

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

PHILIP RAY WORKMAN,)	FOR PUBLICATION
)	
Respondent,)	FILED: _____
)	
v.)	
)	No. M1999-01334-SC-DPE-PD
STATE OF TENNESSEE,)	
)	
Movant.)	

SEPARATE CONCURRING ORDER

I concur with the Court's order setting an execution date in this case and denying the respondent's request for a certificate of commutation pursuant to Tennessee Code Annotated section 40-27-106 (1997). Because my reasons for denying the respondent's request for a certificate of commutation are somewhat different from those of my colleagues, I write separately to explain my views.

Each member of this Court has carefully read the transcript of the original trial in this case. We have also reviewed the opinions and orders which have resulted from the respondent's nearly twenty years of litigation in both the state and federal systems. Each member of this Court agrees that the respondent has availed himself of all possible procedures and venues in an effort to seek judicial relief from his sentence of death. There are no more judicial avenues, either state or federal, available to the respondent. Recognizing that, the respondent is now requesting this Court to recommend by certification in accordance with Tennessee Code Annotated section 40-27-106 that the Governor commute his sentence to something less than death. In support of his request, counsel for the respondent have filed in this Court evidence which the respondent claims raises doubt about his guilt in this case. All

of the members of this Court agree that we are not a fact-finding body and are in no position to consider those documents. See Tenn. Const. art. VI, ' 2; Tenn. Code Ann. ' 16-3-201(a) (1994). I agree with Justice Drowota that the new evidence presented to this Court by the respondent is not appropriate for our consideration. If any extenuating circumstances exist warranting this Court's issuing of a certificate of commutation, they must be based upon facts which have been established in the record. Not only do I see no such facts in the record, but the record fully supports the jury's sentence of death.

Moreover, in my view the statute authorizing this Court to certify to the Governor that a sentence of death ought to be commuted, see Tenn. Code Ann. ' 40-27-106, has largely become obsolete. The statute was originally enacted in 1858 and has remained unchanged in our Code since 1932. Since that time, the trial and appellate procedures used in capital cases have been vastly expanded and improved. The trial in a capital case is now bifurcated with the jury first required to determine guilt or innocence, and if a defendant is found guilty, then a separate sentencing hearing is conducted. Before a jury may sentence an accused to death, it must find the presence of at least one statutorily defined aggravating circumstance, and the aggravating circumstance or circumstances must outweigh any mitigating circumstances. When the statute in question was originally enacted, there was no bifurcated trial and the jury was given little or no guidance in determining whether the defendant would be sentenced to life or death.

Likewise, the appellate process today affords a defendant multiple opportunities for thorough appellate review. The defendant may initially appeal his or her conviction and sentence to the Court of Criminal Appeals, which was created in 1967, then to this Court, and finally, the United States Supreme Court. If the

defendant obtains no relief in his direct appeal, then the defendant may file a post-conviction petition pursuant to the Post Conviction Procedure Act, first enacted by our General Assembly in 1967. In the post-conviction process, the defendant may collaterally attack his or her conviction and sentence based upon any constitutional deprivations which existed in his original trial or appeal. If unsuccessful in a post-conviction proceeding in the state trial and appellate courts, the defendant has a right to seek habeas corpus relief in the United States District Court. If the federal trial court renders an unfavorable decision, the defendant has the right to appeal to the United States Court of Appeals, and finally, the defendant may seek appellate review in the United States Supreme Court.

All of the procedural safeguards now in place are designed to, and in my opinion do, allow the judiciary to prevent a defendant from being executed unjustly. In 1977, the General Assembly charged this Court with reviewing death sentences to determine whether (A) The sentence of death was imposed in any arbitrary fashion; (B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances; (C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and (D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.® See 1977 Tenn. Pub. Acts ch. 51, ' 4(c) (currently codified at Tenn. Code Ann. ' 39-13-206(c)(1) (1997)). In addition, the legislature has also given this Court the power to modify the punishment of death to life imprisonment or to life imprisonment without the possibility of parole. See Tenn. Code Ann. ' 39-13-206(d)(2).

