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.

The death row inmate plaintiffs seek appellate review of the chancery court's ruling regarding the constitutionality of the State's newly-adopted Midazolam-based lethal injection protocol. At issue is whether the 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.

Following a ten-day trial, the chancery court ruled that the protocol was constitutional after considering the pleadings, testimony from twenty-three witnesses, 139 exhibits, argument of counsel, and applicable legal authorities. This was the first opportunity for a court in Tennessee to rule on the constitutionality of the State's new protocol. Within days of the ruling, the plaintiffs filed a notice of appeal with the Court of Appeals.

Today, a majority of the Court, on its own initiative, takes the unusual step of assuming jurisdiction from the Court of Appeals and then imposing unrealistic deadlines on the chancery court clerk, the chancery court judge, the parties, and this Court to fast-track the process. The apparent purpose of this "rocket docket" is to dispose of this appeal before the scheduled executions of plaintiffs Edmund Zagorski on October 11, 2018, and David Earl Miller on December 6, 2018.

Just a week ago today, this same majority declined to stay the execution by lethal injection of plaintiff Billy Ray Irick[1] and ruled that this appeal had *no likelihood of success* on the merits. *See State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Aug. 6, 2018) (order denying motion to vacate execution date). The majority now intends to

[1] The State executed Irick on August 9, 2018, at the Riverbend Maximum Security Institution, using the Midazolam-based protocol at issue.

provide Zagorski and the other plaintiffs with super-expedited appellate review before Zagorski's October 11 execution, even though Irick was deprived of any appellate review. This is difficult to understand since the United States Supreme Court declined to halt Irick's execution so he could obtain appellate review. *Irick v. Tennessee*, 585 U.S. ___, ___ (2018) (order denying application for stay of execution). Justice Sonia Sotomayor filed a forceful and well-reasoned dissenting opinion. *Id.* (SOTOMAYOR, J., dissenting) ("If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism.").

The best course of action is for this Court to allow the appeal to proceed in the Court of Appeals. The Court of Appeals may, within its discretion, expedite the appeal by reasonably shortening time limitations. After the Court of Appeals files its decision, if an application for permission to appeal under Tennessee Rule of Appellate Procedure 11 is filed by one or both of the parties, this Court can decide whether to grant review. In the meantime, the execution dates of Zagorski and Miller should be vacated to allow for appellate review.

The next best alternative is for this Court to reach down and assume jurisdiction under circumstances that allow for meaningful review. Our appellate review must not be "just for show." Here, the majority's highly expedited deadlines for filing the record, briefing, and review place an inordinate and unnecessary burden on the plaintiffs to have the testimony of twenty-three witnesses and other proceedings during the ten-day trial transcribed and filed with the chancery court clerk; on the chancery court judge to approve the transcripts and authenticate the exhibits; on the chancery court clerk to number, index, and assemble a record containing thousands of pages of testimony and exhibits and file it with the appellate court clerk; on the parties to prepare and file their briefs; and on the Court's ability to review the pleadings, thousands of pages of transcripts, nearly 140 exhibits, and applicable legal authorities, and then prepare and issue a written opinion or opinions. The deadlines mandated by the majority allow no room for extensions for cause and are not realistic, reasonable, or conducive to a deliberate and thoughtful consideration of the important issues presented in this appeal. These short deadlines call into question whether the parties will receive meaningful appellate review of the chancery court's decision.

Rule 2 of our Rules of Appellate Procedure authorizes the Court to expedite an appeal for good cause, but the deadlines imposed here are too extreme. For example, the Court orders that the record be filed by August 22, 2018, which is nine days from entry of the Court's order. The record consists of

> (1) copies, certified by the clerk of the trial court, of all papers filed in the trial court except as hereafter provided; (2) the original of any exhibits filed in the trial court; (3) the transcript or statement of the evidence or

> proceedings, which shall clearly indicate and identify any exhibits offered in evidence and whether received or rejected; (4) any requests for instructions submitted to the trial judge for consideration, whether expressly acted upon or not; and (5) any other matter designated by a party and properly includable in the record as provided in subdivision (g) of this rule.

Tenn. R. App. P. 24(a).

