

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN,)	
Petitioner-Appellant,)	
)	No. 96-6652
RICKY BELL, Warden,)	
Respondent-Appellee.)	
)	
In re: PHILIP R. WORKMAN,)	No. 00-5367
Movant.)	

DEATH PENALTY HABEAS CORPUS PROCEEDING
EXECUTION DATE: 3/30/01 1:00 a.m.

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

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REQUIRED STATEMENT FOR REHEARING EN BANC REQUEST

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

Did counsel engage in fraud by representing to this Court that Workman can argue his claims of innocence at a clemency hearing when counsel (1) apparently knew that false evidence had been manufactured for that hearing; and (2) had assumed a role as advisor to the clemency decision-makers?

Christopher M. Minton
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INTRODUCTION

In the original habeas proceeding, State's counsel represented that Workman could argue his claims of innocence at a clemency hearing. At that time, counsel had inserted themselves as advisor to the clemency decision-makers and was preparing the clemency case against Workman, an effort that apparently included the manufacturing of false evidence.

The panel's decision denying Workman's request to reopen the proceedings turns on the belief that

[a]lthough the State asserted that a clemency proceeding was available in which Workman could present evidence, it did not make a statement concerning the clemency proceeding that was intentionally false, wilfully blind to the truth, or in reckless disregard for the truth.

The panel fails to recognize, however, that at the time State's counsel represented that clemency was available, it had apparently been involved in the manufacture of false evidence for presentation at the clemency hearing. This apparent involvement casts doubt on previous State denials of misconduct on which this Court has relied in prior proceedings. With these denials called into doubt, the validity of the prior proceedings are called into doubt as well. This Court should therefore reopen those proceedings.

I STATE'S COUNSEL REPRESENTED THAT WORKMAN COULD ARGUE HIS CLAIMS OF INNOCENCE DURING CLEMENCY PROCEEDINGS

Tennessee's Constitution grants the Governor authority to grant pardons, reprieves, and, by implication, commutations. Tenn. Const. Art. III, § 6. To assist him in exercising this power, the Governor appoints persons to the seven-member Board of Probation and Parole (Parole Board). The Parole Board formally accepts an inmate's application for clemency, performs an independent investigation into the facts of the offense, and, if it chooses, holds a hearing. During

3/23/01 Order at 3.

these proceedings, the State is represented by the District Attorney General's Office for the Federal District in which the conviction occurred. See T.C.A. § 8-7-103. At the conclusion of any hearing, Parole Board members give their non-binding recommendation to the Governor. The Governor considers the recommendation and then makes his decision.

In the original habeas proceeding, Workman asserted claims tied to a showing that a fellow police officer, not Workman, shot Memphis Police Lieutenant Ronald Oliver, and under Tennessee law Workman is therefore innocent of capital murder. In denying Workman's Motion For Rehearing, the original panel expressed no view on whether Workman's claims established his innocence. It referred Workman to the above process and told him:

"the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Hereta v. Collins*, 506 U.S. 390, 417 (1993). Under Tennessee law, the governor may grant clemency, see Tenn. Code Ann. § 40-27-101, so Workman may present evidence to the governor that the fatal shot must have come from someone else's gun.²

Responding to Workman's original request that this Court recall the original panel's mandate or authorize a second habeas proceeding, State's counsel reminded this Court of that referral and represented that Tennessee's clemency process would provide Workman an opportunity to argue claims of innocence.³ As the next section demonstrates, at the time counsel did so, counsel was advising the Governor (clemency decision-maker), advising the Parole Board

² 5/10/99 Order, Appendix attached to Workman's Memorandum In Support Of Motion To Reopen And To Appoint A Special Master (App.) at 2.

³ 3/8/00 Response Of Respondent-Appellee To Petitioner's Motion To Reopen, No. 96-6652, at 12; 3/27/00 Response In Opposition To Petitioner's Motion For Leave To File A Second Habeas Corpus Petition, No. 00-5367, at 17.

(clemency advisor), and preparing the case against Workman with the Shelby County District Attorney's Office (clemency representative of the State) - an effort which apparently included manufacturing false testimony. State counsel's representation that clemency was available for claims establishing Workman's innocence was therefore made with, at the very least, a reckless disregard for the truth.

