



News Release

Office of the Attorney General

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CONTACT: Leigh Ann Jones
(615) 741-5860
Leighannapple.Jones@ag.tn.gov

Attorney General Requests Execution Dates Be Set In Capital Cases

Today, on behalf of the Tennessee Department of Correction, Attorney General Herbert H. Slatery III requested the Tennessee Supreme Court set execution dates in eight capital cases.

The State, through the Department of Correction, is required by law to carry out death sentences by lethal injection; however, its ability to do so after June 1, 2018, is uncertain due to the ongoing difficulty in obtaining the necessary lethal injection chemicals.

In each of these cases, decades have passed since juries in multiple districts across the State sentenced the defendants to death. All of the defendants have long since concluded the standard three-tier appeals process and each case has been thoroughly litigated in the state courts and on federal review through the United States Supreme Court.

The Tennessee Constitution guarantees victims of crime the right to a “prompt and final conclusion of the case after the conviction of sentence.”

(Motion to Set Execution Dates is attached below.)



FILED
 FEB 15 2018
 Clerk of the Appellate Courts
 Rec'd By _____

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,)	
)	
Movant,)	
)	
v.)	
)	
)	
DONNIE JOHNSON,)	No. M1987-00072-SC-DPE-DD
STEPHEN MICHAEL WEST,)	No. M1987-00130-SC-DPE-DD
EDMUND ZAGORSKI,)	No. M1996-00110-SC-DPE-DD
LEROY HALL,)	No. E1997-00344-SC-DDT-DD
ABU-ALI ABDUR'RAHMAN,)	No. M1988-00026-SC-DPE-PD
CHARLES WALTON WRIGHT,)	No. M1985-00008-SC-DDT-DD
NICHOLAS TODD SUTTON, and)	No. E2000-00712-SC-DPE-DD
DAVID EARL MILLER,)	No. E1982-00075-SC-DDT-DD
)	
Defendants.)	

MOTION TO SET EXECUTION DATES

The State of Tennessee requests that the Court set an execution date in each of the above-styled cases. Because there is no legal basis to deny or delay the setting of new execution dates in these cases, and because the Department has a statutory obligation to carry out judicially-imposed death sentences, the State seeks orders in these cases setting new execution dates before June 1, 2018. Sup. Ct. R. 12.4(E).

The State, through its Department of Correction, is required by law to carry out death sentences by lethal injection. Tenn. Code Ann. § 40-23-114(a). But its ability to do so after June

1, 2018, is uncertain due to ongoing difficulty in obtaining the necessary lethal injection chemicals.

This Court previously set dates of execution in each of these cases after determining that the defendants had completed the standard three-tier appeals process and that there is no legal basis for denying the State's request to carry out their criminal sentences. Sup. Ct. R. 12.4(A). The Court later vacated its order in each case due to ongoing litigation and appeal of a declaratory judgment action challenging the constitutionality of Tennessee's lethal injection protocol, which called for the use of the single drug pentobarbital. In the end, the Court determined that the inmates failed to show that the State's method of execution violated the Eighth Amendment or was otherwise unlawful. *West v. Schofield*, 519 S.W.3d 550 (Tenn.), *cert. denied*, *West v. Parker*, 138 S.Ct. 476 (2017), *cert. denied*, *Abdur'Rahman v. Parker*, 2018 WL 311479 (2018).

But, during the three-year pendency of the *West* litigation, death-penalty opponents working in conjunction with pharmaceutical companies succeeded in preventing Tennessee (and other states) from readily obtaining pentobarbital.¹ See *Glossip v. Gross*, 135 S.Ct. 2726, 2733-34 (2015) (describing interplay between anti-death-penalty advocates and pharmaceutical companies and its impact on drug availability for the purpose of lethal injection). Despite continuing efforts to identify an alternate source of pentobarbital, the Department currently has none on hand and no known source to obtain more. As a result, the Department deemed it necessary to provide an alternative drug combination to ensure it could comply with its statutory

¹ The Department's supply of pentobarbital expired while the *West* proceeding was pending.

obligation to carry out death sentences by lethal injection when ordered to do so. Thus, on January 8, 2018, the Commissioner of Correction approved a revised lethal injection protocol, which added, as an alternative to the existing single-drug protocol using pentobarbital, a protocol using a three-drug combination, consisting of midazolam, vecuronium bromide, and potassium chloride.

