

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

STATE OF TENNESSEE)
)
v.) **No. M1999-01334-SC-DPE-PD**
) **Filed: May 8, 2007**
PHILIP RAY WORKMAN)

**RESPONSE IN OPPOSITION TO MOTION
FOR STAY OF EXECUTION**

Workman has failed in federal court in his recent effort to challenge Tennessee’s three-drug lethal injection protocol. That challenge was rejected in federal court for two reasons: first, “the absence of any meaningful chance of success on the merits” of his claims, and second (and most pertinent to the instant motion), “[h]e waited too long to bring this challenge — just five days before what is now the sixth execution date [that] Tennessee has set for him.” *Workman v. Bredesen*, No. 07-5562, slip op, p. 11 (6th Cir. May 7, 2007).¹ Workman now seeks relief from this Court, complaining that he has been left “without any meaningful way” to challenge the protocol, and that he “will never get his day in court.” But as the Sixth Circuit correctly observed, “Workman’s opportunities to avoid this scenario . . . were many.” *Workman*, slip op, p. 12. “By any measurable standard, he has had ample time to challenge the procedure”; his cry that

¹In reaching its determination that Workman had little chance of success, the Court engaged in a detailed assessment of Tennessee’s three-drug lethal injection protocol, much the same as this Court did in 2005 when it upheld the constitutionality of the protocol. See *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005). Indeed, the Sixth Circuit pointed often to this Court’s decision in *Abdur’Rahman*. and concluded that the protocol challenged in the federal proceeding was in all material respects the same protocol reviewed by this Court in *Abdur’Rahman*.

“[t]his is grossly unjust” thus rings hollow.

Seven years ago, in April 2000, Workman came within two days of the execution of his sentence by lethal injection before a stay was issued,² but he never challenged the State’s three-drug lethal injection protocol. In January 2001, Workman came within five days of the execution of his sentence by lethal injection before a stay was issued,³ but he never challenged the State’s three-drug lethal injection protocol. In March 2001, Workman came within two hours of the execution of his sentence by lethal injection before a stay was issued,⁴ but he never challenged the State’s three-drug lethal injection protocol. In September 2003, Workman came within nine days of the execution of his sentence by lethal injection,⁵ but he never challenged the State’s three-drug lethal injection protocol.⁶ And in September 2004, Workman came within twenty

²Workman’s sentence was scheduled to be executed on April 6, 2000; the Sixth Circuit granted a stay on April 4, 2000. *Workman v. Bell*, 209 F.3d 940 (6th Cir. 2000) (en banc).

³Workman’s sentence was scheduled to be executed on January 31, 2001; the Sixth Circuit granted a stay on January 26, 2001. *Philip Workman v. Ricky Bell*, Nos. 96-6652/00-5367 (6th Cir. Jan. 26, 2001) (en banc).

⁴Workman’s sentence was scheduled to be executed on March 30, 2001; this Court granted a stay shortly before midnight on March 29, 2001. *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001).

⁵Workman’s sentence was scheduled to be executed on September 24, 2003; an executive reprieve was issued on September 15, 2003. See *Philip Workman v. Ricky Bell*, No. 03-2660 (W.D.Tenn. Sept. 15, 2003) (docket minutes reflecting withdrawal of motion for stay of execution in light of executive reprieve).

⁶Workman’s failure to challenge the protocol at this juncture is particularly notable given the ongoing state litigation initiated by Abdur Rahman. See *Alley v. Little*, 181 Fed.Appx. 509, 513 (6th Cir. May 12, 2006), *cert. denied*, 126 S.Ct. 2973 (2006) (finding

days of the execution of his sentence by lethal injection,⁷ but he never challenged the State's three-drug lethal injection protocol. As the Sixth Circuit concluded, Workman's previous failure ever to have challenged the three-drug protocol, particularly in the face of all of these instances in which one would have expected him to have done so, cuts the knees from his assertion that he ought to be afforded time to do so now.

His assertion to this Court that a new protocol was issued on April 30, 2007, and that "he simply never could have litigated the new protocols . . . given the timeline under which he was placed" he also made in federal court — and it was likewise correctly rejected. "[A]s Workman acknowledges, the new protocol is only 'slightly different' from the old protocol, Complaint at 3, . . ." *Id.*, slip op., p. 11. *See id.* ("Only one thing has changed since a panel of this court convincingly demonstrated that this challenge to the Tennessee procedure has a 'small likelihood of . . . success,' . . . — the State has *reevaluated and improved* its procedure.") (citing *Alley v. Bell*, 181 Fed.Appx. 509, 513 (6th Cir. 2006) (emphasis in original). Indeed, the three-drug lethal injection protocol currently in place is exactly the same three-drug lethal injection protocol that this Court reviewed in *Abdur'Rahman. Compare Workman*, slip op., pp. 4--5 with *Abdur'Rahman*, 181 S.W.3d at 300-301. *See also Report on Administration of Death Sentences in*

unnecessary delay in prisoner's bringing challenge to Tennessee's lethal injection protocol, Court notes that "Abu-Ali Abdur'Rahman[] petitioned the state Commissioner of Correction to declare the lethal injection protocol unconstitutional in April 2002"). Indeed, there seems no reason why Workman could not have sought to intervene in Abdur'Rahman's case. *See* Tenn.R.Civ.P. 24.02.

⁷Workman's sentence was scheduled to be executed on September 22, 2004; the United States District Court for the Western District of Tennessee granted a stay on September 2, 2004. *See Philip Workman v. Ricky Bell*, Nos. 94-2577; 03-2660 (W.D.Tenn.).

Tennessee, p. 6 (“After considerable research and consultation with medical experts, the Department has *retained* a three-chemical protocol.”) (emphasis added). “Having refused to challenge the old procedure on a timely basis, he gets no purchase in claiming a right to challenge a *better* procedure on the eve of his execution.” *Id.* (emphasis in original).

Workman complains that, in previously opposing Workman’s motion in this Court to vacate the execution date, the State asserted, “Should circumstances present at some point prior to May 9 that would warrant staying Workman’s execution date, then this Court, or another court of competent jurisdiction, could certainly take that action at that time.” There are two responses to Workman’s complaint. First, he takes the statement out of context. It was made in response only to Workman’s reliance on his own speculation about death penalty legislation that may or may not pass. Second, *circumstances have not presented* that would warrant staying Workman’s execution date. If Workman now considers himself to be in a bind, it is one entirely of his own making. As the Sixth Circuit ultimately observed, at some point in time the State has a right to impose a sentence. “Twenty-five years after the imposition of [Workman’s] sentence, that time . . . has come.” *Id.*, slip op., p. 13.

Workman’s motion for a stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by first class mail, postage prepaid, and by facsimile, to Paul Bottei, at 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this the 8th day of May, 2007.

/s/ Joseph F. Whalen

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