II STATE'S COLNSEL CORRUPTED THE CLEMENCY PROCESS

A While Advising The Governor And The Parole Board, The Attorney General's Office Prepared The Case Against Workman, Including The Apparent Manufacturing Of False Evidence

Prior to and during the clemency proceedings, (1) Summers informed Parole Board Chairman Charles Traugbter that members of the Attorney General's Office would act as advisors to the Parole Board in capital cases;⁴ (2) Summers appeared at the first of two clemency hearings "on behalf of the Governor";⁵ and (3) Summers, his Assistants, and Shelby County Assistant District Attorney (ADA) John Campbell prepared the case against Workman.⁶ In the

⁴ 9/30/99 Letter From Paul Summers to Charles M. Traugbter, App. at 3.

⁵ Transcript of *In Re: Philip Workman*, App. at 16.

⁶ See, e.g., 2/1/00 Communication From Pruden To Amy L. Tarkington, Joe Whalen, App. at 7 (members of the Attorney General's Office discuss was advice to give ADA Campbell); 2/25/00 Communication From John Campbell To Glenn Pruden, App. at 13 (Assistant Attorney General (AAG) Glenn Pruden and ADA Campbell discuss preparation of a witness); 12/11/00 Communication From Paul Summers To Glenn Pruden, App. at 17 (Summers informs AAG Pruden that at the second clemency hearing ADA Campbell should present evidence that he presented at the first clemency hearing); 12/19/00 Communication From Glenn Pruden To John Campbell, App. at 20 & 1/3/01 Communication From Glenn Pruden To John Campbell, App. at 22 (AAG Pruden and ADA Campbell work at getting a petition opposing clemency to the Governor); 1/2/01 Communication From Glenn Pruden To Michael Meyer, App. at 21 (AAG Pruden works to obtain Tennessee Bureau of Investigation records on Workman); 1/3/01 Communication From Paul Summers To John Campbell, App. at 23 (Summers recommends a witness for presentation at the clemency hearing); 1/10/01 Communication From:

In that capacity, the Attorney General's Office apparently worked with ADA Campbell in manufacturing false evidence against Workman.

1 The Attorney General's Office Was Involved In Taking And Presenting Clyde Keenan's Sworn Statements That No Other Police Officer Fired A Weapon

In the habeas proceedings, Workman asserted that Lieutenant Oliver was shot by a fellow officer at the scene - either Officer Aubrey Stoddard or Officer Stephen Parker - and under Tennessee law Workman was therefore innocent of capital murder. Evidence indicates that State's counsel was involved in manufacturing false evidence for the clemency hearing that no other policeman fired his weapon the night Lieutenant Oliver died.

On February 25, 2000, recused Parole Board Member Ray Maples¹ contacted ADA Campbell *ex parte* with suggestions for investigation. Specifically, Maples suggested that ADA Campbell investigate what time Memphis Police Lieutenant Clyde Keenan and his "Shoot Team" arrived at the scene and when examinations were made of the guns possessed by the other

Glenn Pruden To John Campbell, App. at 26 (AAG Pruden sets up a witness interview); 1/16/01 Communication From Glenn Pruden To Paul Summers et. al., App. at 27 (AAG Pruden and ADA Campbell work at locating persons to speak out against clemency at the clemency hearing); 1/17/01 Communication From Glenn Pruden To John Campbell, App. at 28 (AAG Pruden allows speeches of persons who will speak out against clemency); 1/18/01 Communication From Glenn Pruden To Paul Summers et. al., App. at 29 (AAG Pruden sets meeting with persons who will speak out against clemency to go over their speeches); 1/19/01 Communication From Glenn Pruden To Paul Summers, App. at 30 (AAG Pruden updates Summers on persons who will speak out against clemency); 1/19/01 Communication From Pruden To Summers, App. at 31 (Pruden assures Summers that speeches by persons who will speak out against clemency will meet Parole Board guidelines).