The United States Supreme Court and other federal appellate courts have uniformly rejected Eighth Amendment challenges to lethal injection protocols that use midazolam as the first drug in a three-drug combination. *Glossip*, 135 S.Ct. at 2739-40 (“numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from the administration of the paralytic agent and potassium chloride”). Indeed, the Supreme Court in *Glossip* specifically concluded that the federal district court did not err in finding that “midazolam is highly likely to render a person unable to feel pain during an execution.” *Id.* at 2739. *See also In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir.), *cert. denied*, 137 S.Ct. 2238 (2017) (reversing order enjoining three-drug protocol using midazolam: “[Ohio’s] chosen procedure here is the same procedure (so far as the combination of drugs is concerned) that the Supreme Court upheld in *Glossip*.”); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir.), *cert. denied*, 137 S.Ct. 1275 (2017) (evidence falls short of showing a significant possibility that Arkansas protocol is “sure or very likely” to cause severe pain and needless suffering); *Arthur v. Commissioner, Ala. Dep’t of Corr.*, 840 F.3d 1268 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 725 (2017) (inmate “has not carried his heavy burden to show that Alabama’s current three-drug protocol—which is the same as the protocol in

Glossip—is ‘sure or very likely to cause’ [inmate] serious illness, needless suffering, or a substantial risk of serious harm”).

Despite the holding in *Glossip* and other cases, the defendants have made it clear that they will ask this Court again to delay execution of their lawful sentences to allow them to mount yet another challenge the state’s lethal injection protocol. *See* Response to Notice (filed in each case on January 18, 2018). Pointing to anecdotal evidence from news reports, defendants will argue that midazolam is not effective in preventing pain and suffering caused by the second and third drugs of the protocol. And they will ask this Court to perpetuate the endless cycle of litigation created by supply pressures caused by drug companies acting at the behest of death penalty opponents. But the defendants will cite no decision of any court holding that the use of midazolam in a three-drug protocol involves a “substantial risk of serious harm” that is “sure or very likely to cause severe pain and needless suffering.” *West*, 519 S.W.3d at 565 (quoting *Baze v. Rees*, 553 U.S. 35, 49-50 (2014)). Nor can they do so because defendants’ tried-but-not-true argument has been consistently rejected across multiple jurisdictions.

Since *Glossip*, there have been fifteen executions in five different states and four different federal circuits using a three-drug protocol that includes midazolam. *See* Death Penalty Information Center, <https://deathpenaltyinfo.org/executions-united-states> (accessed February 14, 2018). As recently as February 1, 2018, the Sixth Circuit Court of Appeals rejected a challenge to Ohio’s midazolam-based, three-drug execution protocol. *In re: Ohio Execution Protocol Litigation*, ___ F.3d. ___, 2018 WL 651386 (6th Cir. 2018). Indeed, every federal appellate court

to consider a three-drug protocol using midazolam, including the United States Supreme Court, has upheld it.

Even though the United States Supreme Court “has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment,” *Glossip*, 135 S.Ct. at 2732, death-sentenced inmates in Tennessee have for more than a decade persisted in their efforts to delay their lawful executions through a succession of protocol challenges. In 2005, this Court concluded that Tennessee’s lethal injection protocol using sodium pentothal as the first drug of a three-drug combination did not violate the Eighth Amendment to the United States Constitution or article I, section 16 of the Tennessee Constitution. *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005). A second round of litigation led to the same result in 2012, when the Tennessee Court of Appeals concluded that the plaintiffs failed to carry their heavy burden to demonstrate that the Department’s lethal injection protocol, as revised in 2010, exposed them to an intolerable risk of severe and unnecessary pain and suffering or that an alternative method of execution is feasible, readily implemented, and significantly reduces any such risk. *West v. Schofield*, 380 S.W.3d 105 (Tenn. Ct. App. 2012) (citing *Baze v. Rees*, 553 U.S. 35, 61-62 (2008)).² This Court revisited the question in 2017 as to the single drug pentobarbital after the Department revised its protocol in response to drug-supply issues, again with the same result. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017).

²This Court denied discretionary review of the Court of Appeals’ decision. *Stephen Michael West, et al. v. Derrick Schofield, et al.*, No. M2011-00791-SC-R11-SC (Tenn. Aug. 17, 2012).

Under Sup. Ct. R. 12.4(E), after a date of execution is set, “the Court will not grant a stay or delay of an execution date pending resolution of collateral litigation in state court unless the prisoner can prove a likelihood of success on the merits in that litigation.” (Emphasis supplied.) The defendants have shown no likelihood that they will succeed in yet another protracted challenge to the Department’s lethal injection protocol. And, given the Supreme Court’s decision in *Glossip* and its progeny, the defendants, in fact, are not able to make that showing.