The Court does not specify to whom the nine-day deadline applies—whether it means the plaintiffs have nine days to have the proceedings from the ten-day trial transcribed and delivered to the chancery court clerk, or whether the chancery court clerk has nine days after the plaintiffs file the transcripts to assemble and file the record with the appellate court clerk, or, most likely, whether the plaintiffs and the chancery court clerk share the nine-day deadline with no delineation between the plaintiffs and the chancery court clerk. Moreover, the nine-day deadline provides no time for the chancery court judge to approve the transcripts and authenticate the exhibits or for the State to file any objection to the record.

This is problematic because under the Rules of Appellate Procedure, submitting the record is a three-part process. First, the plaintiffs (here the appellants) have sixty days after the filing of the notice of appeal to file a certified transcript of the proceedings with the chancery court clerk. Tenn. R. App. P. 24(b). Second, the chancery court clerk then has forty-five days after the filing of the transcript to assemble and transmit the record to the appellate court clerk. Tenn. R. App. P. 25(a)-(b). Assembling the record requires the clerk to, among other things, number the pages in the record; prepare a list of the numbered documents; compile the exhibits in numerical order, securely staple each exhibit to a blank page or place it in a durable envelope or plastic sheet protector and prepare a table of contents for the exhibits; prepare a table of contents of all the papers filed in the trial court with each document's corresponding page number; and bind all of the documents together. Last, before the clerk files the record with the appellate court clerk, the chancery court judge must approve the transcripts and authenticate the exhibits as soon as practicable or after the expiration of the fifteen-day period for objections by the State, but in all events within thirty days after the expiration of the time for filing objections. After this period of time, if the chancery court judge has not approved the transcripts and authenticated the exhibits, they shall be deemed to have been approved, unless the inaction was due to the chancery court judge's death or inability to act.

The Court has reduced the time frame for the three-step process of filing the record with the appellate court clerk from a minimum of 105 days (or more if an objection to the record is filed or if the record needs to be supplemented) to nine days

(seven days excluding a weekend) without specifying the individual deadlines applicable to the plaintiffs, the chancery court clerk, or the chancery court judge.

The plaintiffs have thirty days after the date the record is filed to file their brief. Tenn. R. App. P. 29(a). Their brief must include

> (1) A table of contents, with references to the pages in the brief;
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> (2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;
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> (3) A jurisdictional statement in cases appealed to the Supreme Court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the Supreme Court;
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> (4) A statement of the issues presented for review;
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> (5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below;
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> (6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;
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> (7) An argument, which may be preceded by a summary of argument, setting forth: (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);
>
> (8) A short conclusion, stating the precise relief sought.

Tenn. R. App. P. 27(a).

The State then has thirty days to file its brief after the filing of the plaintiffs' brief. Tenn. R. App. P. 29(a). The plaintiffs have fourteen days to file a reply brief. *Id.* The majority shrinks the regular briefing period from seventy-four days to thirty-seven days (twenty-six days, excluding weekends and Labor Day).

The Court's order sets oral argument for October 3, 2018. With Zagorski's execution set for October 11, the Court will have eight days after oral argument to prepare, circulate, and file its opinion and any separate opinions before his execution. Given the gravity of the issues presented in this appeal, the voluminous record to be reviewed, and the legal analysis to be made, the majority's super-expedited schedule is wholly inadequate.

A more just, measured, and reasoned approach would be for the Court to shorten all filing times by cutting them roughly in half:

- The plaintiffs file certified transcripts with the chancery court clerk within thirty days after entry of the Court's order;
- The chancery court judge approves the transcripts and authenticates the exhibits or they are deemed approved and the clerk assembles and files the record with the appellate court clerk within thirty days after the plaintiffs file the transcript;
- The plaintiffs file their initial brief within twenty days after the record is filed;
- The State files its brief within twenty days after the filing of the plaintiffs' initial brief; and
- The plaintiffs file their reply brief within seven days after the filing of the State's brief.

The Court would hear oral argument as soon as briefing is complete in late November or early December and issue its opinion soon thereafter. The Zagorski and Miller executions, depending on the outcome of the appeal, could then proceed with all deliberate speed—a brief respite, but a necessary one.

This appeal is of national interest because many states struggle with finding a constitutionally humane way to execute death row inmates. The issues in this appeal are of particular importance to the plaintiffs and the State since neither wants an execution protocol that results in torture to the inmate being executed.

It is essential that we 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. Ben Franklin's words from 1753—"haste makes waste"—continue to be good advice.

Sharon G. Lee

SHARON G. LEE, JUSTICE