¹ At Workman's request, Maples recused himself because he was a lifetime Memphis Policeman.

officers at the scene.⁸

ADA Campbell forwarded Maple's suggestions to AAG Pruden in Nashville. AAG Pruden assigned AAG Whaler the tasks of reviewing the file to ascertain whether it contained any material addressing Maple's questions and then contacting ADA Campbell with his findings.⁹ AAG Pruden wrote ADA Campbell, "I was just thinking that this would be good if there is nothing in the file. Then we could get an affidavit from this person."¹⁰

On March 9, 2000, apparently satisfied that "there is nothing in the file", ADA Campbell obtained a sworn statement from Keenan at the State Attorney General's Office in Nashville. In that statement, Keenan swore that the night of the Oliver shooting, he was the Commander of the "Shoot Team," a group of officers that perform an investigation any time there was a police use of deadly force. Keenan claimed that he and fellow police officer Rick Wilson were immediately at the scene of the shooting. Keenan proclaimed: "We were probably on the scene between a minute and a minute and a half after the time that we heard the officer was down."¹¹ Keenan made further claims about what he supposedly saw when he arrived:

The first thing that we'd found was two officers down. Both of them were known to me. One of the officers was a former partner of mine by the name of Ronnie Oliver The other police officer, Officer Stoddard (sic), was an officer I was familiar with. He was down also. Stoddard (sic) had been hit in the arm. Oliver had been hit somewhere in the torso; was badly injured. And at that particular

⁸ 2/25/00 Communication From John Campbell To Glenn Pruden, App. at 13.

⁹ 2/25/00 Communication From Glenn Pruden To John Campbell, App. at 13.

¹⁰ *Id.*

¹¹ Transcript of 3/9/00 Sworn Statement, Appendix attached to Workman's 3/21/01 Supplemental Memorandum To Motion To Reopen And To Appoint A Special Master (App2) at 6.

point, we went to try to aid him in any way we could awaiting the arrival of the paramedic crews ... Officer Parker was ... standing actually between Lt. Oliver and Officer Stoddard (sic).¹²

Keenan continued that he went to Oliver's aid, and, after placing him in an ambulance, he began checking the weapons of the other officers that were at the scene:

[W]e needed to ... make sure that any weapons that were there on the scene were not any danger to anybody. So we actually check officers' weapons at that particular point... So the first thing that I did, the first weapon that I actually checked was Officer Parker's weapon, his service revolver... There was no indication at all that that weapon had been fired.¹³

ADA Campbell then asked: "What about Officer Stoddard (sic)? Was his weapon checked also?"¹⁴ Keenan responded:

His weapon was checked, and his was a little bit different situation. It was in his holster, and his weapon really ended up being checked at the hospital. So once he got to the hospital, both his weapon and the weapon for Lt. Oliver were secured. Lt. Oliver's had been fired. Stoddard's had not been fired.¹⁵

The State submitted Keenan's sworn statement at an April 3, 2000, clemency hearing held by a Policy Advisor to the Governor, Justin Wilson.¹⁶ Because this Court granted rehearing en banc the day after the Wilson hearing, the Governor withheld his decision on whether to commute Workman's death sentence.

In the fall of 2000, after this Court announced it was equally divided on whether to order

¹² *Id.* at 6-7.

¹³ *Id.* at 8-13.

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 13-14.

¹⁶ Transcript of 4/3/00 Clemency Proceeding, App2 at 21-22.

At a hearing, the Governor announced that Workman would have a second opportunity to present evidence on his claims, this time directly to the Parole Board. A hearing was scheduled for January 25, 2001. In preparation for that proceeding, Attorney General Summers contacted ADA Campbell to "recommend highly that you call Clyde Keenan to testify at the hearing."¹⁷

At the January 25, 2001, hearing, Keenan reiterated the substance of his prior statement, emphasizing that he was the first officer on the scene - arriving within one minute of hearing the cell "shots fired."¹⁸ Keenan also added that (1) he sent police officer Gary Bali from the crime scene to the hospital to check Stoddard's weapon,¹⁹ and (2) to check a gun to ascertain whether it was fired, one must examine it within a couple of hours of the incident.²⁰

2 Clyde Keenan's Sworn Statements Are False

Memphis Police Radio Dispatch Log Cards (Dispatch Cards), a transcript of police radio transmissions (Radio Transcript), and other police documents reveal that Clyde Keenan's sworn statements are false.

