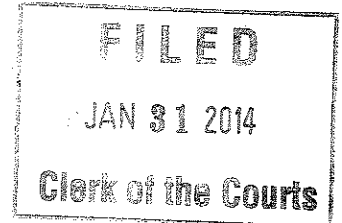


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN v. STATE OF TENNESSEE

**Criminal Court for Davidson County
No. 87W417**

No. M1988-00026-SC-DPE-PD



ORDER

On October 3, 2013, the State filed a Motion to Reset Execution Date for Abu-Ali Abdur'Rahman. The motion stated that Mr. Abdur'Rahman had completed the standard three-tier appeals process. The State pointed out that this Court previously set an execution date for June 18, 2003, but that the United States Court of Appeals for the Sixth Circuit stayed execution pending disposition of proceedings in the federal courts. Ultimately, the case was appealed to the United States Supreme Court, which denied a writ of certiorari on June 25, 2012, and denied a rehearing on August 31, 2012. Therefore, under federal law, there is no longer pending a stay of execution, and the case is ripe for a new execution date to be set under Tennessee Supreme Court Rule 12.4(E).

On November 22, 2013, Mr. Abdur'Rahman filed a Response in Opposition to Motion to [Res]et Execution Date and Motion for Certificate of Commutation. The response alleged that an execution date should not be set because: (1) trial counsel was ineffective; (2) the State engaged in prosecutorial misconduct; (3) his sentence is disproportionate because a death sentence for drug-related killings violates evolving standards of decency; (4) there is an ongoing Federal Rule of Civil Procedure 60(b) motion pending in the federal courts; and (5) there is an ongoing challenge in state courts to the Department of Correction's newly adopted one-drug lethal injection protocol. Mr. Abdur'Rahman also requests that this Court issue a certificate of commutation to the Governor.

On December 3, 2013, Mr. Abdur'Rahman filed a Supplement to Response to Motion to Set Execution Date. Mr. Abdur'Rahman represented that he is a plaintiff in *West et al. v. Schofield et al.*, No. 13-1627-I (Davidson Chancery, filed Nov. 20, 2013), a declaratory judgment action challenging the constitutionality of the State's new one-drug lethal injection protocol. He attached a copy of the Complaint for Declaratory Judgment in that case, and

the chancery court's scheduling order dated December 3, 2013, which reflects that a trial date has been set for July 7, 2014. Mr. Abdur'Rahman requested that the Court reset his execution date for a date following the resolution of the declaratory judgment action.

The Court finds no legal merit to Mr. Abdur'Rahman's claim that his sentence was the result of ineffective assistance of counsel or prosecutorial misconduct; those issues were raised and found to be without merit in his direct and collateral appeals. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), *cert. denied* 498 U.S. 908 (1990); *James Lee Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. at Nashville, Feb. 23, 1995), *perm. app. denied* (Tenn. Aug. 28, 1995), *cert. denied* 516 U.S. 1122 (1996); *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. denied* 534 U.S. 970 (2001); *Abu-Ali Abdur'Rahman v. Ricky Bell*, No. 3:96-0380, 2009 WL 211133 (M.D.Tenn. Jan. 26, 2009); *Abdur'Rahman v. Colson*, 649 F.3d 468 (6th Cir. 2011), *cert. denied* 133 S.Ct. 30 (2012), *reh'g denied* 133 S.Ct. 91 (2012).

Likewise, the Court finds no legal merit to Mr. Abdur'Rahman's claim that his sentence is disproportionate. While Mr. Abdur'Rahman asserts that evolving standards of decency preclude capital punishment for drug-related killings, we note that, to the contrary, under aggravated circumstances, prosecutors have sought, and juries have imposed, sentences of death. *See State v. David Lee Smith*, No. E2002-01232-CCA-R3-DD (Bradley Circuit No. 99-054, dismissed upon notice of defendant's death, Mar. 26, 2003); *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000); *State v. Wright*, 756 S.W.2d 669 (Tenn. 1988); *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985). The fact that a killing is drug related does not preclude capital punishment.

In the past, this Court has found little merit in arguments that an execution date should not be set because of ongoing federal litigation. Instead, the Court has consistently held that a request for a stay of execution pending litigation of claims in federal court is more appropriately addressed to the federal courts. *See Coe v. State*, 17 S.W.3d 251, 251 (Tenn. 2000).

Insofar as the pending declaratory judgment action, the Court notes the complaint alleges that (1) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it creates a risk of unnecessary pain when carried out in the manner prescribed; (2) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it requires the use of compounded Pentobarbital from non-FDA-approved sources, and compounded Pentobarbital has the potential to be contaminated or sub-potent, presenting a substantial risk of pain and suffering when administered according

to the protocol; (3) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it fails to provide for the adequate qualification and training of personnel, presenting the substantial risk of unnecessary pain and suffering during the execution process; (4) the new lethal injection protocol violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, section 16 of the Tennessee Constitution because it fails to conform to those accepted medical practices necessary to minimize the known risks involved in execution by lethal injection, presenting a substantial risk of unnecessary pain and suffering; (5) the new lethal injection protocol violates Article VI, section 2 of the United States Constitution and Article 1, section 8 of the Tennessee Constitution (the federal and state supremacy clauses) because its provisions violate various federal and state drug laws; and (6) the secrecy provisions of Tennessee Code Annotated section 10-7-504(h)(1), which shield from disclosure the identity of persons or entities involved in the process of executing a sentence of death, violate Article VI of the United States Constitution, the First and Fourteenth Amendments to the United States Constitution, Article 1, sections 8 and 17 of the Tennessee Constitution, and Article 2, section 2 of the Tennessee Constitution, because they deny death-sentenced inmates access to the courts, deny death-sentenced inmates due process, violate the federal and state supremacy clauses, and violate the constitutional provisions for separation of powers.

Previously, this Court has recognized that

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

State v. Stephen Michael West, No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010) (Order). Mr. Abdur'Rahman is correct that currently, there is no controlling law in Tennessee on the constitutionality of the use of the single drug, Pentobarbital, to execute a death row inmate, or on the legality of using compounded drugs from a non-FDA approved source to do so.

Having considered the Motion to Reset Execution Date, the Response and the Supplement to Response, this Court finds that while Mr. Abdur'Rahman has presented no legal basis for denying the State's Motion to Reset Execution Date, a short delay to allow the resolution of the declaratory judgment action challenging the constitutionality of the new

lethal injection protocol is appropriate. Therefore, the State's Motion is GRANTED. Mr. Abdur'Rahman has failed to allege sufficient extenuating circumstances that would merit a certificate of commutation. Accordingly, Mr. Abdur'Rahman's request for a certificate of commutation is DENIED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the sixth day of October, 2015, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. Abdur'Rahman shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM