IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

Filed: January 3, 2000

PHILIP WORKMAN,	**)**	
	)	**FOR PUBLICATION**
Respondent,	**)**	
	)	
V.	**)**	
	)	**S.Ct. No. M1999-01334-SC-DPE-PD**
STATE OF TENNESSEE,	**)**	
	)	
Movant.	**)**	

CONCURRING ORDER

I fully concur with the Court=s order setting an execution date and denying the respondent=s request for a certificate of commutation pursuant to Tenn. Code Ann. ' 40-27-106 (1997). However, I write separately to explain the jurisprudential landscape that existed at the time Section 40-27-106 was enacted, to discuss the important role of executive clemency and commutation in the Anglo-American tradition of law, and to emphasize that the respondent should take the opportunity to file an application for executive clemency. A final decision on the application should be rendered only after careful review and full consideration by the Governor of the facts and circumstances of this case and the circumstances of other similar first degree murder cases in Tennessee, regardless of the sentence imposed. See Tenn. Code Ann. ' 40-27-105 (1997).

The respondent=s request for a certificate of commutation is grounded upon Tenn. Code Ann. ' 40-27-106 (1997), which provides that A[t]he governor may, likewise, commute the punishment from death to imprisonment for life, upon the certificate of the supreme court, entered on the minutes of the court, that in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted.@ Although the statute has been applied in a handful of prior cases by this Court,[1] none of those cases, nor any other

[1] Anderson v. State, 215 Tenn. 83, 383 S.W.2d 763 (1964); Leroy Powell v. State, No. 50869 (Tenn. February 25, 1958); Carl Hill v. State, No. 48841 (Tenn. July 20, 1956); Bass v. State, 191 Tenn. 259, 231 S.W.2d

Tennessee authority, contains a comprehensive discussion of the statute. Furthermore, there appears to be no similar statute in any other state although some states have constitutional provisions which are analogous.[2]

---

707 (1950); Temples v. State, 183 Tenn. 531, 194 S.W.2d 332 (1946); Morris Ridley v. State, No. 38826 (Tenn. July 2, 1945); Jess Clark v. State, No. 36339 (Tenn. November 10, 1942); J.B. Shannon v. State, No. 31272 (Tenn. February 15, 1938); Ray Flynn v. State, No. 32041 (Tenn. July 2, 1938); Luther Johnson v. State, No. 32032 (Tenn. July 2, 1938); Freddo v. State, 127 Tenn. 376, 155 S.W. 170 (1913); Green v. State, 88 Tenn. 634, 14 S.W. 489 (1890); State v. Becton, 66 Tenn. 138 (1874).

[2] See Cal. Const. of 1879, art. V, ' 8(a) (AThe Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring@); La. Const. of 1974, art. VI, ' 5(E)(1) (AThe governor may grant reprieves to persons convicted of offenses against the state and, upon recommendation of the Board of Pardons, may commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeitures imposed for such offenses@); Pa. Const. art. VI, ' 9(a) (AIn all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice.@); Tx. Const. art. IV, ' 11(b) (AIn all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons@).

The statutory provision was originally enacted in 1858.[3] At the time of its enactment, there were few judicial avenues of review and relief available to persons convicted of first degree murder. For instance, there are early decisions which appear to espouse a limited view of the power of an appellate court to modify a sentence. See Annotation, Reduction by Appellate Court of Punishment Imposed by Trial Court, 29 A.L.R. 318 (1924) (stating that if a trial court pronounced a sentence in excess of the punishment provided by law, the judgment was deemed wholly illegal so that the only judgment which the appellate court could render was one of reversal). Moreover, the state constitutional writ of habeas corpus was available to challenge only void, as opposed to voidable, judgments. See Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999); Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993); State v. Galloway, 45 Tenn. (5 Cold.) 326, 336-37 (1868). The writ of error coram nobis, though it existed in 1858, see Code 1858, ' 3111, was limited in scope to civil proceedings and was not extended to criminal proceedings until 1955. See State v. Mixon, 983 S.W.2d 661, 668 (Tenn. 1999) (discussing the history of the writ of error coram nobis). The Post-Conviction Procedure Act was not enacted until 1967. See House v. State, 911 S.W.2d 705, 709 (Tenn. 1995); Archer, 851 S.W.2d at 162. Finally, the statute requiring comparative proportionality review of Tennessee death penalty cases was not enacted until 1977, almost 120 years later. See State v. Bland, 958 S.W.2d 651, 662-63 (Tenn. 1997).