Time entries on the back of the Dispatch Cards record that the call "shots fired" went out at 22:35 (10:35 p.m.).²¹ The Dispatch Cards reveal that, contrary to Keenan's sworn statement:

¹⁷ 1/3/01 Communication From Summers To Campbell, App. at 23.

¹⁸ Transcript of 1/25/01 Clemency Hearing, App2 at 29, 42.

¹⁹ *Id.* at 40-41.

²⁰ *Id.* at 35.

²¹ Dispatch Card, App2 at 62.

and hearing testimony, Keenan (#1012)²¹ did not arrive at the scene until 22:41 (10:41 p.m.), six minutes after the "shots fired" call.²² The Dispatch Cards further reveal that Keenan was not, as he claimed, the first officer on the scene - numerous officers arrived before him.²³ Indeed, Officer Hayes (#105) had charge of the crime scene prior to Keenan's arrival.²⁴ And most telling, is that while Keenan claimed that he saw Stoddard lying on the ground with an arm wound, the Dispatch Cards and the Radio Transcript reveal that at the time Keenan actually arrived at the scene, Stoddard had already left for the hospital.

Police documents demonstrate that when Officer Barry Larkin (#146)²⁵ arrived at the scene, he put Stoddard in his patrol car and left for the hospital.²⁶ The Radio Transcript reveals that Larkin (#146) left the scene with Stoddard minutes before Keenan (#1012) arrived at the scene.²⁷ The Dispatch Cards confirm that Larkin (#146) left to transport Stoddard to the hospital

²¹ For purposes of radio communication, each Memphis Police Officer is assigned a number. At the January 25, 2001, hearing, Keenan stated that as Commander of the Shoot Team, he sent Officer Ball to the hospital to check Stoddard's weapon. Transcript of 1/25/01 Clemency Hearing, App2 at 29, 42. We therefore know that the number assigned to Keenan is 1012. See Radio Transcript, App2 at 55 (1012 radios "Advise Sgt. Ball from my unit on the scene to proceed immediately to John Gaston Hospital ...; 8/6/81 Police Report of Gary Ball, App2 at 58 (Lt. Keenan instructs Ball to go to the hospital)).

²² Dispatch Card, App2 at 62.

²³ *Id.*

²⁴ Arrest Reports, App2 at 63, 64.

²⁵ See Officer Roster, App2 at 66.

²⁶ 8/6/81 Statement of Otis W. Stewart, App2 at 65.

²⁷ Radio Transcript, App2 at 48.

at 22:39 (10:39 p.m.), and Keenan did not arrive at the scene until two minutes later.²⁹

Police documents further demonstrate that Keenan fabricated his claim that he immediately sent Officer Ball to the hospital to check Stoddard's weapon, and Stoddard's weapon was therefore secured as soon as Stoddard reached the hospital.

As noted earlier, the logs show "shots fired" at 22:35 (10:35 p.m.).³⁰ While Keenan did thereafter send Ball to the hospital, he did so *an hour and a half later*³¹ — and then not to have Stoddard's weapon checked but to see if Ball could get a statement from Workman who police were transporting to the hospital where Stoddard was being treated.³² Ball went to the hospital and did as instructed; he attempted to talk to Workman.³³

Ball first saw Stoddard's weapon *two hours later*, at 2:00 a.m., which was three and a half hours after the shooting.³⁴ And even then, Ball did not obtain Stoddard's weapon through a search aimed at securing it — officers who had taken custody of Oliver's and Stoddard's possessions approached him with the gun.³⁵ Keenan's story that he immediately sent Ball to the hospital to check Stoddard's weapon is simply false.

²⁹ Dispatch Card, App2 at 62.

³⁰ Dispatch Card, App2 at 62.

³¹ See 8/6/91 Police Report, App2 at 68 (Workman arrested at approximately Midnight — at that point Keenan directs Ball to go to the hospital).

³² *Id.*, App2 at 68.

³³ *Id.*

³⁴ *Id.*, App2 at 69.

