

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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ATTORNEY GENERAL'S  
OFFICE

No. 96-6652

PHILIP R. WORKMAN, )  
 )  
Petitioner-Appellant, )  
 )  
v )  
 )  
RICKY BELL, Warden. )  
 )  
Respondent-Appellee. )

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE

PETITIONER PHILIP RAY WORKMAN'S  
PETITION FOR REHEARING  
AND SUGGESTION FOR REHEARING EN BANC

DEATH PENALTY HABEAS CORPUS CASE

EXECUTION DATE: 4/6/2000 AT 1.A.M.

Christopher M. Minton  
Office of the Post-Conviction Defender  
460 James Robertson Parkway  
Nashville, Tennessee 37243  
(615) 253-1986

Saul Belz  
Waring Cox  
50 North Front Street  
Memphis, Tennessee  
(901) 543-8000

REQUIRED STATEMENT FOR PETITION FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

Will this Court tolerate, without any investigation, the failure to produce subpoenaed evidence which leaves no doubt that a condemned man is innocent of capital murder?

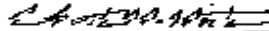
  
Christopher M. Minton  
Counsel for Philip Workman

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1 INTRODUCTION

In the District Court, Workman asserted that he is innocent of capital murder because he did not fire the bullet that killed Memphis Police Lieutenant Ronald Oliver.<sup>1</sup> See State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988). To support this allegation, Workman noted that his gun was loaded with .45 caliber aluminum-jacketed hollow-point bullets, such bullets rarely exit a body they strike, and if they do they leave an exit wound significantly larger than the entry wound. Because the Oliver Autopsy Report records an exit wound to Oliver slightly smaller than the entry wound,<sup>2</sup> Workman asserted that wound could not have been caused by one of his bullets. Workman alleged that a jury nonetheless found otherwise because counsel failed to investigate the physical evidence and the State presented Harold Davis's perjured testimony that he saw Workman shoot Oliver.<sup>3</sup>

The District Court authorized Workman to serve Fed.R.Civ.P. 45 subpoenas,<sup>4</sup> and on June 2, 1995, Workman served the Shelby County Medical Examiner's Office a subpoena requesting, among other things, any x-ray taken of Oliver's corpse.<sup>5</sup> While the Medical

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<sup>1</sup> Joint Appendix ("J.A.") at 27-68.

<sup>2</sup> J.A. at 1152.

<sup>3</sup> J.A. at 27-68. On September 30, 1999, counsel tracked down Davis at a Phoenix, Arizona, Motel 6. Davis admitted that contrary to his trial testimony, he did not see Workman or anyone else shoot Oliver. On November 19, 1999, counsel located Davis in an Arizona County Jail. Davis asserted that he lied at Workman's trial because authorities coerced him to do so. Davis has since disappeared. See Exhibit I filed with the panel in No. 00-5267 (Videotape of Davis Interviews).

<sup>4</sup> Appendix attached to 3/8/00 Memorandum In Support Of Motion To Reopen (filed with the panel in No. 96-6632) at 1.

<sup>5</sup> Appendix attached to 3/8/00 Memorandum In Support Of Motion To Reopen (filed with the panel in No. 96-6632) at 4.

1 INTRODUCTION

In the District Court, Workman asserted that he is innocent of capital murder because he did not fire the bullet that killed Memphis Police Lieutenant Ronald Oliver.<sup>1</sup> See State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988). To support this allegation, Workman noted that his gun was loaded with .45 caliber aluminum-jacketed hollow-point bullets, such bullets rarely exit a body they strike, and if they do they leave an exit wound significantly larger than the entry wound. Because the Oliver Autopsy Report records an exit wound to Oliver slightly smaller than the entry wound,<sup>2</sup> Workman asserted that wound could not have been caused by one of his bullets. Workman alleged that a jury nonetheless found otherwise because counsel failed to investigate the physical evidence and the State presented Harold Davis's perjured testimony that he saw Workman shoot Oliver.<sup>3</sup>

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Examiner's Office produced documents responsive to Workman's subpoena. It did not produce an x-ray of Oliver's chest.<sup>6</sup>

