IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN ET AL. v. TONY PARKER ET AL.

Chancery Court for Davidson County
No. 18-183-III

No. M2018-01385-SC-RDO-CV

SHARON G. LEE, J., dissenting.

Four death row plaintiffs, Larry McKay, David Earl Miller, Nicholas Todd Sutton, and Stephen Michael West, seek appellate review of the Davidson County Chancery Court's ruling on the constitutionality of Tennessee's Midazolam-based lethal injection protocol—the first ruling on this issue in Tennessee. The Court summarily denies their request for a bifurcated appeal or an extension of the briefing schedule mandated by the Court's August 13, 2018 order, without explanation or waiting to consider the State's response. Today, the Court forces these plaintiffs – unnecessarily and unfairly – into an even more compressed super-expedited briefing schedule than the one imposed on the other death row plaintiffs.[1] *See Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Aug. 13, 2018) (order sua sponte assuming jurisdiction of appeal under Tenn. Code Ann. § 16-3-201(d)(3)).

These four plaintiffs timely filed their notice of appeal. But two weeks ago, the Court unwisely put this appeal on a "rocket docket." Now, it is "Houston, we have a problem." The Court's response is to require these plaintiffs to comply with the super-expedited schedule it issued two weeks ago—before these plaintiffs had even filed their notice of appeal. The Court finds itself in a box of its own creation.

The deadlines imposed on these four plaintiffs are neither reasonable nor realistic. The issue in this appeal – whether the State's lethal injection protocol creates a risk that the plaintiffs will experience serious and needless pain and suffering during their executions in violation of the Eighth Amendment's prohibition on cruel and unusual punishment – is neither simple nor trivial.

[1] Twenty-nine other death row plaintiffs appealed the chancery court's judgment on July 30, 2018. Twenty-eight of these plaintiffs remain after the State executed Billy Ray Irick on August 9, 2018.

This schedule creates an uneven playing field that is tilted in the State's favor. Under the Court's order, these four plaintiffs will have only ten days (seven business days given the Labor Day holiday) to review the record[2] *and* prepare and file their brief. Yet, the State will have fifteen days to prepare and file its brief in response.

The reason the Court continues rushing this appeal is the scheduled execution of plaintiff Edmund Zagorski on October 11, 2018. But, who set this date? The Court. Who can, with the stroke of a pen, reset this date, provide meaningful appellate review, and eliminate all these procedural problems? The Court.

These four plaintiffs have established good cause not to be subject to the super-expedited schedule. They note that the earliest and only scheduled execution date among them is on December 6, 2018 for Miller. This Court or the Court of Appeals could provide meaningful appellate review "with deliberate speed" over the next 100 days before the Miller execution date. *See Abdur'Rahman v. Parker*, No. M2018-01385-COA-R3-CV (Tenn. Ct. App. July 30, 2018) (order sua sponte). As the plaintiffs explain, the Zagorski execution date is a circumstance completely beyond their control, and they should not be penalized by this Court's decision to dispose of the appeal before that date. Moreover, these plaintiffs assert that they will likely raise issues that are different from those raised by the original twenty-nine death row plaintiffs.

We must afford the parties the careful consideration this appeal deserves. Appellate review that is expeditious, yet unrushed, will cause minimal, if any, harm to the State. Yet, appellate review so hurried that it is meaningless could inflict irreparable harm on the inmates facing execution *and* jeopardize the public's confidence and trust in the impartiality and integrity of the judicial system.

For all these reasons and more, the Court needs to pause, hit the reset button, and allow the plaintiffs, Larry McKay, David Earl Miller, Nicholas Todd Sutton, and Stephen Michael West, a fair opportunity to be heard.

Sharon G. Lee

SHARON G. LEE, JUSTICE

[2] These four plaintiffs were not able to participate in the preparation or designation of the record on appeal.