Even though the statute upon which the respondent now relies was, at the time of its enactment, one of only a few avenues of relief available to prisoners sentenced to death, the statute has always been applied sparingly by this Court. The respondent has not cited, nor has independent research revealed, any case in which the statute has been applied since the Post-Conviction Procedure Act was adopted in 1967. Moreover, Section 40-27-106 has never been previously applied to afford relief to a death-sentenced prisoner who files what amounts to an original action in this Court and relies upon extra-judicial Anew evidence@ to challenge the accuracy of the jury=s verdict and the credibility of the evidence upon which his or her conviction

[3]The Code of 1858, section 5259 provided as follows: The Governor may, likewise, commute the punishment from death to imprisonment for life, upon the certificate of the Supreme Court, entered on the minutes of the court, that, in their opinion, there were extenuating circumstances attending the case, and that the punishment

was based. Research reveals that certificates of commutation pursuant to Tenn. Code Ann. ' 40-27-106 have been issued only when the Aextenuating circumstances attending the case@ are based upon facts contained in the record of the judicial proceedings, see Bass v. State, 231 S.W.2d 707 (Tenn. 1950), or upon a combination of record facts and new evidence that is uncontroverted, see Anderson v. State, 215 Tenn. 83, 383 S.W.2d 763 (1964); Green v. State, 88 Tenn. 634, 14 S.W. 489 (1890).

Assuming for the sake of argument, however, that the respondent=s extra-judicial Anew evidence@ could be considered, such evidence is disfavored because it was Aobtained without the benefit of cross-examination and an opportunity to make credibility determinations.@ Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 869, 122 L. Ed.2d 203 (1993). Moreover, the evidence was obtained over eighteen years after commission of the crime. Cf. McCleskey v. Zant, 499 U.S. 467, 491, 111 S. Ct. 1454, 1468, 113 L. Ed. 2d 517 (1991) (A[T]he >erosion of memory and dispersion of witnesses that occur with the passage of time= prejudice the government and diminish the chances of a reliable criminal adjudication.@) In addition, the evidence is itself internally inconsistent thereby further undermining its reliability. Finally, the Anew evidence@ must be considered in light of the proof of the respondent=s guilt at trial, proof that included the eyewitness testimony of Officers Stoddard and Parker. The recantation of witness Harold Davis notwithstanding, the evidence of the respondent=s guilt is overwhelming. Officer Stoddard was in close proximity to the victim, Officer Oliver, and the respondent, Workman, at the time the victim was shot. Not only did Officer Stoddard hear the shots fired and see the victim lying on the ground, but he was also fired upon and wounded by the respondent. Although not in close proximity when the victim was shot, Officer Parker came around the corner after hearing shots fired and saw Officer Oliver fall to the ground. There is no evidence that either of these witnesses fired a weapon during the struggle between the victim and the

---

ought to be commuted@

respondent. Furthermore, the evidence includes testimony by the respondent, who admits to pulling the trigger and firing all the bullets from his gun. This testimony combined with all other evidence leaves no doubt that the respondent killed Officer Oliver. Accordingly, the respondent=s claim that his testimony has been improperly characterized as a Aconfession@ is without merit. As to the new expert testimony concerning the consistency of the appearance of the fatal wound with bullets fired from the respondent=s gun, this evidence merely conflicts with the testimony of the medical examiner at trial that the wound was consistent with a bullet fired from a high caliber weapon. The respondent has presented no uncontroverted evidence that someone else fired the fatal shot. Even considering the Anew evidence@, the respondent has presented no extenuating circumstances that warrant issuance of a certificate of commutation from this Court.

Consequently, in light of the many avenues of judicial review which now exist and are available to prisoners sentenced to death and in light of the fact that the respondent relies solely upon extra-judicial Anew evidence@ that is aimed at impeaching the verdict of the original jury, I fully concur in the Court=s denial of the respondent=s request for a certificate of commutation pursuant to Tenn. Code Ann. ' 40-27-106.

Having so stated, I emphasize that executive clemency operates outside the letter of the law. The executive clemency process is a vehicle for mercy. Ex parte Tucker, 973 S.W.2d 950, 952 (Tex. Crim. App. 1998) (Overstreet, J., concurring). The executive is not required to confine his or her clemency determination to those facts contained in the record of the judicial proceeding. Executive clemency has been appropriately described by the United States Supreme Court both as the A>fail safe= in our criminal justice system@ and Athe traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion. . . .@ Herrera, 506 U.S. at 415-17, 113 S. Ct. at 868-69; see also Workman v. Bell, No. 96-6652 (6th Cir. May 10, 1999) (Order on Petition for Rehearing En Banc) (Citing Herrera and stating A[a]lthough this court expresses no view as to whether Workman is actually innocent, if

that is the situation, >the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.=@).