The District Court granted the State summary judgment, opining that Workman's evidence did not preclude the possibility that one of Workman's bullets killed Oliver.<sup>7</sup> The panel agreed. While it expressed "no doubt" that if the fatal bullet had emerged from Oliver's body intact it could not have come from Workman's gun, it affirmed the District Court "because the record in no way compels the conclusion that the bullet ... emerged ... in one piece."<sup>8</sup>

On January 29, 2000, Workman filed with the Tennessee Board of Probation and Parole an Application For Commutation of his death sentence. The Board set a March 9, 2000, hearing date and ordered Workman and the State to file statements outlining their positions on or before February 28, 2000. On that date, the District Attorney's Office for the 30th Judicial District filed its opposition. That opposition contains a report from the Medical Examiner's Office in which Dr. O. C. Smith states that prior to drafting the report he examined a chest x-ray of Lieutenant Oliver. Counsel immediately contacted the Medical Examiner's Office, and on March 2, 2000, counsel obtained a copy of the Oliver x-ray.

On March 4, 2000, counsel learned that the x-ray establishes that the bullet that killed

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<sup>6</sup> *Id.* at 6-32.

<sup>7</sup> J.A. at 1326.

<sup>8</sup> *Workman v. Bell*, 178 F.3d 759, 767 (6th Cir. 1998)(Workman attaches the panel's original decision as Appendix 1 to this rehearing request).

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Oliver emerged from his body intact.<sup>9</sup> On March 6, 2000, Workman filed in this Court a Motion To Reopen his case so that federal courts could consider the Oliver X-Ray, withheld in violation of a properly-issued subpoena, which leaves no doubt that Workman did not shoot Oliver. While Workman argues that the Oliver X-Ray entitled him to an unconditional writ of habeas corpus, in a footnote he alternatively requested that the panel either (1) grant him a conditional writ; or (2) remand this case to the trial court for further proceedings.<sup>10</sup> Having initiated court proceedings, Workman withdrew his Application For Commutation.

On March 8, 2000, the State filed its response. It argued that Workman could not demonstrate that the Medical Examiner's failure to produce the x-ray was reckless, and therefore this Court could not reopen the case. Workman replied that if this Court was hesitant to reopen this case on the basis of the current record, it should appoint a Special Master to hear evidence on why the Medical Examiner's Office failed to produce the Oliver x ray.

On March 31, 2000, the panel denied Workman's request to reopen his case. It opined that Workman had not made a sufficient showing for the relief he requested, and it specified that its denial was without prejudice to Workman's seeking any other relief to which he may be entitled.<sup>11</sup>

On March 31, 2000, Workman filed before the panel a second motion to reopen. In it

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<sup>9</sup> Appendix attached to 3/8/00 Memorandum In Support Of Motion To Reopen (filed with the panel in No. 96-6652) at 33.

<sup>10</sup> 3/6/00 Memorandum In Support Of Motion To Reopen at 8 n. 14.

<sup>11</sup> Workman attaches the panel's decision as Appendix 2 to this rehearing request.

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Workman noted that the panel order appeared to indicate that the panel had discerned a way for Workman to get his case heard on the merits - but counsel had yet to figure it out. Counsel thought that perhaps the panel was unwilling to grant Workman an unconditional writ of habeas corpus, and perhaps the footnote in which Workman requested alternative relief was an inappropriate method for making such a request. In the second Motion To Reopen, Workman therefore specifically prayed for either a conditional writ of habeas corpus or a remand to the District Court. In addition, Workman requested that if the panel was aware of an avenue of relief, but counsel still had not figured it out, the panel *sua sponte* grant Workman the relief to which he is entitled. As of the date of drafting this rehearing request, Workman's Second Motion To Reopen is pending before the panel.

**II THE EN BANC COURT SHOULD VACATE THE PRIOR PROCEEDINGS DUE TO THE MEDICAL EXAMINER'S FAILURE TO PRODUCE THE OLIVER X RAY**

Whether a fraud has been perpetrated on this Court is an issue particularly appropriate for en banc review. Each judge has an interest in maintaining the integrity of legal proceedings before this Court. A fraud upon one panel of this Court is a fraud upon each of this Court's judges.