³⁵ *Id.*

B The State Presented Dr. O.C. Smith's Fabricated Testimony That Scientific Evidence Establishes That Workman Shot Oliver

To counter Workman's expert evidence that the mortal wound to Oliver was inconsistent with wounds caused by Workman's ammunition, the State presented the Shelby County Medical Examiner, Dr. O.C. Smith. Based on a supposedly sophisticated scientific test, Smith stated that he was 100% certain that Workman shot Oliver.³⁶ Because the State provided Workman no notice of Dr. Smith's testimony, and because the Parole Board denied Workman the opportunity to cross-examine Smith, Workman was unable to challenge Smith's assertions. A subsequent investigation, however, reveals the utter unreliability of Smith's testimony.

Because Workman fired aluminum coated hollow-point bullets the night of Oliver's death, Dr. Smith stated that he decided to "investigate" whether Oliver's mortal wound contained aluminum residue. Smith testified that in an effort to establish this fact, he had soft tissue samples of Lieutenant Oliver's mortal wound tested for metals under a scanning electron microscope with energy dispersant of x-rays (SEM-EDX). He claimed that (1) before the test he was able to see under a microscope metallic fragments in the tissue samples,³⁷ (2) the test demonstrated these metallic fragments were aluminum,³⁸ and (3) when a similar test was run on a pig's foot which Dr. Smith shot with an aluminum coated bullet, a similar positive reading for aluminum occurred.³⁹ Based on these tests, Smith confidently asserted that he was 100% certain

³⁶ *Id.*, App. at 45-46.

³⁷ *Id.*, App. at 41.

³⁸ *Id.*, App. at 42.

³⁹ *Id.*, App. at 39.

that Workman shot Oliver.⁴⁰

Smith failed to tell the Parole Board, however, that he had his tissue samples tested earlier and those tests failed to show the aluminum which he claimed was present.⁴¹ This initial test is apparently accurate because bullets do not leave residue in soft human tissue.

Dr. Werner Spitz, author of the leading pathology treatise *Medicolegal Investigation of Death*, declares that (1) in his forty-eight years as a pathologist he has never heard of metal fragments from a bullet being left in soft human tissue; (2) he has never tested for trace metals in soft human tissue; and (3) he is not aware of any other pathologist who has ever performed such a test.⁴² The "test" supporting Dr. Smith's 100% certainty is, accordingly, no test at all. More troubling, however, is the fact that Smith left out vital details invalidating the results he obtained, details which indicate that his claims about Workman's guilt are simply not true.

Smith told the Parole Board that he used as a control a pig's foot he shot with an aluminum coated bullet. Dr. Smith testified that the pig's foot tested positive for aluminum, and this fact establishes that when an aluminum bullet travels through soft tissue it leaves aluminum residue.⁴³ The lab technician who actually performed the test on the pig's foot, however, declares that it did not test positive for aluminum.⁴⁴

⁴⁰ *Id.*, App. at 45.

⁴¹ 3/14/01 Affidavit of Lou Boykins, App. at 69 ¶5.

⁴² 3/9/01 Declaration of Werner U. Spitz, M.D., App. at 47.

⁴³ Transcript of *In Re: Philip R. Workman*, App. at 39.

⁴⁴ 3/14/01 Affidavit of Lou Boykins, App. at 71 ¶3; 3/15/01 Declaration of Dr. Azron Puckett, App. at 74 ¶¶3d; 76 ¶8.

While Dr. Smith had stated that he could see metal fragments in the tissue sample with his naked eye,⁴⁵ when the lab technician put the tissue sample under the electron microscope, she did not see any such claimed aluminum fragments.⁴⁶ Dr. Aaron Puckett, an expert in SEM-EDX, declares that if such fragments actually were in the sample, as Smith claimed, under the electron microscope they would have "lit up like a neon sign on a dark night."⁴⁷ Accordingly, "it is unfathomable to explain how metallic granules could be seen by Dr. Smith with his naked eye, and then not detected with the electron microscope"⁴⁸ The lab technician's inspection of the tissue sample under the electron microscope thus eliminates any possibility that the tissue sample contained aluminum fragments. Dr. Smith left out this critical detail in his testimony before the Parole Board.

Finally, Dr. Puckett declares that under the protocol used by the lab technician to test the tissue samples, background interference could be responsible for any positive aluminum reading.⁴⁹ The supposed presence of aluminum could therefore be nothing more than a false positive from the aluminum in the microscope itself.

