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The Honorable Bill Lee
Governor of Tennessee
State Capitol, 1st Floor
600 Dr. Martin L. King, Jr. Blvd.
Nashville, TN 37243

RE: Request for Reprieve of Pending Execution Dates to Permit Expedited Court Review of New Lethal Injection Protocol

Dear Governor Lee:

We are grateful for the opportunity to address you on behalf of our clients, Oscar Smith and Byron Black. Mr. Smith was preparing to accept communion when you courageously and correctly halted his execution on April 21, 2022. Mr. Black was facing an execution date just a few months later. After learning that members of your department of correction had failed to follow the execution protocols, it was unquestionably the right thing to pause all executions and seek an independent review. When that review came back, it was proper that you instructed your department of correction to take the recommendations of the independent investigation seriously and to implement changes. The department then took two years to update the protocol. Sadly, the new protocol does not address the recommendations of the independent review in any meaningful way. Further, except

for firing two staff members, it does not appear that the department implemented the safeguards you directed.

We have been kept in the dark as to the department's efforts to comply with the recommendations in the report and your directives. As soon as we learned of the new protocol, we acted swiftly to protect our clients' rights—including by filing a lawsuit in the Davidson County Chancery Court as soon as TDOC rejected the grievances that its attorneys insisted that our clients file before seeking judicial review. A copy of the complaint is appended as Attachment A. We have asked for, and received, an expedited trial schedule for the litigation of our case. Attachment B, Transcript of Proceedings. But there is simply not enough time between now and May 22nd (Mr. Smith's execution date) or even August 5th (Mr. Black's execution date) to prepare and try a case of this importance.

Please do the next right thing. Please pause all executions in Tennessee until March 1, 2026, to permit the Davidson County case to go to trial. We have genuine and well-founded concerns that the new protocol—which contains even fewer safeguards than the last—will cause our clients to experience the terror, pain, and suffering that comes from the act of poisoning called for in the protocol.

Through your grace and good judgment, the department of correction has had three years to review its procedures. But in our tripartite system of government, judicial review of the new protocol is necessary for the public to have faith in the actions of the department. This is particularly true where the independent review uncovered the fact that a key person in the development of past protocols provided

false testimony to the courts. That same person was also the key witness in all of the previous legal challenges to the now abandoned execution protocols. Under the circumstances, it is right, just, and fair for you to grant the judicial system the same grace to do its work that you gave to the department.

Below we will outline the reasons a short reprieve is warranted here. We welcome the opportunity to meet with you and your staff at your earliest convenience.

The New Protocol Fails to Implement Important Safeguards, Eliminates Pre-Existing Safeguards, and Increases the Risk of Prolonged Suffering and Torture

The independent review of TDOC and its implementation of its execution protocol revealed that the department "viewed the lethal injection process through a tunnel-vision, result-oriented lens." Report at 40. The resulting culture was one of recklessness and non-compliance. In the intervening years there is no indication that the culture within the department has changed. The new and abbreviated protocol suggests the opposite. The 2018 protocol, which could not safeguard against non-compliance and abuse, was over 100 pages in length. The new 2025 protocol is just 44 pages. Where the 2018 protocol at least had *some* discussion about procurement, handling, and storage of the lethal chemicals, the new protocol's discussion of these critical issues is less than a full page of text—all of which is conclusory and vague. Simply put, the new protocol is but a shadow of its predecessor. This is not a theoretical concern.

In 2022, when you discovered that the department of correction failed to conduct testing on the chemicals used for execution as was required by the protocol,

you stepped in to prevent the use of improperly tested chemicals to execute Mr. Smith. Then, the independent investigation discovered that the department had used chemicals which failed potency testing to execute another person. The independent investigation revealed that other chemicals provided by the compounder were similarly sub-potent and/or had fallen out of solution. These failures go to the heart of the integrity of the execution process. And yet, rather than implement safeguards to ensure proper testing of the chemicals moving forward—the new protocol eliminated the previous safeguards and replaced them with nothing. How can it possibly be that a test so important to the integrity of the process that its failure warranted a reprieve in 2022 can simply be eliminated in 2025? This critical ommission is enough to warrant a pause in executions.

TDOC has not been transparent about whether the chemicals it intends to use to execute our clients will be compounded or manufactured. Compounded chemicals are risky and unstable. There is a real and substantial risk they would be sub-potent. There is a real and substantial risk that the chemical will fall out of solution. Chemicals that fall out of solution feel like rocks when they are pushed through the veins. The protocol fails to provide any safeguards against these known and foreseeable risks. In fact, the protocol contemplates that the chemicals will be on hand for a timeframe and in a physical state incompatible with the safe storage and handling of compounded chemicals, thus increasing the risks to our clients. What's more, TDOC has provided no assurance that it will not use the same compounder who provided false testimony to the courts and faulty chemicals to the department.

