

CAPITAL CASE

EXECUTION SCHEDULED DECEMBER 11, 2025 at 10 a.m. Central

No. _____

IN THE
Supreme Court of the United States

IN RE: HAROLD WAYNE NICHOLS

APPLICATION FOR A STAY OF EXECUTION

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To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Harold Wayne Nichols is scheduled to be executed on **December 11, 2025, at 10 a.m. Central**. Nichols respectfully requests a stay of his execution pending this Court's disposition of his petition for a writ of certiorari and pending the resolution of his litigation regarding the State of Tennessee's violation of his Equal Protection rights and the constitutionality of the State's lethal injection protocol.

Plaintiff-Appellant Harold Wayne Nichols moves this Court for a stay of execution pursuant to Rule 23 of the Rules of the Supreme Court of the United States and the Eighth and Fourteenth Amendments to the United States Constitution. Nichols offers the following Brief of Law in Support.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's ruling dismissing the case on procedural grounds on December 5, 2025. (Doc. 18-1). Nichols contemporaneously seeks certiorari on the denial of his appeal. As such, this Court has jurisdiction to entertain Nichols' petition for certiorari and application for stay of execution under 28 U.S.C. § 1254.

BACKGROUND

On January 8, 2025, the Tennessee Department of Correction released a redacted version of its new method of execution protocol. On March 3, 2025, the Tennessee Supreme Court set a December 11, 2025 execution date for Nichols.

On April 18, 2025, Nichols filed a Complaint in the United States District Court for the Middle District of Tennessee, raising several constitutional challenges to the new protocol

pursuant to 42 U.S.C § 1983. Compl. (R. 1; PageID# 1). Specifically, he alleged that the Defendants-Appellees (hereafter “Defendants”) denied him his rights to Due Process and Equal Protection under the Fourteenth Amendment to the United States Constitution by refusing to extend to him the same agreement it extended to other death row prisoners: to not oppose a stay of execution while a method of execution claim was litigated. Compl. (R. 1; PageID# 29–32). He also raised facial and as-applied challenges to Tennessee’s new protocol. Compl. (R. 1; PageID# 34–39). His Complaint sought injunctive relief to allow him the opportunity to challenge Tennessee’s new protocol. Compl. (R. 1, PageID# 31 (“this Court should order the Defendants to enter into an agreement with Plaintiff ‘not to oppose a motion for stay of execution’”)); Compl. (R. 1, PageID# 57 (“issue a permanent injunction against the use of the revised lethal injection protocol”)).

Almost two months later, Defendants moved to dismiss Nichols’ Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Mot. Dismiss (R. 27; PageID# 296–98).

On November 6, 2025, Nichols filed a Motion for Preliminary Injunction. Mot. PI (R. 47; PageID# 494–97).

On November 26, 2025, the District Court granted Defendants’ Motion to Dismiss. Order (R. 56; PageID# 1608). The District Court did not rule on the preliminary injunction motion. On December 1, 2025, Nichols filed a notice of appeal. Notice (R. 58; PageID# 1611).

On December 5, 2025, the Sixth Circuit affirmed the District Court’s ruling

dismissing the case on procedural grounds.

I. Factual Background

A. Governor Lee Halts Executions because TDOC was not following its Method of Execution Protocol.

On the afternoon of April 21, 2022, less than one hour before the execution of Oscar Franklin Smith by lethal injection, Tennessee Governor Bill Lee issued a temporary reprieve due to “an oversight in preparation.” Compl. Exh. 1 and 2 (Gov. Lee Statement on Temporary Reprieve, R. 1-1, 1-2; PageID# 60, 62). It was later discovered that the drugs prepared for Oscar Smith’s execution had not been tested for endotoxins, an oversight of the three-drug protocol’s requirement to conduct testing of the lethal injection chemicals. Reply Exh. 8 (R. 54-8; PageID# 1386).

