

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**PHILIP RAY WORKMAN v. STATE OF TENNESSEE**

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**No. M1999-01334-SC-DPE-PD**  
**Filed February 28, 2001**

**DISSENTING ORDER**

I dissent from the Court's order setting a new execution date in this case. In January 2000, Workman filed with this Court a "Response to Motion to Set Execution Date and Motion for Certificate of Commutation," in which he moved this Court to certify, pursuant to Tenn. Code Ann. § 40-27-106 (1997),<sup>1</sup> that there were extenuating circumstances attending his case and that his punishment should be commuted. See *Workman v. State*, 22 S.W.3d 807, 807-08 (Tenn. 2000). A majority of this Court denied Workman's motion and set an execution date. I dissented at that time, however, because I felt that there were, indeed, extenuating circumstances in this case sufficient to justify a certificate of commutation. *Id.* at 817 (Birch, J., concurring in part and dissenting in part by separate order). I adhere to the views I expressed at that time, and I continue to believe this Court should stay Workman's execution and certify to the Governor a recommendation that Workman's sentence be commuted.

Two separate extenuating circumstances, in my view, necessitate the transmission of a certificate of commutation to the Governor: (1) Workman's death sentence is disproportionate and excessive considering the circumstances of this case, and a life sentence would be a more appropriate punishment, and (2) Workman asserts that newly discovered evidence, which has never been formally evaluated in any evidentiary hearing reviewed by this Court, may prove that he did not fire the shot which killed Memphis Police Lieutenant Ronald Oliver.

I. Proportionality

Tennessee law requires this Court to conduct a comparative proportionality review of all death penalty cases in order to determine whether "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." Tenn. Code Ann. § 39-13-206(d) (1999). The purpose of this review is "to eliminate the possibility that a person will be sentenced to death by the action of an aberrant jury and to guard against the capricious or random imposition of the death penalty." *State v. Bland*, 958 S.W.2d 651

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<sup>1</sup>Tenn Code Ann. § 40-27-106 (1997) provides, "The governor may . . . 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."

(Tenn. 1997). Such a review was conducted on direct appeal, and the Court concluded that “the sentence of death under the circumstances of this case is in no way arbitrary or disproportionate.” State v. Workman, 667 S.W.2d 44, 46 (Tenn. 1984). Thus, the issue of proportionality has been previously determined and will not be re-decided by the Court at this juncture.<sup>2</sup> Nevertheless, in my view, the circumstances of this case strongly indicate that Workman’s death sentence is the disproportionate action of an aberrant jury. The lack of proportion between Workman’s crime and the penalty imposed should be treated as an extenuating circumstance, and this Court should have acknowledged that extenuating circumstance formally by certifying that Workman’s sentence be commuted.

Philip Workman was convicted of first degree murder in the perpetration of a robbery for shooting and killing police officer Ronald Oliver during a shootout following Workman’s robbery of a Wendy’s restaurant. See generally State v. Workman, 667 S.W.2d 44, 46 (Tenn. 1984). Oliver’s death, though unquestionably reprehensible, was not brought about by any abnormally torturous or violent means compared to typical homicides. The record reflects that the jury did not find that the murder was premeditated. In addition, Workman’s criminal record as disclosed at trial does not include any prior violent crimes. Finally, at least one of the statutory aggravating factors relied upon by the jury during sentencing was invalid.<sup>3</sup> In my view, when the facts and circumstances of this case are considered, they are far less egregious than the circumstances of most

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<sup>2</sup>On direct appeal, the Court only briefly discussed proportionality analysis, stating simply that “the sentence of death under the circumstances of this case is in no way arbitrary or disproportionate.” State v. Workman, 667 S.W.2d 44 (Tenn. 1984). In the years following that decision, the comparative proportionality review protocol has been expanded upon significantly, so that reviewing courts must now conduct a much more involved analysis in determining whether a death sentence is proportionate. See State v. Bland, 958 S.W.2d 651, 661-74 (Tenn. 1997). This expansion does not provide Workman with a basis for post-conviction relief, however, because the United States Supreme Court has held that comparative proportionality review is not constitutionally required. See Pulley v. Harris, 465 U.S. 37, 50-51, 104 S. Ct. 871, 879-80, 79 L. Ed. 2d 29 (1984).