The State thus requests the following:

Donnie Johnson, No. M1987-00072-SC-DPE-DD: Johnson was convicted by a Shelby County jury in 1985, more than thirty years ago, for the first-degree murder of his wife, Connie Johnson. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987), *cert. denied*, 485 U.S. 994 (1988). Johnson completed the standard three-tier appeals process in 2004, and since that time, this Court has entered three separate orders setting dates of execution. The first two orders (setting dates of November 16, 2004, and October 25, 2006) were stayed by federal courts pending litigation on post-judgment motions filed in the context of Johnson’s federal habeas corpus action. On December 17, 2013, this Court set an execution date of March 24, 2015, but later vacated the order during the pendency of the *West* proceedings, the most recent round of litigation challenging Tennessee’s single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set Johnson’s execution date.

Stephen Michael West, No. M1987-00130-SC-DPE-DD: West was convicted by a Union County jury in 1987, more than thirty years ago, for the first-degree premeditated murders of Wanda Romines and her daughter, Sheila Romines, aggravated kidnapping of both victims,

and aggravated rape of Sheila Romines. *State v. West*, 767 S.W.2d 387 (Tenn. 1989), *cert. denied*, 497 U.S. 1010 (1990). He was sentenced to death for each of the murders and forty years in prison for each of the rape and kidnapping convictions. *Id.* West completed the standard three-tier appeals process in 2010, and since that time, this Court has entered three separate orders setting dates of execution. The Court first set an execution date of November 9, 2010, but later reset the date to November 30, 2010, to allow West to present evidence in the Davidson County Chancery Court on a challenge to Tennessee's sodium thiopental-based three-drug lethal injection protocol. On November 29, 2010, the Court stayed the executions of West and three other death-sentenced inmates to allow further review of the protocol. As outlined above, that challenge was ultimately unsuccessful. In the meantime, however, sodium thiopental became unavailable to Tennessee, necessitating a new lethal injection protocol and spawning a new legal challenge.

On December 17, 2013, this Court set an execution date of February 10, 2015, but later vacated the order during the pendency of the most recent round of litigation challenging Tennessee's single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set West's execution date.

Edmund Zagorski, No. M1996-00110-SC-DPE-DD: Zagorski was convicted by a Robertson County jury in 1984, more than thirty years ago, for the first-degree murders of John Dotson and Jimmy Porter. He was sentenced to death for each of the murders. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986). He completed the standard three-tier appeals process in 2010, and this Court set an execution date of January 11, 2011. On

October 25, 2010, defendant West filed a declaratory judgment action challenging Tennessee's three-drug lethal injection protocol. On November 29, 2010, this Court stayed Zagorski's execution during the pendency of that litigation, which was ultimately unsuccessful. In the meantime, however, the drug at issue in that case, sodium thiopental, became unavailable to Tennessee, necessitating a new lethal injection protocol and a new legal challenge.

On January 31, 2014, this Court set an execution date of December 9, 2014, but later vacated the order during the pendency of the most recent round of litigation challenging Tennessee's single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set Zagorski's execution date.

Leroy Hall, No. E1997-00344-SC-DDT-DD: Hall was convicted by a Hamilton County jury in 1992 for the first-degree murder of Traci Crozier and for aggravated arson. He received consecutive sentences of death for the murder and twenty-five years in prison for arson. *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997), *cert. denied*, 524 U.S. 941 (1998). In 2011, a federal district court granted Hall's request to dismiss his application for federal habeas corpus relief and to forgo his appeal. *Lee Hall v. Ricky Bell, Warden*, No. 2:06-cv-56 (E.D. Tenn. Sept. 22, 2011). On August 12, 2014, this Court set an execution date of January 12, 2016, but later vacated the order during the pendency of the most recent round of litigation challenging Tennessee's single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set Hall's execution date.

Abu-Ali Abdur'Rahman, No. M1988-00026-SC-DPE-PD: Abdur'Rahman was convicted by a Davidson County jury in 1987, more than thirty years ago, for the first-degree

murder of Patrick Daniels and sentenced to death. He was also convicted of assault with intent to commit murder of Norma Norman and armed robbery, receiving consecutive life sentences for those convictions. *State v. Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990). Abdur'Rahman initially completed the standard three-tier appeals process in 2000, but a federal district court later granted his motion to consider the merits of certain claims that it had earlier concluded were procedurally defaulted, ultimately denying relief in 2009. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court, and the United States Supreme Court denied certiorari. *Abdur'Rahman v. Colson*, 649 F.3d 468 (6th Cir. 2011), *cert. denied*, 133 S.Ct. 30 (2012) (reh. denied).

On January 31, 2014, this Court set an execution date of October 6, 2015, but later vacated the order during the pendency of the most recent round of litigation challenging Tennessee's single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set Abdur'Rahman's execution date.