B. The same sort of TDOC failures that led to the executive reprieve were also the subject of then-pending litigation.

At the same time, inmates King and Middlebrooks had pending challenges to Tennessee’s protocol in the United States District Court for the Middle District of Tennessee. *See King v. Strada, et.al.*, No. 3:18-cv-01234 (M.D. Tenn.); *Middlebrooks v. Strada, et al.*, No. 3:19-cv-01139 (M.D. Tenn.).

In *King*, documents turned over in discovery uncovered a persistent history of error and malfeasance on TDOC’s behalf as it attempted to carry out its protocol including: attempting to acquire drugs from a veterinarian, exploring the use of Ketamine, discussing ways to compound to save money, failing to consult with a pharmacist about its protocol, regularly deviating from the protocol, failing to train personnel assigned to carry out lethal injection, preparing expired drugs for the executions of inmates Johnson and Irick, failing to follow written instructions related

to managing the execution drugs, using a pharmacist who had been fined by a state board of pharmacy, failing to compound lethal injection drugs in accordance with controlling standards, failing to test for endotoxins and for potency, failing to follow compounding recipes, failing to properly store lethal injection chemicals, failing to conduct inventory of lethal injection chemicals and failing to dispose of expired drugs.¹

C. The State of Tennessee agrees that King and Middlebrooks should not be executed until concerns about TDOC's ability to implement and follow a lethal injection protocol are resolved through an adversarial process.

After Governor Lee ordered the independent review, the State of Tennessee entered into an agreement with inmate King that it would not seek an execution date for him until judgment in his challenge to the lethal injection protocol had been resolved. The State of Tennessee also agreed that if Middlebrooks' execution date was reset, it would not oppose a stay. Compl. Exh. 3 (R. 1-3; PageID# 64–67). Pursuant to the Agreement, Middlebrooks received a stay of execution on April 1, 2025. *See* Compl. Exh. 4 (R. 1-4; PageID# 3, 30). As part of the Agreement, the State of Tennessee also agreed that the litigation in the King and Middlebrooks cases would be stayed until the independent review was completed. Compl. Exh. 3 (R. 1-3; PageID# 64–67).

¹ This information is alleged in Nichols Complaint and is taken from the litigation in the *King* case. Compl. (R. 1; PageID# 8–11); *King v. Strata, et al*, No. 3:18-cv-01234 (M.D. Tenn., Doc. 180-3, PageID# 5585-5602; Doc. 200, PageID# 11774–11820).

D. The Independent Review finds “TDOC operated in a task-oriented, tunnel-vision manner that failed to appreciate the interwoven nature of the lethal injection process as a whole.”

The Report and Findings of the Independent Review² acknowledged errors unearthed in litigation and found others, including:

- The State of Tennessee never provided the pharmacy tasked with testing its lethal injection chemicals with a copy of the lethal injection protocol. Mot. PI Exh. 8 (R. 54-8; PageID# 1383).
- No employee of the Tennessee Department of Correction informed the pharmacy tasked with testing the lethal injection chemicals that it should conduct an endotoxin test until the eve of Oscar Smith’s scheduled execution. Mot. PI Exh. 8 (R. 54-8; PageID# 1383).
- The pharmacy that tested Tennessee’s lethal injection chemicals only tested the chemicals for potency and sterility, not endotoxins, because the pharmacy followed United States Pharmacopeia testing guidelines, not Tennessee’s lethal injection protocol. Mot. PI Exh. 8 (R. 54-8; PageID# 1383).
- The chemicals used in the execution of Billy Ray Irick in August 2018 were not tested for endotoxins, and the Midazolam used during Irick’s execution was not tested for potency. Mot. PI Exh. 8 (R. 54-8; PageID# 1383–84).
- The chemicals to be used in the event that Edmund Zagorski opted for lethal injection in November 2018 were not tested for endotoxins and failed potency testing. Mot. PI Exh. 8 (R. 54-8; PageID# 1384).
- The chemicals used in the May 2019 execution of Donnie Edward Johnson were not tested for endotoxins. Mot. PI Exh. 8 (R. 54-8; PageID# 1384).
- The chemicals to be used in the event that Stephen West opted for lethal injection in August 2019 were not tested for endotoxins. Mot. PI Exh. 8 (R. 54-8; PageID# 1384).