<sup>3</sup>One of the aggravating factors found by the jury under the then-applicable first degree murder sentencing statute was that the defendant committed the murder during the commission of, or while “fleeing after having a substantial role in committing,” a robbery. See Tenn. Code Ann. § 39-2-203(i)(7) (1984). As noted by the Court of Criminal Appeals during post-conviction review of this case, the (i)(7) aggravating factor was later found inapplicable in felony murder cases for double jeopardy reasons. See Workman v. State, 868 S.W.2d 705, 712 (Tenn. Crim. App. 1993) (citing State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)). In addition, a significant, but unresolved, question remains regarding whether the jury properly applied the aggravating factor that Workman committed the murder “during [his] escape from lawful custody . . . .” In order to apply this factor, the jury had to find that Workman had been taken, at least briefly, into police custody. One might argue that, upon being taken into custody, the course of Workman’s robbery had been brought to an end, and thus Workman’s conviction for murder during the perpetration of a robbery would be inconsistent. In its 1998 opinion, a three-judge panel of the United States Sixth Circuit Court of Appeals acknowledged this argument, but it concluded that Workman had failed to raise the argument at the appropriate time and thus the issue had been waived. See Workman v. Bell, 178 F.3d 759, 773 n.1 (6th Cir. 1998). The merits of the issue remain unaddressed by any court.

cases in which the Tennessee Supreme Court has affirmed the sentence of death on direct appeal.<sup>4</sup> See, e.g., State v. Hall, 957 S.W.2d 679 (Tenn. 1997) (defendant threw gasoline onto the victim while she was in her car and ignited it; the victim remained alive, conscious, and in severe pain for several hours before dying from third degree burns over her entire body); State v. Mann, 959 S.W.2d 503 (Tenn. 1997) (defendant was discovered by his 62-year-old, hearing impaired neighbor while burglarizing her home; he then assaulted her, stabbed her, raped her, and strangled her); State v. Shepherd, 902 S.W.2d 895 (Tenn. 1995) (defendant broke into the 88-year-old victim's home, robbed her, raped her, cut her throat, and placed her in a bathtub full of water; testimony indicated that the victim may have lived for hours after having her throat cut); State v. Keen, 926 S.W.2d 727 (Tenn. 1994) death penalty aff'd after resentencing, 31 S.W.3d 196 (Tenn. 2000) (defendant held his hand over the 8-year-old victim's mouth and raped her until she defecated, then wrapped a shoestring around her throat until it cut into her neck, strangled her, and threw her body into a local river); State v. Harris, 839 S.W.2d 54 (Tenn. 1992) (defendant and three others robbed the Rocky Top Motel in Gatlinburg, murdered a clerk by stabbing her 18 times, cutting her throat, and shooting her in the head, and murdered a guard by striking him on the head, stabbing him around the neck, and shooting him between the eyes); State v. Black, 815 S.W.2d 166 (Tenn. 1991) (defendant, while on weekend furlough on a conviction for shooting his girlfriend's ex-husband, shot and killed his girlfriend and her nine-year-old daughter as they slept and her six-year-old daughter as she tried to protect herself); State v. Alley, 776 S.W.2d 506 (Tenn. 1989) (defendant raped the victim with a stick, inserting the stick to the point of causing severe internal injury, struck her in the head in excess of 100 times, fracturing her skull, and strangled her).

Indeed, the facts of this case are less egregious than the facts of many cases the Court has reviewed in which a life sentence was imposed.<sup>5</sup> See, e.g., State v. Harris, 989 S.W.2d 307 (Tenn. 1999) (defendant and others stood on the side of the road and flagged down the victim's truck; they then took his wallet, ordered him into the back of the truck, shot him in the hip, drove him around for 20 or 30 minutes while he screamed for help and cried out in pain, and then shot him in the head); State v. Kelley, 683 S.W.2d 1 (Tenn. Crim. App. 1984), app. denied, (Tenn. 1984)

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<sup>4</sup>Under the sentencing statute applicable when Workman was tried, the jury could impose the death penalty only if it found that one or more statutory aggravating circumstances were present and that such circumstances were not outweighed by any mitigating circumstances present in the case. See Tenn. Code Ann. § 39-2-203(i) (1984). During the sentencing phase of Workman's trial, his defense counsel essentially conceded the presence of all five statutory aggravating factors argued by the State, but then did not present any mitigating proof, even though counsel had told the jury during his opening statement that such proof would be offered. Although a panel of the Sixth Circuit Court of Appeals observed that Workman later presented "very compelling mitigating evidence" of drug use, diminished capacity, and tragic family background during federal habeas corpus proceedings, that court declined to consider the evidence. See Workman v. Bell, 178 F.3d 759, 770 (6th Cir. 1998).

<sup>5</sup>The following cases were cited by Justice Drowota in a prior concurring order in which he recommended that Workman "should take the opportunity to file an application for executive clemency." Workman v. State, 22 S.W.2d 807, 809, 813 (Drowota, J., concurring by separate order). In his concurrence, however, Justice Drowota noted that Workman's sentence had been found proportionate on direct appeal and that the cited cases provided "no legal ground for relief," id. at 813 (Drowota, J., concurring by separate order), and he joined the majority in denying a certificate of commutation to the governor.

