

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

<p>FILED</p> <p>March 13, 2000</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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PHILIP RAY WORKMAN,)
)
 Movant,)
)
 v.)
)
 STATE OF TENNESSEE,)
)
 Respondent.)

**No. M1999-01334-SC-DPE-PD
CAPITAL CASE**

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

Workman asks this Court to stay his execution, which, by this Court’s order of January 3, 2000, is scheduled for April 6, 2000. In support of his request, Workman claims an interest in the Court’s upcoming disposition of the case of *State v. Morris*, S.Ct. No. W1998-00679-SC-DDT-DD, in which the Court has asked for further briefing on, among other things, the issue of whether electrocution constitutes cruel and unusual punishment. In its January 3rd order, however, this Court pointed out that Workman had “exhausted the standard three-tier appeals process,” and that “[t]here exists no procedure, no method, and no means by which the conviction *or the sentence* can be further tested or scrutinized under the procedural guidelines within which this Court must function.” (emphasis added) *Workman v. State*, S.Ct. No. M1999-01334-SC-DPE-PD (Filed Jan. 3, 2000 at Jackson). Accordingly, the Court proceeded to set an execution date. To now allow Workman, or any defendant under similar circumstances, the opportunity to delay the lawful execution of his sentence simply because another case has

appeared on the horizon in which he expresses an interest, would destroy any concept of the finality of the state court appellate review process.

Furthermore, Workman has previously raised his challenge to the constitutionality of electrocution, and by his present motion for stay essentially asks this Court to do that which the United States Supreme Court has declined to do: allow him to renew that challenge. Workman did not raise a specific challenge to the constitutionality of electrocution until his second state post-conviction proceedings in 1992.¹ There, Workman included a claim that electrocution constitutes cruel and unusual punishment to his multi-pronged attack on the constitutionality of the Tennessee death penalty statute. The trial court dismissed the petition, finding that Workman's challenge to the statute's constitutionality had been previously determined. (App., at 2-3) Workman did not renew the challenge on post-conviction appeal in the state appellate courts. *See Workman v. State*, 868 S.W.2d 705, 707 (Tenn.Crim.App. 1993).

On federal habeas corpus review, Workman's claim that electrocution is unconstitutional as cruel and unusual punishment was denied by the district court as without merit. *See Workman v. Bell*, No. 94-2577 GA, p. 90 (W.D.Tenn., Oct. 28, 1996)(order on cross motions for summary judgment)(copy of pertinent portion attached in Appendix, at 5-8) The Court of Appeals for the Sixth Circuit also found no merit to this claim. *Workman v. Bell*, 178 F.3d 759, 778 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 264 (1999). In his petition for rehearing after denial of certiorari before the United States Supreme Court, Workman specifically asked the Court to grant

¹ As part of his direct appeal, Workman challenged the constitutionality of the death penalty statute, including a claim that the death penalty is cruel and unusual. In support of that claim, he merely cited the dissenting opinion in *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn. 1981). *See State v. Workman*, 667 S.W.2d 44, 46, 52 (1984).

certiorari on his electrocution claim. (App., at 13) The Court, however, denied his petition on November 29, 1999.²

The claim that electrocution *per se* is unconstitutional as cruel and unusual punishment was rejected by this Court in *State v. Black*, 815 S.W.2d 166, 178-179, 187-191 (Tenn. 1991), and the Court has repeatedly reaffirmed its holding. *See State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994); *State v. Cazes*, 875 S.W.2d 253, 268 (Tenn. 1994); *State v. Smith*, 868 S.W.2d 561, 582 (Tenn. 1993). *See also In Re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997) (“[e]lectrocution has never been found to be cruel and unusual punishment by any American court”).³ The defendant in *State v. Morris* cannot make an “as applied” attack on its constitutionality, as there has been no state court record created in that case to support such an argument. *See State’s Motion to Strike in State v. Morris* (filed this date, at Jackson). Nor was such a record created in Workman’s case. As a result, Workman can have no realistic expectation that he will derive any benefit from this Court’s disposition of the *Morris* case. In the absence thereof, this Court would not be warranted in issuing a stay of his execution. *See In Re Sapp, supra* at 464-465 (issuance of a stay of execution requires a “strong and significant likelihood of success on the merits,” which, in the case of a challenge to electrocution, simply “does not exist”). *See also Herrera v. Collins*, 954 F.2d 1029, 1033 (5th Cir. 1992), *affirmed*, 506 U.S. 390 (1993), *citing Delo v. Stokes*, 495 U.S. 320, 321-322 (1990)(issuance of a stay of execution may not be granted in the

² This Court had denied the State’s then-filed motion to set an execution date pending the Supreme Court’s decision on Workman’s petition for rehearing.

³ Passage of a bill now pending before the legislature, S.B. 2866, would render such a point, as well as Workman’s motion, moot by providing for all executions to be conducted by means of lethal injection.

absence of a “substantial case on the merits” of a “serious legal question”).

Workman’s present motion merely seeks a delay of his execution for its own sake.

Accordingly, the Motion for a Stay of Execution should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

JOSEPH F. WHALEN
Assistant Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 532-7361
B.P.R. No. 19919

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served on the defendant by mailing same, first-class, postage prepaid, to his counsel: Marjorie A. Bristol, Esq., Office of the Post-Conviction Defender, 460 James Robertson Parkway, Nashville, Tennessee 37243, on this the _____ day of March, 2000.

JOSEPH F. WHALEN