² Tenn. Lethal Injection Protocol Investigation Rep. and Findings, Butler Snow, LLP (Dec. 13, 2022). Mot. PI Exh. 8 (R. 54-8; PageID# 1371–1548).

The Independent Review concluded that there was an “absence of adequate expertise, guidance, and counsel either enlisted by or provided to TDOC in connection with Tennessee’s lethal injection process.” Reply Exh. 8 (R. 54-8; PageID# 1420–21).

E. TDOC’s single drug new protocol relies upon an execution method that inflicts significant pain and does not ameliorate the problems identified in the independent review.

The new protocol calls for executing Nichols via 100 ml of a 50 mg/ml solution (a total of 5 grams) of pentobarbital. Mot. PI Exh. 1 (R. 48-1, PageID# 524). Anesthesiology expert Gail Van Norman, M.D., opines that an intravenous injection of 5 gm of pentobarbital will render a prisoner aware but unable to respond. Mot. PI Exh. 1 (R. 48-1; PageID# 525). She further opines it is very likely Nichols will experience flash (acute) pulmonary edema and sensations of suffocation and drowning after injection of 5 gm of Pentobarbital. Mot. PI Exh. 1 (R. 48-1, PageID# 525). Flash pulmonary edema occurs when the lungs rapidly flood with fluid, causing shortness of breath, air hunger, and the sensation of drowning. Mot. PI Exh. 1 (R. 48-1, PageID# 545). She opines that “[n]ot being able to breathe while drowning or asphyxiation is one of the most powerful, excruciating feelings known to man.” Mot. PI Exh. 1 (R. 48-1, PageID# 546).

Dr. Van Norman also notes that Tennessee’s new protocol does not provide information about how or where to place an IV if it is difficult to place an IV in the arm. She notes that a cut-down procedure without anesthesia can cause “excruciating pain.” Mot. PI Exh. 1 (R. 48-1, PageID# 551). She notes numerous executions have been delayed or halted because of difficulties with IV placement. Mot. PI Exh. 1 (R. 48-1, PageID# 559).

Finally, Dr. Van Norman finds that Tennessee's protocol does not provide critical information about storage of pentobarbital or its preparation for injection. Mot. PI Exh. 1 (R. 48-1, PageID# 553–54). She notes the protocol provides for using an ECG but does not explain where to place the leads on the prisoner. Mot. PI Exh. 1 (R. 48-1, PageID# 555). She opines that the lack of guidance and standards increase risks of increasing and prolonging suffering. Mot. PI Exh. 1 (R. 48-1, PageID# 557).

F. Byron Black suffered during his execution and still had a heartbeat when he was pronounced dead.

Media witnesses to Byron Black's recent execution uniformly reported he was visibly in pain and moaned and gasped for several minutes. Mot. PI Exh. 1 (R. 48-1, PageID# 541 (discussing witness accounts)). Black's autopsy revealed pulmonary edema and congestion. Mot. PI Exh. 1 (R. 48-1, PageID# 542). It was later determined that he continued to have a heartbeat for at least two minutes after the physician declared him dead. Mot. PI Exh. 1 (R. 48-1; PageID# 557). He probably had a heartbeat for longer than two minutes. While his heart continued to beat, the ECG printer was simply turned off. Mot. PI Exh. 1 (R. 48-1, PageID# 557).³ The physician who pronounced him dead apparently failed to recognize this fact. What is more, TDOC failed to follow its protocol's steps for what to do if the first dose of Pentobarbital does not kill the prisoner.

³ The media reported the ECG did not have tape in it during Smith's execution. Travis Loller, *Attorney says electrocardiogram at Tennessee execution was active after inmate pronounced dead*, Associated Press, Oct. 24, 2025.

