No. 99-5644

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

PHILIP R. WORKMAN,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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CAPITAL CASE

Death sentenced Petitioner Philip R. Workman respectfully requests that this Court reconsider its order denying his Petition For A Writ Of Certiorari.

After this Court denied certiorari in this case (1) another Court of Appeals rendered a decision which conflicts with the Sixth Circuit's decision in this case; and (2) this Court granted certiorari in another case to determine whether electrocution is a constitutional means of imposing a death sentence. Because of these intervening events, this Court should grant rehearing. Supreme Court Rule 44.2; see Sanitary Refrigeration Co. v. Winters, 280 U.S. 30, 34 n.1 (1929).

1

In this litigation, the Tennessee Attorney General's Office has never contended that Workman remains guilty of felony-murder if the bullet that killed Police Officer Ronald Oliver did not come from Workman's gun. The reason for this silence is clear: The felony-murder rule in Tennessee is simple and straight forward.

For a felon to be guilty of felony-murder, the deadly force must come from him or one acting in concert with him. If deadly force comes from a third party attempting to thwart the crime the felon is attempting to commit, while the felon is guilty of a non-capital offense, he is not guilty of felony-murder. State v. Farmer, 296 S.W.2d 879, 885 (Tenn. 1956); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim.App. 1988). Because there is no evidence that Workman had an accomplice, if the bullet that killed Oliver did not come from Workman's gun, Workman is not guilty of felony-murder.

In his habeas petition, Workman alleged that the State withheld evidence that Harold Davis, the only witness who claimed to have seen Workman shoot Oliver, was not present at

the scene.[1] Workman based this allegation on, among other things, the following:

- Davis's name is not found in any contemporaneous police report listing the names and addresses of every witness to the incident;
- police found no car parked on the crime scene where Davis claimed his car was parked;[2] and
- Davis did not attend a line-up held upon Workman's capture which every available eye witness attended.[3]

These facts demonstrate that after the Oliver shooting, police knew who saw events surrounding that shooting, and they knew Davis was not one of those persons. For purposes of Workman's withheld evidence claim, this knowledge is imputed to the prosecution. Kyles v. Whitley, 514 U.S. 419, 437 (1995). A recent case from the United States Court of Appeals for the Fourth Circuit demonstrates that, contrary to the Sixth Circuit's opinion, Workman is entitled to a hearing on his claim that the State withheld evidence that Davis was not present at the Oliver shooting.

In Spicer v. Roxbury Correctional Institute, -- F.3d --, 1999 WL 827837 (4th Cir. October 18, 1999), Larry Brown was arrested on cocaine distribution charges. Brown told his

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[1] J.A. at 46. On September 24, 1999, a woman gave a sworn statement that Davis was with her the night of the Oliver shooting, and neither she nor Davis were at the scene to see the shooting. On October 1, 1999, Davis recanted his trial testimony and confirmed that he did not see Workman shoot Oliver. While Workman would like to assert these occurrences as intervening events warranting rehearing, Supreme Court Practice indicates that asserting non-record facts constitutes "unprofessional conduct" warranting condemnation. Stern, Gressman, Supreme Court Practice 355 (7th ed. 1993).

[2] J.A. at 961-71.

[3] J.A. at 973-74.

[4] J.A. at 976-77.

attorney that, while he had some information that Brady Spicer was involved in an aggravated assault, he did not see Spicer the day of the assault. The defense attorney told a prosecutor what Brown had told him, and the prosecutor interviewed Brown. During the interview Brown said for the first time that he had seen Spicer the day of the assault running from the crime scene. Brown so testified at trial, and the jury convicted Spicer.

In the federal habeas proceeding, Spicer asserted that the prosecution knew that Brown had said prior to Spicer's trial that he did not see Spicer the day of the assault, and the prosecution's failure to turn over that knowledge violated Brady v. Maryland, 373 U.S. 83 (1963). The Fourth Circuit agreed. It held that the prosecutor's knowledge of facts contradicting Spicer's trial testimony was "unequivocally subject to disclosure." Spicer, -- F.3d at --, 1999 WL 827537 at *7. Because Brown was the key witness against Spicer, the Fourth Circuit approved the grant of habeas relief. It concluded

> withheld, favorable evidence of the kind identified in this case, in a context where the undisclosed material could have been used to render the evidence of guilt ambiguous has a more significant impact than where the evidence of guilt is otherwise ample. In this case, that significant impact requires us to conclude that Spicer did not receive a fair trial resulting in a verdict worthy of confidence.

Spicer, -- F.3d at --, 1999 WL 827537 at *13.

Like Spicer, Workman asserted that the State withheld information that flatly contradicts the key witness's trial testimony. Specifically, while Davis testified that he saw Workman shoot Oliver, police knew that neither Davis nor his car were at the scene. Because Davis was the only person to testify that he saw Workman shoot Oliver, and because Tennessee's felony-murder rule requires such an event for Workman to be guilty of felony-

murder, the withheld information is material. Under the reasoning in Spicer, Workman's allegations and proof raise the distinct possibility that Workman "did not receive a fair trial resulting in a verdict worthy of confidence."

Evidence establishes that the State withheld knowledge that the only witness who claimed to see an event which made Philip Workman eligible for execution was not even at the scene. Because state and federal courts have relied on procedural rules to deny Workman a hearing, no court has ever considered Workman's evidence. This Court should grant this rehearing petition, grant certiorari, and order that before the State of Tennessee executes Philip Workman, a United States District Court must hear and consider the evidence.

II

Workman is sentenced to die by electrocution. In his habeas petition and brief to the Sixth Circuit, Workman asserted that electrocution falls out of comport with evolving standards of decency because it involves pain, suffering, and something more than the extinguishing of a human life.[1] The Sixth Circuit found no merit to this claim.[2] On October 26, 1999, this Court granted certiorari in Bryan v. Moore, 1999 WL 973586 (1999), to consider the constitutionality of electrocution as a means of imposing a sentence of death. This Court should grant this rehearing petition, grant certiorari on Workman's challenge to his execution by electrocution, and resolve that question simultaneously with Bryan v. Moore.

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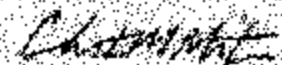
[1] J.A. 50; 8/29/97 Brief of Appellant at 93.

[2] Workman v. Bell, 160 F.3d 276, 294 (6th Cir. 1998) (App. at 13).

CONCLUSION

For the foregoing reasons, this Court should grant this rehearing petition.

Respectfully submitted,



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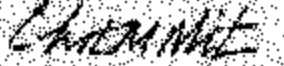
CERTIFICATE OF COUNSEL

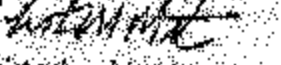
As counsel for the Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified on Rule 39, 2.



Christopher M. Minton

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Petition For Rehearing Of Order Denying Certiorari has been placed in the United States mail, first class postage prepaid, addressed to Paul Summers, Attorney General & Reporter, 2nd Floor, John Sevier Building, 500 Charlotte Avenue, Nashville, Tennessee, 37243, on this the 29th day of October, 1999.



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