IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN	)	
	)	
Petitioner-Appellant	)	No. 06-6451
	)	07-5031
vs.	)	
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee	)	

MOTION TO THE *EN BANC* COURT FOR STAY OF EXECUTION
UNDER *BAREFOOT v. ESTELLE*

Because the District Court granted Philip Workman a certificate of appealabilty (R. 205), this Court is required to issue a stay of execution under Barefoot v. Estelle, 463 U.S. 880 (1983), so that this Court can decide the merits of his pending appeals in 6th Cir. Nos. 06-6451, 07-5031.

As the Supreme Court held in *Barefoot*, when a habeas petitioner obtains a certificate of probable cause to appeal (now certificate of appealability), the court of appeals *must decide the case on the merits*:

> When a certificate of probable cause is issued . . . petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal.

Barefoot v. Estelle, 463 U.S. 880, 893 (1983). See Garrison v. Patterson, 391 U.S. 464, 466 (1968)(per curiam). Ford v. Haley, 179 F.3d 1342 (11th Cir. 1999)

While *Barefoot* involved an appeal from an initial habeas petition, that distinction is immaterial here. The question before this Court is whether Workman's *first habeas* should be reopened. Further, the *Barefoot* rule (requiring a stay to address the merits following issuance of a certificate) applies to Rule 60(b) appeals Zeigler v. Wainwright, 791 F.2d 828, 830 (11th Cir. 1986)(per curiam)(granting certificate of probable cause in 60(b) case, granting stay of execution, and ordering expedited briefing). In fact, as the *en banc* Eleventh Circuit has held, the *Barefoot* rule even applies to second habeas petitions, when a certificate has been granted. Messer v. Kemp, 831 F.2d 946, 957-958 (11th Cir. 1987)(en banc)(granting certificate and addressing merits of claims raised in second habeas petition).

The panel's actions run directly counter to *Barefoot*. Indeed, on April 26, 2007, this Court entered an order consolidating Workman's appeals for "briefing and submission" but then did not order briefing. More significantly, under *Barefoot*, there has been no decision on the merits of the pending appeals. All the panel has done is decide a stay motion (which included Workman's request for a *Barefoot* stay). That decision was *not* a decision on the merits:

> Although a decision by the Court to grant a stay may take into account 'whether the applicant has a reasonable probability of prevailing on the merits of the case,' R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 17.19 (6th ed. 1986)(*citing* Rostker v. Goldberg, 448 U.S. 1306, 1308, 101 S. Ct. 1, 2, 65 L. Ed. 2d 1098 (Brennan, Circuit Justice

1980)), ***it is not a merits decision***.

Messer v. Kemp, 831 F.2d at 957 (emphasis supplied).

That Workman has been denied his rights under *Barefoot* is apparent when one considers the possible disposition of his appeals were he executed. The pending appeals for which he has received a certificate would be dismissed as moot. But, as the Supreme Court has made manifest, a court may not fail to decide a case on the merits by denying a stay and thereby mooting the proceedings. Lonchar v. Thomas, 514 U.S. 314, 320 (1996).

CONCLUSION

Because the panel denied a stay of execution in violation of *Barefoot*, the *en banc* Court should grant such a stay and order further proceedings on Workman's appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by fax to Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this 7th day of May, 2007.

Paul R Bottin