If the chemicals are manufactured, then it appears nearly certain that TDOC has procured the chemicals from the gray market. We know that every manufacturer of pentobarbital has placed distribution controls prohibiting the sale of its product to a department of correction for execution. If manufactured drugs have been sold to TDOC, they have been acquired outside the approved and tightly controlled commercial stream. As Attorney General Jonathan Skrmetti has noted, gray market drugs are inherently suspect. *See* Tenn. Att'y Gen. & Rptr., *TN Attorney General Leads Bipartisan Call for Action Against Sellers of Counterfeit, Unapproved, and Contaminated Weight Loss Drugs* (Feb. 20, 2025). Tennessee has actively sought to crack down on the sale of drugs in the gray market. For good reason. First, the seller of gray market drugs has compromised his or her professional ethics by lying and violating the end-use agreement required for the purchase of the drugs. Second, there is a high risk that the chemicals have been altered because there is a financial incentive to provide drugs that are not as potent as the label claims. Public records obtained by *The Tennessean* suggest that the most recent chemicals procured by TDOC were purchased for $525,000. The seller could easily split the dosages in half to maximize profits—and without published testing protocols to ensure this will not happen, we cannot be sure that the drugs will be what the seller claims they are. Third, there is absolutely nothing in the protocol to ensure that the chemicals have been stored under proper conditions since leaving the controlled and regulated commercial stream and before landing in the hands of TDOC. Manufactured pentobarbital is unusable if it has been exposed to extreme heat or cold conditions.

There is nothing in the protocol to safeguard against these known and foreseeable risks.

Our complaint, which we urge you to review, highlights other serious concerns with the protocol's failure to implement important safeguards as well as its failures to safeguard the religious liberties of our clients. These issues also deserve full judicial consideration.

Our Request Comes to You with Clean Hands

For three years, we have been kept completely in the dark, despite the fact that our inquiry triggered the discovery that the chemicals to be used to execute Mr. Smith were not properly tested and despite the fact that it is our clients who will be executed. And even after the independent review uncovered multiple problems with the protocol and its implementation, we have been placed in a black box regarding all of TDOC's efforts to develop and implement a new protocol. A brief history of our efforts illustrates that we have tried multiple times to obtain and preserve information:

- On April 20, 2022, I emailed staff for TDOC and your office seeking confirmation of testing on the chemicals to be used to execute Mr. Smith. Public records later obtained from a TPRA request to your office revealed that at least one person in TDOC knew that the drugs had not been fully tested later that same night.
- On April 21, 2022, after your reprieve, I immediately emailed TDOC requesting that all evidence be preserved.

- On April 22, 2022, we sought a court order to preserve evidence related to the Smith execution.
- On May 2, 2022, we entered into an agreement with the State to pause all litigation to permit the independent investigation to proceed without interference.
- We cooperated with the independent investigation, including by participating in an interview and providing documents which TDOC omitted from its submission to the investigative team.
- After the investigation was completed and a report issued, on January 12, 2023, the State requested a further pause in all litigation while TDOC revised its protocol. We agreed to the extension but sought and received an additional protective order to preserve important evidence relevant to the protocol and TDOC's culture of recklessness and non-compliance.
- During the next two years, the State filed periodic status reports which revealed nothing about the development of the new protocol. We made multiple TPRA requests to TDOC, but no information was provided.
- On December 27, 2024, TDOC announced that it had completed its protocol, but failed to release it to the public or to us.
- On January 8, 2025, TDOC provided a redacted copy of the protocol to the press, but that protocol was signed on January 8, 2025, not December 27, 2024. The discrepancy in dates remains unexplained.
- We promptly contacted the State and asked them to waive any procedural

requirement that our clients go through the futile process of filing an administrative grievance because the process is not designed for such complaints. The State refused. This caused our clients to have to burn through two months of time to exhaust their remedies only to get the answer that the process was inappropriate for such a grievance. Our chancery court complaint was filed the day after the Commissioner of Correction denied their administrative appeal.

- Meanwhile, on February 6, 2025, we filed another public records request. TDOC has yet to provide a single document in response to that request but has said that they need until April 15, 2025, to do so.

Despite knowing the history above, including our intention to seek court review of the protocol, the State requested execution dates for five of our clients on February 14, 2025. Those requests remain pending with our response due to be filed with the Tennessee Supreme Court on May 27, 2025.

On March 3, 2025, the Tennessee Supreme Court set Mr. Smith and Mr. Black's execution dates without warning. Eleven days later, and one day after the Commissioner denied the final administrative appeal, we were in court.