(defendants opened fire on a family fishing on the bank of a river, killing three victims and wounding a fourth, in an apparently random attack with no stated motive); State v. Turnbull, 640 S.W.2d 40 (Tenn. Crim. App. 1982), app. denied (Tenn. 1982) (defendant punched the victim in the face, kicked him in the head and side, stomped him in the face hard enough to leave tread marks from his tennis shoe on the victim's face, and beat the victim for twenty-five to thirty minutes, causing the victim to die the following morning from head trauma).

When the facts of Workman's case are compared to the facts of the above-cited cases, it becomes evident that Workman's crime is inconsistent with those cases for which a death sentence typically is imposed. The disproportionate punishment that has been imposed in this case should be treated as an extenuating circumstance, and thus in my view this Court should stay Workman's execution and certify to the Governor that this death sentence should be commuted to a more fitting and proportionate punishment.

## II. New Evidence

Workman contends that x-ray evidence which was not disclosed by the prosecution until long after his trial supports his theory that Lieutenant Oliver may have been killed by "friendly fire" rather than by a bullet from Workman's own gun. He further contends that the only witness at trial who testified to seeing Workman shoot Oliver now claims that he offered perjured testimony under instruction from the prosecution. See Workman v. State, 22 S.W.3d 807, 812-13 (Tenn. 2000). Workman's evidence has never been presented or evaluated in any formal hearing reviewed by this Court. See id. at 812-13 (Drowota, J., concurring by separate order) (noting that "the 'new evidence' [in this case] is not a part of the record in any regular judicial proceeding").

In September 2000, the en banc United States Court of Appeals for the Sixth Circuit reviewed Workman's claims and considered whether to reverse the district court's grant of summary judgment in favor of the State of Tennessee on Workman's petition for a writ of habeas corpus. See Workman v. Bell, 227 F.3d 331, 332-33 (6th Cir. 2000). That court announced that it was deadlocked, and thus it rejected Workman's request for a hearing to evaluate whether the new evidence he had offered was sufficient to justify the issuance of a writ of habeas corpus. Seven of that court's judges, however, including Chief Judge Martin, stated that they would reverse the district court's grant of summary judgment and remand the case for an evidentiary hearing. They explained, "We believe Workman has raised facts sufficient to make a prima facie showing that a reasonable jury would not have found him guilty, or alternatively would not have sentenced him to death, if the new evidence is proven and believed." Id. at 337 (Merritt, J., opinion in split decision).

The evidence upon which Workman bases his claims is clearly extra-judicial, for it has not been made a part of the record in any formal evidentiary hearing. Extra-judicial facts may not be relied upon as extenuating circumstances to justify a certificate of commutation because the Court in making its decision may "consider only facts contained in the record, or facts which are uncontroverted." Workman v. State, 22 S.W.3d 807, 808 (Tenn. 2000) (majority order); see also Anderson v. State, 383 S.W.2d 763 (Tenn. 1964); Bass v. State, 231 S.W.2d 707 (Tenn. 1950).

Therefore, in evaluating whether extenuating circumstances exist in this case, it would be improper to judge the weight or the veracity of the alleged new evidence Workman has offered. However, it would not be improper to observe the uncontroverted fact that seven judges of the United States Court of Appeals for the Sixth Circuit, including the Chief Judge, have concluded that Workman's claims are sufficient to justify a formal hearing to more fully explore the merits of his claims. See Bell, 227 F.3d at 338 (Merritt, J., opinion in split decision). Moreover, it would not be improper to observe that, if true, Workman's allegations would be particularly serious because the evidence he offers undermines the theory pursued by the prosecution at trial, and furthermore the evidence allegedly was beyond Workman's reach at the time of his trial because of the actions of the prosecution. See id. at 337-38. I emphasize that I do not presume to actually weigh or review the evidence Workman has offered, nor do I express any opinion with respect to the veracity of Workman's allegations of prosecutorial misconduct in this case. However, I nonetheless would recognize that the claims are significant and have been so acknowledged by seven esteemed judges of the Sixth Circuit Court of Appeals. That Workman may be executed without ever having been afforded an opportunity to prove his claims in an evidentiary hearing before any court should be deemed an extenuating circumstance which, in my view, justifies issuance of the certificate of commutation.

### III. Conclusion

I continue to believe that sufficient extenuating circumstances exist in this case to justify this Court's certification to the Governor that Workman's sentence ought to be commuted. Given my concerns, I cannot agree with the majority's order setting a new date for Workman's execution, and therefore I dissent.

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ADOLPHO A. BIRCH, JR., JUSTICE