Charles Walton Wright, No. M1985-00008-SC-DDT-DD: Wright was convicted by a Davidson County jury in 1985, more than thirty years ago, of the first-degree murders of Gerald Mitchell and Douglas Alexander. He was sentenced to life imprisonment for the murder of Mitchell and death for the murder of Alexander. *State v. Wright*, 756 S.W.2d 669 (Tenn. 1988), *cert. denied*, 488 U.S. 1034 (1989). Wright completed the standard three-tier review process in 2011. On December 17, 2013, this Court set an execution date of August 18, 2015, but later vacated the order during the pendency of the most recent round of litigation challenging

Tennessee's single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set Wright's execution date.

Nicholas Todd Sutton, No. E2000-00712-SC-DPE-DD: Sutton was convicted by a Morgan County jury in 1986, more than thirty years ago, of the first-degree murder of Carl Estep for which he was sentenced to death. *State v. Sutton*, 761 S.W.2d 763 (Tenn. 1988), *cert. denied*, 497 U.S. 1031 (1990). Sutton completed the standard three-tier review process in 2012. On December 17, 2013, this Court set an execution date of November 17, 2015, but later vacated the order during the pendency of the most recent round of litigation challenging Tennessee's single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set Sutton's execution date.

David Earl Miller, No. E1982-00075-SC-DDT-DD: Miller was convicted by a Knox County jury in 1982, more than thirty-five years ago, of the first-degree murder of Lee Standifer for which he was sentenced to death. This Court affirmed the conviction but reversed the death sentence and remanded for a new sentencing hearing. *State v. Miller*, 764 S.W.2d 279 (Tenn. 1985). Following a resentencing hearing in 1987, the jury again sentenced Miller to death. *State v. Miller*, 711 S.W.2d 401 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990). Miller completed the standard three-tier appeal process in 2013.

On December 17, 2013, this Court set an execution date of August 18, 2015, but later vacated the order during the pendency of the most recent round of litigation challenging Tennessee's single-drug lethal injection protocol using pentobarbital. That matter is now complete, and the Court should re-set Miller's execution date.

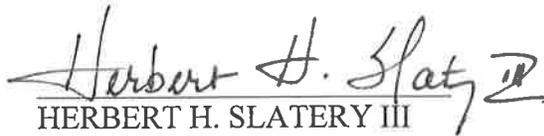
CONCLUSION

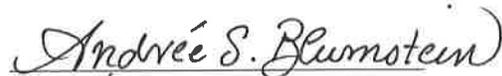
In each of these cases, decades have passed since juries in multiple districts across the State sentenced the defendants to death. Each of the defendants has long since concluded the standard three-tier appeals process described in Sup. Ct. R. 12.4(A), and each case has been thoroughly litigated in the state courts and on federal habeas review through the United States Supreme Court.

Years of delay between sentencing and execution undermines confidence in our criminal justice system. Justice Lewis Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989). Conversely, finality advances values “essential to the operation of our criminal justice system.” *Teague v. Lane*, 489 U.S. 288, 309 (1989). It provides peace of mind to a wrongdoer’s victims, promotes public confidence in the justice system, and conserves limited public resources. *Buck v. Davis*, 137 S.Ct. 759, 785 (2017) (Thomas, J., dissenting). Indeed, the Tennessee Constitution guarantees the victims of crime the right to a “prompt and final conclusion of the case after the conviction or sentence.” Tenn. Const., art. I, sec. 35.

Because there is no legal basis to deny or further delay the setting of new execution dates in these cases, the State of Tennessee requests that the Court set the executions in these cases for dates before June 1, 2018.

Respectfully submitted,


HERBERT H. SLATTERY III
Attorney General and Reporter


ANDRÉE S. BLUMSTEIN
Solicitor General


JENNIFER L. SMITH
Associate Solicitor General
P. O. Box 20207
Nashville, Tennessee 37202
Phone: (615) 741-3487
Fax: (615) 741-2009

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion was forwarded by United States mail, first-class postage prepaid, and by email on the 15th day of February, 2018, to the following:

Kelley Henry, Assistant Federal Public Defender
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37202

Stephen M. Kissinger, Assistance Federal Community Defender
Susanne Bales, Assistant Federal Community Defender
Stephen Ferrell, Assistant Federal Community Defender
Federal Defender Services of Eastern, Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929

Kathleen Morris
Attorney at Law
42 Rutledge Street
Nashville, TN 37210

Deborah Y. Drew
Andrew L. Harris
Office of the Post-Conviction Defender
P.O. Box 198068
Nashville, TN 37219-8068



JENNIFER L. SMITH
Associate Solicitor General