

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

**FILED**

December 10, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

**PHILIP RAY WORKMAN, )  
Respondent/Defendant, )**

v. )  
**00096** )

**S.Ct. No. 02S01-9910-CR-**

**(M1999-01334-SC-DPE-**

**PD)  
STATE OF TENNESSEE, )  
Movant. )**

**REPLY TO RESPONSE TO MOTION TO SET EXECUTION DATE  
AND RESPONSE TO MOTION FOR CERTIFICATE OF COMMUTATION**

The defendant asks this Court to refrain from setting a date for his execution and to issue a certificate of commutation of his 1982 sentence of death. In support of his request, the defendant claims that he was convicted upon perjured testimony, as he claimed upon federal habeas corpus review of his conviction. As was the case on federal review, he is not entitled to either form of relief and an immediate date for his execution should be set.

**I. THE DEFENDANT IS NOT ENTITLED TO FURTHER DELAY IN THE  
IMPOSITION OF HIS SENTENCE OF DEATH.**

Upon the State's filing of a motion to set a date for execution, the issue before the Court is whether a defendant sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of [his] conviction and sentence. *Heck Van Tran v. State*, \_\_\_ S.W.2d \_\_\_, No. W1998-00175-SC-R11-PD (Tenn., filed November 23, 1999, at Jackson)(for publication). Here, the defendant sought direct appellate review of his 1982 conviction and sentence, which were affirmed by this Court. *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984). His subsequent efforts to seek state post-conviction relief concluded with the 1993 affirmance by the

Court of Criminal Appeals of his second such petition. *Workman v. State*, 868 S.W.2d 705 (Tenn.Crim.App. 1993). The defendant's 1995 petition for federal habeas corpus relief resulted in the district court's award of summary judgment to the State on all of the defendant's claims, including his claim of perjured testimony, and that judgment was affirmed by the Court of Appeals for the Sixth Circuit in 1998. *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998). The defendant's petition to the United States Supreme Court for the writ of certiorari, challenging the decision of the Court of Appeals, was denied by the Supreme Court on October 4, 1999. A motion to set a date for execution, previously filed by the State on October 4, 1999, was denied by this Court pending resolution of the defendant's application for petition to rehear the denial of certiorari.<sup>1</sup> On October 29, 1999, the Supreme Court denied the defendant's petition to rehear.

Throughout this process of review, the validity and correctness of the defendant's conviction and sentence have been repeatedly upheld and have now been passed upon by no fewer than 17 judges. The defendant has no further remedies available to him, and does not aver otherwise in his response to the State's motion. Having exhausted all avenues of state and federal review, and lacking grounds to reopen any collateral attack to his conviction and sentence, the defendant herein seeks to create yet another layer of appellate review that does not exist and to which he is not entitled. This Court should rebuff the defendant's efforts to bypass the lawful provisions of appellate and collateral review and to engender further delay. The time has come for an immediate and final date to be set for imposition of the defendant's sentence of death.

## II. THE DEFENDANT'S CASE IS NOT AN APPROPRIATE ONE FOR THIS COURT TO CONSIDER ISSUANCE OF A CERTIFICATE OF COMMUTATION.

The defendant also asks this Court to issue a certificate of commutation of his sentence of

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<sup>1</sup> In his petition to rehear, the defendant sought the Court's consideration of the same new allegations relative to his perjured testimony claim he now presents to this Court. (Attachment 1, p. 2)

death on the basis of his claim of perjured testimony. Under Tenn.Code Ann. ' 40-27-106, the governor may commute a defendant's punishment from death to life imprisonment upon the certificate of this Court that, in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted. Tenn.Code Ann. ' 40-27-106. In *Bass v. State*, 191 Tenn. 259, 321 S.W.2d 707 (1950), however, the case cited by the defendant as instructive to this Court on the proper exercise of its authority under the statute, this Court considered only record facts when it determined, on direct review of a first degree murder conviction, that questions concerning the defendant's deliberation constituted sufficient extenuating circumstances so as to warrant exercise of its authority to recommend commutation. By contrast, the defendant here asks this Court to consider non-record allegations of fact -- assertions that have not been subjected to and are not the product of the adversarial process. Such allegations are inherently suspect and subject to question. In addition, this Court is an appellate court only, having no original jurisdiction. Tenn.Code Ann. ' 16-3-201. It is not a proper forum for the presentation of evidence in the first instance.

Moreover, the defendant's claim that he was convicted and sentenced to death upon perjured testimony is based primarily upon a non-record, unattested statement of a witness, made 18 years after his original trial testimony, under questioning by, and in the presence of, at least two attorneys representing the defendant. It is apparently the second of two such statements of the witness, over a 2-month period, and yet the defendant does not provide this Court with the previous statement, raising questions about its veracity and consistency with the second statement. This "evidence" is simply not worthy of this Court's consideration, much less adequate to warrant a conclusion that the defendant's sentence of death "ought to be commuted" under Tenn.Code Ann. ' 40-27-106. If it were, the pressures and influences to which trial witnesses might one day be

subjected by desperate defendants facing imminent executions are not difficult to imagine.

Lastly, and unfortunately, by framing his response as he does -- injecting personal opinion, knowledge and belief, and purporting to lecture this Court concerning its own sense of conscience, duty and obligation -- the defendant attempts once again to shift responsibility for the imposition of his death sentence on all but the person actually responsible for his predicament -- himself. This Court should denounce such efforts in the strongest terms, deny defendant's motion for a certificate of commutation and set an immediate date of execution for the defendant, Philip Ray Workman.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing Motion to Set Date for Execution, with attachment, was served on the defendant by facsimile and by mailing same, first-class, postage prepaid, to his counsel: Donald E. Dawson, Esq. Office of the Post-Conviction Defender, 460 James Robertson Parkway, Nashville, Tennessee 37243, on this the \_\_\_\_\_ day of December, 1999.

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JOSEPH F. WHALEN