The clemency power in England was vested in the Crown and can be traced back to the 700's. Herrera, 506 U.S. at 412, 113 S. Ct. at 866. Blackstone characterized executive clemency as Aone of the great advantages of monarchy in general, above any other form of government.@ 4 W. Blackstone, Commentaries *397. Because there was no right of appeal until 1907, clemency provided the principal avenue of relief for individuals convicted of criminal offenses, most of which were capital crimes. Herrera, 506 U.S. at 412, 113 S. Ct. at 867.

Both the Constitution of the United States and the Constitution of Tennessee adopt the British model and give to the executive the power to grant reprieves and pardons. United States Const. Art. 2, sec. 2, cl. 1; Tenn. Const. Art. III, sec. 6; see also Carroll v. Raney, 953 S.W.2d 657, 659-60 (Tenn. 1997). In an early case, Chief Justice Marshall provided the following explanation of the relationship between the executive clemency power and the judicial process.

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.

United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61, 8 L. Ed. 640 (1833) (emphasis added).

Although Justice Marshall made this statement more than 150 years ago, the pronouncement remains sound. The respondent=s Anew evidence@ consists entirely of Afacts not brought regularly into the cause.@ In other words, the Anew evidence@ is not a part of the record in any regular judicial proceeding. Accordingly, it is clear that a request for executive clemency pursuant to Tenn. Code Ann. ' 40-27-105 is the appropriate and only available avenue for the

respondent to assert his claims which are based upon new extra-judicial information.

Although I fully realize that executive clemency decisions are outside the domain of the courts, in this separate concurring order, I feel it is appropriate to state my concerns. In almost twenty years of service as a justice on the Tennessee Supreme Court, I have participated in reviewing the sentences in 117 death penalty cases and have been the author of the majority opinion of this Court in thirty-one of those cases and the author of the minority opinion in five of those cases. In addition, I have reviewed innumerable reports of trial judges in first degree murder cases in which a sentence of life imprisonment or life imprisonment without the possibility of parole was imposed. **I have no hesitation in observing that the circumstances of this case are by no means as egregious as most of the death penalty cases I have reviewed. See, e.g., State v. Pike, 978 S.W.2d 904 (Tenn. 1998); State v. Blanton, 975 S.W.2d 269 (Tenn. 1998); State v. Hall, 958 S.W.2d 679 (Tenn. 1997); State v. Cazes, 875 S.W.2d 904 (Tenn. 1994); State v. Howell, 868 S.W.2d 238 (Tenn. 1993); State v. Smith, 868 S.W.2d 561 (Tenn. 1993); State v. Caughron, 855 S.W.2d 526 (Tenn. 1993); State v. Alley, 776 S.W.2d 506 (Tenn. 1989); State v. West, 767 S.W.2d 387 (Tenn. 1989); State v. Melson, 638 S.W.2d 342 (Tenn. 1982). Furthermore, the circumstances of this case are less egregious than many of the life sentence cases I have reviewed. See, e.g., State v. Harris, 989 S.W.2d 307 (Tenn. 1999); State v. Jack Jay North, No. 02C01-9512-CC-00369 (Tenn. Crim. App., at Jackson, Dec. 12, 1996), app. denied (Tenn. 1997); State v. Kelley, 638 S.W.2d 1 (Tenn. Crim. App. 1984), app. denied (Tenn. 1984); State v. Turnbill, 640 S.W.2d 40 (Tenn. Crim. App. 1982), app. denied (Tenn. 1982); State v. Wright, 618 S.W.2d 310 (Tenn. Crim. App. 1981), app. denied (Tenn. 1981). Clearly, these observations provide no legal ground for relief. The issue of statutory comparative proportionality was addressed and rejected in the respondent=s direct appeal to this Court. State v. Workman, 667 S.W.2d 44, 46 (Tenn. 1984), cert. denied 469 U.S. 873, 105 S. Ct. 226 (1984).[4] However, with respect to any executive clemency application that**

[4] **Although this Court=s proportionality review has been expanded upon since the Workman decision, see**

may be filed by the respondent, it is my belief that a final decision should be rendered only after full scrutiny and careful consideration has been given to both the circumstances of the respondent=s particular case and the circumstances of other similar first degree murder cases in Tennessee, regardless of the sentence imposed. The date set for execution of the sentence of death, April 6, 2000, affords the Governor sufficient time to carefully consider any executive clemency application that may be filed by the respondent.

_____

FRANK F. DROWOTA, III,
JUSTICE

State v. Barber, 753 S.W.2d 659, 665-66 (Tenn. 1988); State v. Bland, 958 S.W.2d 651, 661-674 (Tenn. 1997), we clearly stated in Bland that comparative proportionality review is not constitutionally required. Therefore, such a claim provides no basis for post-conviction relief.