Tennessee Code Annotated section 40-27-106 allowing for a certificate of commutation was enacted at a time when this Court did not have the ability to review

or modify a sentence of death based upon arbitrariness, proportionality, or evidentiary support. As such, the only avenue available to the courts to correct a manifest injustice was through a recommendation of executive clemency. Since 1977, however, this Court has possessed the statutory authority to evaluate the appropriateness of a death sentence on direct review and even to modify such a sentence on its own if the statutory and procedural requirements are met. Virtually every *extenuating circumstance* warranting modification can reasonably fit within the four factors that this Court is required to consider in all death penalty reviews, and consequently, the statute providing for a certificate of commutation has been rendered obsolete in most all cases.

On the direct appeal of the respondent's sentence, this Court applied the statutory factors which would justify judicial modification, and it unanimously determined that such a modification was not appropriate. When a defendant unsuccessfully challenges his or her conviction or sentence through the full panoply of state and federal procedures, it is highly unlikely that there will be any *extenuating circumstances* in the judicial record so as to justify a certificate from this Court to the governor recommending a commutation. If there are any *extenuating circumstances*, they will be outside of the judicial record which may be proper for the Governor to consider, but not this Court.

Finally, I am also of the opinion that there exists a serious question concerning the constitutionality of Tennessee Code Annotated section 40-27-106. The statute may represent an unconstitutional infringement upon the doctrine of separation of powers. I believe that application of section 40-27-106 is constitutionally suspect because a recommendation from this Court respecting the executive's commutation

power, although granted by statute, may be wholly without the constitutional power of the judiciary in this State.

The Constitution grants the power to grant reprieves and pardons solely to the governor, see Tenn. Const. art. III, ' 6, and this power is to be exercised by the governor alone without reference to the Board of Paroles or anyone else. Rowell v. Dutton, 688 S.W.2d 474, 476-77 (Tenn. Crim. App. 1985). The very purpose of granting to the executive the exclusive exercise of the clemency power is so that some authority other than the courts is empowered to ameliorate or avoid particular criminal judgments. In this respect, the governor's clemency power is an important check entrusted to the executive to afford relief from undue harshness or evident mistake occurring during the normal administration of the criminal law by the courts. Cf. Ex Parte Grossman, 267 U.S. 87, 120-21 (1925).

Because the governor's clemency power serves as a check on the exercise of judicial power by this Court, I believe that it is inappropriate for this Court to obtrude in the executive's exercise of the clemency power by recommendation or otherwise. The Constitution is quite explicit that "[n]o person or persons belonging to [any branch of government] . . . shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tenn. Const. art. II, ' 2. I find no provision in the Constitution granting this Court a role in the clemency process itself, and although this power is granted by statute, I doubt whether it is not within judicial competency to control, interfere with, or even to advise the Governor with respect to the clemency power. Cf. Eacret v. Holmes, 333 P.2d 741, 743 (Or. 1958). I recognize that a certificate issued by this Court recommending clemency can have no force of law and in no way compels any executive action; nevertheless, to the extent that any statute authorizes this Court to attempt to influence a governor's clemency

decision, that statute may overstep the constitutional authority given the judicial branch of our government.¹

The Governor is fully capable of reviewing the record in the respondent's case independently of this Court. Therefore, should the respondent choose, he may seek a commutation of his sentence pursuant to the procedure contained in Tennessee Code Annotated section 40-27-105. The procedure outlined in that section does not involve this Court, but rather it is a procedure established for the Governor's independent decision.

For these reasons, I concur in the order granting the State's motion to set an execution date and denying the respondent's motion requesting this Court to issue a certificate of commutation to the governor.

WILLIAM M. BARKER, JUSTICE

¹ I do believe, however, that the certificate of commutation in Collins v. State, 550 S.W.2d 643, 649 (Tenn. 1977), was properly issued. In Collins, this Court recommended commutation of all death sentences in Tennessee because the statute under which the sentences were imposed was presumably unconstitutional in the wake Gregg v. Georgia, 428 U.S. 153 (1976), Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976). A certificate of commutation was appropriate in that case because the certificate was founded upon a legal ground that plainly called into question the constitutionality of the sentences, and this legal ground did not exist at the time of the direct appeals.