**A Proceedings Before The Panel**

On appeal before the panel, Workman argued that the District Court's grant of summary judgment was improper because the record established a genuine issue of fact respecting whether the bullet that killed Lieutenant Oliver came from Workman's gun.<sup>12</sup> At

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<sup>12</sup> Brief of Appellant at 12-13.

oral argument, Judge Nelson asked Workman's counsel, "Was the body x-rayed?" Based on the subpoena response of the Medical Examiner's Office, counsel responded "Not that I am aware of", and counsel agreed with Judge Nelson's statement that there was no indication in the record that an x-ray was taken. ~~After the following exchange occurred between Judge Nelson and counsel for Workman.~~

Judge Nelson: I wonder if you're in a position to comment on the suspect likelihood that what happened here was that the bullet fragmented and that what exited the body was not the entire bullet but a little piece of bullet.

Mr. Minton: You're Honor, I'm not able right now to answer that question.

On October 30, 1998, the panel issued its opinion. Based on its understanding that no x-ray was taken of the Oliver corpse, the panel wrote

If a .45 caliber hollow point bullet had gone all the way through Lt. Oliver's chest and emerged in one piece, we have no doubt that the exit wound would have been larger than the entry wound. It hardly follows, however, that Lt. Oliver could not have been shot with the type of ammunition Workman was firing - *because the record in no way compels the conclusion that the bullet which killed the officer emerged from his body in one piece.*

Workman v. Bell, 178 F.3d 759, 767 (6th Cir. 1998)(emphasis added)(Appendix I, attached).

**B The En Banc Court Possesses Authority To Reopen This Case**

Because the record before the panel did not include the Oliver X-Ray, it did not compel the conclusion that the bullet which killed Lieutenant Oliver emerged from his body in one piece, and it therefore could not have come from Workman's gun. The x-ray was not in the record for one reason: in violation of a federal subpoena, the Medical Examiner's Office failed to produce it. In Dermianjuk v. Petrovsky, 10 F.3d 318 (6th Cir. 1993), a panel of this Court exercised its power to reopen a habeas case on facts similar to those presented here.

In Demjanjuk, the District Court issued denaturalization, deportation, and extradition orders upon a finding that the petitioner was a notorious Nazi war criminal. "Ivan the Terrible." This Court affirmed, and the petitioner was taken to Israel where he was convicted of war crimes and sentenced to death.

Six and a half years after this Court affirmed the District Court's orders, it learned that the Government had failed to produce documents the petitioner had requested during discovery. The documents contained a significant amount of information indicating that petitioner was not, as the District Court had found, "Ivan the Terrible." Pursuant to Fed.R.Civ.P. 60(b)(6), the All Writs Act, and its inherent power to protect the integrity of the judicial process, a panel of this Court reopened the petitioner's appeal. Finding that the Government recklessly deprived the petitioner and the federal courts of vital information indicating that the petitioner was not "Ivan the Terrible", the panel vacated its previous judgment and that of the District Court. Demjanjuk, 10 F.3d at 356.

C The En Banc Court Should Reopen This Case And Either (1) Order That Workman Is Entitled To A Writ Of Habeas Corpus; Or (2) Remand This Case To The District Court For Further Proceedings

As in Demjanjuk, Workman requested through discovery a specific document which a government record custodian had in its custody, but which the custodian withheld. As in Demjanjuk, the failure to comply with the discovery request deprived Workman, the District Court, and this Court of vital evidence that he is innocent of the charges that were brought against him. As in Demjanjuk, this Court should reopen this case.

Upon reopening a case, a court has wide discretion in choosing the relief it will order. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 243. In habeas corpus cases,

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28 U.S.C. § 2243 authorizes federal courts to dispose of habeas petitions "as law and justice require." This mandate "is broad with respect to the relief that may be granted". Carrigan v. LaVallee, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968).

This Court has two alternatives: (1) grant Mr. Workman's writ of habeas corpus; or (2) remand this case to the District Court for summary judgment proceedings during which Mr. Workman can present the Oliver X-Ray. Mr. Workman requests that this Court do either.