G. Execution by firing squad reduces the risk of severe pain and is readily implemented.

Nichols' firearms expert, medical doctor, and former police medical officer, James S. Williams, M.D., offered an opinion that the firing squad would cause a quick and painless death and is a readily implemented method of execution. Reply Exh. 7 (R. 54-7, PageID# 1350–69). Dr. Williams describes the Utah and U.S. Army firing squad execution procedures in detail. Reply Exh. 7 (R. 54-7, PageID# 1364–67). Williams is familiar with the Peace Officer Standards & Training (P.O.S.T.) certification in Tennessee, and a general-purpose rifle and caliber used by agencies in Tennessee would be suitable for execution by firing squad. Availability of a firearm is not subject to the same supply interruptions as lethal injection chemicals. Reply Exh. 7 (R. 54-7, PageID# 1366).

Dr. Williams opines that pain from a lethal firearm injury to the chest is relatively minor, if not painless, and of short duration. Targeting the heart and great vessels of the chest denies the nervous system the blood supply necessary to function. A firing squad execution stops the heart as well as the blood supply to the brain. Dr. Williams opines the firing squad causes death with minimal pain and suffering. The firing squad would cause nearly instantaneous loss of purposeful movement suggesting rapid loss of consciousness and the inability to perceive pain. Reply Exh. 7 (R. 54-7, PageID# 1354–58).

H. Nichols is similarly situated to King and Middlebrooks.

Nichols is similarly situated to King and Middlebrooks. Middlebrooks was

convicted in 1989, King in 1985, and Nichols in 1990. All three men are death row prisoners in Tennessee. The Attorney General moved for execution dates for Middlebrooks and Nichols on September 20, 2019. Their dates were reset because of the Covid-19 pandemic. Both men received new dates after the pandemic: Nichols received a new date of June 9, 2022, and Middlebrooks received a new date of December 8, 2022. Both men received executive reprieves on May 3, 2022, following the paused execution of Oscar Smith. On March 3, 2025, both men received execution dates for 2025: Middlebrooks received an execution date of September 10, 2025, and Nichols received an execution date of December 11, 2025. Because the State had extended an agreement to Middlebrooks so that he could litigate his method of execution challenge to completion, Middlebrooks' date came and went. Yet Nichols does not have the benefit of such an agreement and faces imminent execution.

REASONS FOR GRANTING THE STAY

A stay of execution is warranted where there is a “presence of substantial grounds upon which relief might be granted.” *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). An application for a stay of execution is evaluated under the familiar four factor test that analyzes:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009). In other cases, the Court has considered the diligence of the applicant for the stay, in order to deter manipulation of the Court's

stay power. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

I. Nichols has shown a reasonable likelihood of success in establishing the State of Tennessee violated his Equal Protection Rights.

Nichols seeks to challenge Tennessee's new one-drug protocol. This is his constitutional right, and he has not been given the opportunity to do so. His efforts have been thwarted at every turn. The State of Tennessee has continually denied public records requests regarding the shrouded details of the protocol. The State's refusal to extend the Middlebrooks/King agreement to Nichols violates the Equal Protection Clause of the Fourteenth Amendment. The courts below have denied Nichols' Equal Protection claims on procedural grounds without reaching the merits.

Absent a stay of execution, Nichols will be executed imminently, having been unjustly deprived of the protections under the Equal Protection clause of the Constitution. Similarly situated prisoners will have the opportunity to litigate the constitutionality of the new protocol at their leisure, but Nichols will be another test case for the State of Tennessee to experiment with a protocol that has already proven to be excruciatingly painful.

II. Nichols has shown a strong likelihood of prevailing on his facial and his as applied challenges to TDOC's lethal injection protocol.