Based on SEM-EDX testing, Dr. Smith testified that Lieutenant Oliver's mortal wound contained aluminum residue, and he was therefore 100% certain that Workman shot Oliver. The only thing anyone can say with 100% certainty, however, is that Dr. Smith's claims were wholly

⁴⁵ 3/14/01 Affidavit of Lou Boykins, App. at 71 ¶4.

⁴⁶ 3/15/01 Declaration of Dr. Aaron Puckett, App. at 74 ¶3c.

⁴⁷ *Id.*

⁴⁸ *Id.*, App. at 75 ¶7.

⁴⁹ *Id.*, App. at 74 ¶¶ 4-6.

misleading, if not simply false.

III THE STATE'S CURRENT ACTIONS CAST DOUBT ON ITS PRIOR DENIALS OF WRONGDOING

In Workman's initial habeas proceeding, Workman alleged that the prosecution knowingly presented Harold Davis's false testimony that he saw Workman shoot Oliver. We now know, beyond any doubt, that Davis's testimony was false. State's counsel, however, repeatedly told this Court that Workman was not entitled to relief based on Davis's false testimony because Workman could not establish that the prosecution knew Davis's testimony was false:

[The evidence] does [not] present a genuine issue of fact that any state witness testified falsely at the trial or that the prosecution knew that any testimony was false.⁵⁰

[The evidence] does [not] present a genuine issue of fact that Davis testified falsely or that the prosecution deliberately deceived the court and jurors with respect to Harold Davis.⁵¹

None of the evidence Workman offered creates a genuine issue of fact that the prosecution withheld evidence or knowingly allowed false evidence to be presented.⁵²

Nor does it present a genuine issue of fact that any state witness testified falsely or that the prosecution knowingly produced false testimony.⁵³

In reliance upon the State's assertions of lack of knowledge, this Court denied relief. *Workman v. Bell*, 178 F.3d 759, 768 (6th Cir. 1998).

Then, after the prior appeal concluded, Workman learned that during the prior habeas proceeding, Dr. Smith's Office withheld an x-ray showing that the fatal bullet did not come from

⁵⁰ Final Brief of Respondent-Appellee, *Workman v. Bell*, No. 96-6652, p.15.

⁵¹ *Id.*, pp. 15-16.

⁵² *Id.*, p. 16.

⁵³ *Id.*, p. 18.

Workman's gun. Workman thus moved to reopen the proceedings, and once again, State's counsel denied any knowledge of the deliberate withholding of the evidence. Yet again, based upon the State's claims of ignorance, this Court denied relief as seven judges stated that "nothing in this record demonstrates that the Attorney General knew of the X-ray at the district court proceeding." Workman v. Bell, 227 F.3d 331, 341 (6th Cir. 2000)(en banc)(Opinion of Siler, J.).

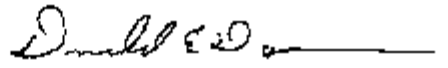
And now we have State's counsel, in his capacity as Counsel to the Governor, Legal Advisor to the Parole Board, and co-counsel with ADA Campbell, apparently involved in presenting the fabricated testimonies of Keenan and Smith -- the very person who claimed that the Oliver x-ray was not intentionally withheld.

The recent revelations cast doubt on the State's prior denials that it did not know that Harold Davis testified falsely (raised in the first habeas) and that the failure to produce the Oliver x-ray was inadvertent (raised in the motion to reopen). This Court should therefore reopen all of the prior proceedings (the first habeas, the request for a second habeas application, and the motion to reopen the first habeas petition) to ensure that Workman is not executed on the basis of a pattern of lies which began at trial and has continued throughout the proceedings, including the clemency process.

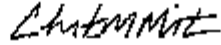
IV CONCLUSION

If this Court does not reopen the proceedings, it will send a message to litigants who are willing to act unscrupulously that it will tolerate their misconduct. To ensure the continued integrity of judicial proceedings before it, this Court must reopen the proceedings for an investigation into whether they were tainted by fraud.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on March 26, 2000, I hand delivered a copy of the foregoing to:

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