III IF THIS COURT IS HESITANT TO REOPEN THIS CASE ON THE BASIS OF THE RECORD, IT SHOULD APPOINT A SPECIAL MASTER TO INVESTIGATE WHY THE MEDICAL EXAMINER'S OFFICE FAILED TO PRODUCE THE OLIVER X-RAY

This Court has long recognized that whether one has engaged in fraudulent conduct is a question of fact. See Eaton Corp. v. Easton Associates, Inc., 728 F.2d 285, 292 (6th Cir. 1984); Price v. Commercial Union Assurance Co., 334 F.2d 673, 677 (6th Cir. 1964); Rooks v. American Brass Co., 263 F.2d 166, 169 (6th Cir. 1959). A reckless non-disclosure of evidence under subpoena supports a finding of fraud sufficient to reopen a case. See Demjanjuk v. Petrovsky, 10 F.3d at 348. This Court has the inherent power to appoint a Special Master to ascertain whether the Medical Examiner's failure to comply with the District Court's order to produce the Oliver X-Ray amounted to reckless conduct. Fed.R.Civ.P. 53(c); see Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946); Demjanjuk, 10 F.3d at 339. While the State suggested to the panel that such an investigation could not produce any evidence of recklessness, it offers nothing which supports such a suggestion.

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The State asked the panel to consider the Affidavit of Tami Ruth. In her affidavit, however, Ms. Ruth acknowledges that she has no present memory of seeing the subpoena Workman served for the Oliver X-Ray or any actions she or anyone else took as a result of it.<sup>13</sup> She states only that various events generally occur when she receives a subpoena, and there may have been "justifiable" reasons explaining why the x-ray was not produced.<sup>14</sup> These assertions do little, if anything, to preclude the possibility that the failure of the Medical Examiner's Office to produce a document under subpoena constituted reckless conduct.

Before the panel, the State contended that the actions of the Medical Examiner's Office cannot be imputed to Warden Bell, any attorney working for him, or the District Attorney's Office. The actions of any investigative officer, however, are imputed to the State. See U.S. v. Buchanan, 891 F.2d 1436, 1442 (10th Cir. 1989)(citing cases); Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984); Boone v. Paderisk, 541 F.2d 447, 450-51 (4th Cir. 1976). The Medical Examiner's Office investigates causes of death. T.C.A. §§ 38-7-106 (a). Indeed, it performs such an integral role in assisting the District Attorney's Office that a District Attorney General can order the Medical Examiner to perform an autopsy. *Id.* In addition, federal courts have held habeas respondent's responsible for producing, and for failing to produce, documents and things requested in discovery that were in the custody of State agencies other than the Department of Corrections. See in re Warden, Kentucky State Penitentiary, 865 F.2d 786 (6th Cir. 1988)(ordering habeas respondent to provide petitioner

<sup>13</sup> Exhibit B to 3/8/00 Response at ¶ 11.

<sup>14</sup> Exhibit B to 3/8/00 Response at ¶ 13.

access to trial exhibits); U.S. ex rel. Zembowski v. DeRobertis, 771 F.2d 1057, 1065 (7th Cir. 1985)(holding habeas respondent liable for recalcitrance in providing documents possessed by the District Attorney). Just because Warden Bell did not have possession of the Oliver X-Ray does not exonerate the State from repercussions flowing from the failure of the Medical Examiner's Office to produce it.

IV CONCLUSION

Workman subpoenaed the Oliver X-ray. It was not produced. It compels the conclusion that the bullet that killed Lieutenant Oliver emerged from his body intact. This fact leaves the panel "no doubt" the bullet that killed Lieutenant Oliver could not have come from Workman's gun, and Workman is therefore innocent of capital murder. The en banc Court should therefore reopen this case and either (1) grant Workman a writ of habeas corpus; or (2) remand this case to the District Court for further proceedings. If it is not willing on the current record to do so, the en banc Court should appoint a Special Master to ascertain why the Oliver X Ray was not produced.

Respectfully submitted,

*C. Minton*

Christopher M. Minton  
OFFICE OF THE POST-CONVICTION  
DEFENDER  
460 James Robertson Parkway  
Nashville, Tennessee 37243  
(615) 744 9331