The elements of an Eighth Amendment method of execution challenge are that (1) the State's method of execution is sure or very likely to cause a substantial risk of severe pain—"severe pain over and above death itself"; and (2) that there is a feasible, readily implemented alternative that substantially reduces the risk of harm that the

State unreasonably refuses to adopt. *Nance v. Ward*, 597 U.S. 159, 164 (2022). When considering the proof of a feasible alternative, this Court has held that it is important not to “overstate” the alternative method element and that it may be established by pointing to other states that rely on the alternative method. *Bucklew v. Precythe*, 587 U.S. 119, 139–40 (2019). In *Bucklew*, the Court held this standard applies to both facial and as applied challenges. 587 U.S. at 135–36.

Nichols offers evidence that injection of a lethal dose of pentobarbital is sure or very likely to cause acute (flash) pulmonary edema. He is likely to remain aware, but unable to respond, as he suffocates. His awareness will not be obvious to observers because he will be restrained or taped down. Black’s autopsy showed that he developed pulmonary edema. Media witnesses reported that he moaned and audibly gasped for minutes during his execution and that he was still alive for minutes after he was pronounced dead. He suffered a tortuous and lingering death, which this Court has not countenanced. In any event, Black certainly suffered more severe pain than was necessary to cause his death.

Nichols has also presented evidence that a readily implemented alternative—the firing squad—would greatly reduce the risk of severe pain during execution. Numerous other states employ this virtually painless method, and the State of Tennessee is without penological justification for failing to implement the firing squad.

The lower courts have avoided the substantive issues by relying on dubious procedural grounds to dismiss the Complaint. As further explained in the petition,

Nichols sufficiently pled these claims and the State was put on notice. Because of the irreversible nature of death, the Court should grant Nichols the opportunity to have his claims decided on the merits.

III. Nichols will suffer irreparable injury in the absence of a stay of execution.

There is no question that Nichols will suffer irreparable harm absent this Court entering a stay of execution. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (irreparable harm is “necessarily present in capital cases”). This factor weighs in Nichols’ favor.

IV. Defendants will not be harmed if a stay of execution issues, and the public interest will be served by issuing an injunction.

Defendants cannot dispute this factor when they have agreed to not oppose a stay for Middlebrooks nor to seek an execution date for King while their challenge to the protocol winds its way through the courts. A stay will not injure the State of Tennessee.

Although Tennessee has an interest in seeing finality by imposing a constitutional punishment, substantial harm to the State will not follow from carrying out an unconstitutional execution. Although the “powerful and legitimate interest in punishing the guilty” attaches to both “the State and the victims of crime alike,” *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citations and internal quotations omitted), the State and its citizens have an interest in the punishment being doled out in accordance with constitutional standards.

Accordingly, this factor also weighs in Nichols’ favor.

V. Nichols has not been dilatory in pursuing relief in lower courts.

Nichols has been diligent in challenging Tennessee's efforts to execute him by its new protocol. His Complaint was filed little more than a month after the State assigned him an execution date—his third time being in that precarious position. Along with other prisoners on Tennessee's death row, Nichols has weathered a tumultuous drama as the State has fumbled to achieve a reliable and constitutionally sound execution protocol. As evidenced by Black's painful execution, it still has not done so.

At the time of Nichols' Complaint, there was a nearly eight-month window until his execution date. The litigation stalled for months, but that delay is not attributable to Nichols. During that time, he diligently pursued records he hoped would shed light on the nebulous protocol—and the State continually concealed and withheld information. Nichols still does not know the origins, efficacy, or status of the testing protocols of the chemicals that are to be injected into his veins. Thus, the last-minute nature of this application is not due to a lack of diligence by Nichols and should not weigh against the application of a stay.

CONCLUSION AND PRAYER FOR RELIEF

As recounted more fully in the pending Petition for Certiorari, Nichols has presented meritorious issues to the lower courts regarding the constitutional sufficiency of Tennessee's protocol, but the courts avoided the merits by standing on alleged procedural deficiencies. The remaining equities of this case weigh in favor of the application of a stay, and there is a grievous risk of executing an

individual in violation of the constitution. Nichols respectfully requests that the Court grant this application, stay his execution, and grant any other relief that the Court may find just.

Filed this 8th day of December, 2025.

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