or an amendment to Rule 12.4. It is within this Court's discretion to determine what those procedures will be. Whatever they are, however, Mr. Black should be permitted to avail himself of them.

Mr. Black has been diligent and straightforward in his pursuit of this issue. Despite TDOC's repeated aspersions that he was simply seeking a stay, Mr. Black never requested a stay related to this issue until now—when there is truly no other way for him to assert his rights. That stay should be granted, either for a limited period of time sufficient to allow the parties to confer to resolve the ICD issue or for a sufficient period of time for this Court to consider Mr. Black's request. If no such stay is granted, the result will be that Mr. Black was denied his day in court on this issue—after enforceable injunctive relief had been awarded—based solely on a newly announced, retroactively applied procedural rule. Neither the basic principles of justice nor the constitutional guarantee of due process would countenance such a result.

Respectfully submitted this 1st day of August, 2025.

Kelley J. Henry, BPR #21113
Chief, Capital Habeas Unit

Amy D. Harwell, BPR #18691
First Asst. Federal Public Defender
Asst. Chief, Capital Habeas Unit

Eli Swiney, BPR #026626
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A handwritten signature in black ink, appearing to read "Kelley J. Henry", with a long, sweeping horizontal stroke extending to the right.

Kelley J. Henry, BPR #21113
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that on August 1, 2025, a true and correct copy of the foregoing was served via the Court's electronic filing system to opposing counsel, Nicholas Spangler, Associate Solicitor General.

A handwritten signature in black ink, appearing to read "Kelley J. Henry", with a stylized flourish at the end.

Kelley J. Henry, BPR #21113
Counsel for Respondent

Byron Black Case

From Kelley Henry <Kelley_Henry@fd.org>

Date Thu 7/31/2025 9:21 AM

To Jonathan.Skrmetti@ag.tn.gov <jonathan.skrmetti@ag.tn.gov>

Cc Nick Spangler <nick.spangler@ag.tn.gov>; Cody N. Brandon <cody.brandon@ag.tn.gov>; Amy Harwell <Amy_Harwell@fd.org>

General Skrmetti,

While you and I may see many things differently, I have always viewed you as a person of great integrity. It is in that spirit that I am writing to you today. As I am sure you are aware, yesterday evidence came to light which casts doubt on the truthfulness of a declaration filed under your name with the Davidson County Chancery Court and presented as true to the Tennessee Court of Appeals and Tennessee Supreme Court. This is not the first time that TDOC has placed attorneys in the AG's office in this position. But we are where we are—5 days from an execution where Mr. Black could be subject to torture because TDOC failed to take the issue of his internal defibrillator seriously. Whatever legal position you all may take in court, I can assure you that we did not know that Mr. Black's pacemaker had a defibrillating function until just before we sent the interrogatory to your attorneys. When we brought the issue to TDOC's attention, there was time to address the situation without requiring a delay in the execution. That appears to no longer be true. The defibrillator issue is a problem that can be solved. But, with the way that TDOC has handled the situation, including by misrepresenting key facts to the courts, it appears that a brief pause may be required. We urge you to join our request to Governor Lee for a reprieve.

More importantly, it is a simple truth that Mr. Black is a person with intellectual disability. It is also a truth that if he sat on his rights, he could waltz into court right now and be declared ineligible for the death penalty, thus avoiding an execution date. The courts have not been able to fix this problem. The Governor has the ability to grant clemency. The Davidson County DA supports clemency. We ask that you join that request to prevent the unconstitutional execution of Mr. Black.

Thank you for taking the time to read this email.

Kelley

Kelley J. Henry
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Suppl. App. 17

Email: Kelley_Henry@fd.org

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