For the past three years, we have been diligent in protecting our clients' rights, while balancing the need to be respectful of the State's need for time to respond to the investigative report and develop a new protocol. After the protocol was released, we acted swiftly. We have requested, and received, a scheduling order from the court which will force the parties to litigate this case in nearly a quarter of the time it would

take to litigate under a normal schedule. In fact, it was the State who, at a status conference scheduled at our request, offered to the Chancellor as a comparison the fact that a similar case being litigated in federal court had been pending for 4 years before the 2022 pause in executions. Appendix B, Transcript at 32. The State agrees with us that the case simply cannot be tried before January 2026. *Id.*at 36-37. We are not seeking undue delay. We are seeking fairness.

Mr. Smith and Mr. Black Will Be Unfairly Subjected to this Risky New Protocol Absent a Reprieve

Given the practice of our Supreme Court, it appears that no additional execution dates will be set before the Davidson County Chancery Court trial is concluded. Thus, of our 9 clients eligible for execution dates, only Mr. Smith and Mr. Black, through no fault of their own, will be denied the opportunity for judicial review of the protocol to be used in their executions.

This is arbitrary and unfair.

The risk they face is dire. Despite the branding that attempts to create the impression that lethal injection is a medical procedure, it is in fact, the act of poisoning a person to death. The person does not die from the effects of the chemical on their brain, but rather by drowning. Autopsies of persons executed with pentobarbital provide the scientific evidence demonstrating this. The autopsies show that the poison eats away the lining of the lungs causing fluid to rush in, overwhelming the respiratory system. Supporters of execution by lethal injection argue that the intense bodily trauma done by the injected poison does not matter,

because the same drug that kills the individual will also render him incapable of experiencing physical suffering. That belief, however, is nothing more than wishful speculation, and the limited actual evidence available weighs heavily in the other direction. Far more likely, based on the available evidence, is that a person executed by lethal injection will remain aware and experience the horror and torture of what has been described as chemical waterboarding. Executions by pentobarbital can last as long as 20 minutes. This is prolonged anguish and suffering.

Our clients have offered the alternative of death by firearm. It is an option now used in two states. Death by firearm is much faster than death by poisoning. What's more, as we explain in our complaint, death by firearm is in keeping with traditional standards of decency—it is what our Framers would have found acceptable in a judicial execution. The Framers would flatly reject lethal injection because poisoning would have been considered both a cruel and an unusual punishment at the time of our Constitution's adoption. The State of Tennessee has been among the litigants who have fought hard for years to get the courts to recognize the vital role of Founding-era traditions in constitutional adjudication. Mr. Smith and Mr. Black should have the opportunity to assert such arguments for themselves, under the caselaw that Tennessee has played no small part in bringing about.

The concerns we have raised are weighty and deserve fulsome consideration. Mr. Smith and Mr. Black are no less deserving of fair consideration than our other clients. If the Court declares that the protocol fails to pass constitutional muster, absent a reprieve, they will have been executed under an unconstitutional protocol

which will be a stain on this State that cannot be erased.

A Reprieve to Permit Expedited Court Review of the New Protocol Will Reduce Unnecessary Pressure on State Actors, Promote Integrity in the System, and Boost Public Confidence

Executions are carried out by the executive branch in the name of the citizens of the State. Confidence in the system is undermined when government does not act with transparency in such situations. Here, the new protocol increases, rather than decreases, the secrecy around one of the most solemn acts of government—extinguishing the life of a citizen. This increase in secrecy on the heels of the damning report of the independent investigation which documented a culture of recklessness and non-compliance will only serve to undermine the integrity of the system.

By contrast, permitting judicial review will boost confidence in the system. Judicial review allows us to air the concerns outlined here and in our complaint, and for a neutral decisionmaker to carefully examine the proof and render a fair decision while balancing the interests of all parties.

Another important consideration is that a reprieve will reduce pressure on state actors. It has been well-documented that executions take a toll on those who participate in them. The stress and anxiety is magnified when questions surround the integrity of the protocol.

You Have the Power to Permit Judicial Review of the Protocol Prior to Any Execution

The Tennessee Constitution gives you the "power to grant reprieves[.]" Tenn. Const. Art III, § 6. Whatever anyone might believe about executions, when carried

out they are a statement of values. An execution says more about us as a society than it does about the person condemned. Tennesseans value human life and the rule of law. A brief reprieve that allows the court to do its job and to assure the citizens of our State that executions will be carried out in a way that is consistent with Tennessee values is right, just, and fair.

Once again, we thank you for the opportunity to address you on behalf of our clients.

Very respectfully,

Kelley J. Henry

Chief, Capital Habeas Unit

Amy D. Harwell
Asst. Chief, Capital Habeas Unit