IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN,	)	
	)	
Petitioner-Appellant,	)	No. 06-6451
	)	07-5031
v.	)	
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee.	)	

MOTION FOR STAY OF EXECUTION

In Johnson v. Bell, No. 05-6925 (6th Cir. Oct. 19, 2006)(Boggs, C.J., Norris, Clay, JJ.)(Exhibit 1), this Court granted a stay of execution under circumstances virtually identical to those presented in Philip Workman's appeal. The District Court acknowledged *Johnson*, but nevertheless denied a stay of execution as "improvident" because "there is no habeas proceeding left pending before this Court." R. 206, p. 6.

As in *Johnson*, this Court should stay execution because Workman has received a certificate of appealability (R. 205) and his appeal presents "substantial grounds upon which relief may be granted." Barefoot v. Estelle, 463 U.S. 880, 895 (1983)(stay standard). Under Fed.R.Civ.P. 60(b) and its Savings Clause, Workman has shown actionable fraud, misconduct and/or misrepresentation because: (1) In federal habeas proceedings, the State Attorney General denied that Terry Willis committed perjury at trial, but afterwards presented testimony proving Willis' perjury;

(2) In habeas proceedings, the State Attorney General denied that "eyewitness" Harold Davis committed perjury, while at the same time failing to disclose exculpatory evidence proving that Davis committed perjury; (3) In violation of federal law prohibiting witness intimidation (18 U.S.C. § §1512(b)(1) & (b)(2)), state actors threatened Davis into "sticking to his story" and not revealing his trial perjury, thus denying Workman a fair federal habeas proceeding; and (4) Throughout federal habeas proceedings, the State Attorney General failed to comply with his ongoing obligation to disclose exculpatory evidence, which included a bullet found at the scene (likely a police bullet), information from a Memphis Police Officer (on duty at the time of the shooting) who said that Officer Oliver's death was reported as friendly fire, and proof from a former Memphis Police Officer trainee, who was taught that Lieutenant Oliver may have been hit by "friendly fire."

As in *Johnson*, Workman has a reasonable likelihood of success in this appeal, which presents serious questions whether the initial habeas proceedings were tainted by fraud, misconduct, and/or misrepresentation. Especially where the District Court has granted a certificate of appealability – thus acknowledging this appeal's viability – this Court should grant a stay of execution. See In Re Abdur'Rahman, Nos. 02-6547, 02-6548 (6th Cir. June 6, 2003)(en banc)(stay of execution)(Exhibit 2); Zeigler v. Wainwright, 791 F.2d 828 (11th Cir. 1986)(same).

I.
FACTS

Lieutenant Ronald Oliver was not shot by Philip Workman: He was killed by friendly fire. Because of that, Philip Workman is actually innocent of first-degree murder under Tennessee law. See Workman v. State, 41 S.W.3d 100 (Tenn. 2001). Workman was convicted of first-degree capital murder, however, as a result of manipulation of witnesses and evidence surrounding Oliver's death.

A.
Lieutenant Oliver Was Shot After Police "Officers" Fired Weapons During A Confrontation With Philip Workman: The Police Were Concerned That Oliver Was Hit By Friendly-Fire, After Which New Evidence "Emerged" The Day After The Shooting

After Workman robbed a Wendy's restaurant in Memphis, he left the Wendy's and was confronted by Lieutenant Oliver and Officer Aubrey Stoddard. A struggle ensued and, according to a police report, during the confrontation, "officers" – plural – fired their weapons.[1] During the fray, Oliver was struck by one bullet and mortally wounded on the nearby Holiday Auto Parts parking lot. Concerned that they had shot

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[1] "There on the Holiday Auto Parts lot there was an exchange of gunfire between the *officers* and the suspect. (There was) an exchange of gunfire between Officer Parker and the suspect." R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Ex. A, p. 27, quoted in R. 161: First Amended Motion For Equitable Relief From Judgment, p. 5 & n.8. Despite this report, the state doggedly clings to the claim that no officer other than Oliver shot his weapon. That assertion is clearly contradicted by the Memphis Police's own words.

one of their own, the police went to the morgue to take polaroid pictures of Oliver's wound.[2] Afterwards, officers convened and had an "exchange of information."[3] After this meeting, two new pieces of evidence suspiciously "emerged" – remarkably at the very same minute, some fourteen (14) hours after the shooting.[4]

First was Terry Willis, a Holiday Auto Parts employee, who now claimed that he found a bullet at the crime scene – a bullet which the prosecution later claimed was the fatal bullet and which came from Workman's gun.[5] There was also a new "eyewitness," Harold Davis, who now claimed that he saw the whole incident, and claimed that he saw Workman shoot Lieutenant Oliver – even though no other witnesses ever saw him at the scene.[6]

At trial, Willis and Davis were the critical witnesses against Workman, as they

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[2] Id., Ex. A, p. 4; Ex. B, p. 375, cited in R. 161: First Amended Motion For Equitable Relief From Judgment, p. 5 & n.9.

[3] Id., Ex. A, p. 39, quoted in R. 161: First Amended Motion For Equitable Relief From Judgment, p. 6 & n. 10.

[4] The bullet supposedly found by Willis was logged as evidence at 2:25 p.m. on August 6. Davis supposedly identified Workman as shooting Oliver at the very same minute, 2:25 p.m. See R. 161: First Amended Motion For Equitable Relief From Judgment, p. 6.

[5] Id.

[6] See Id., p. 6 & n.12, citing R. 67, Petitioner's Response To Respondent's Motion For Summary Judgment, Ex. A, pp. 36-46; Ex. C; Ex. E; Ex. G; Trial Tr. 646, 695, 720.

provided both the critical piece of "evidence" against Workman, as well as the only claimed eyewitness testimony concerning the actual shooting. Davis was especially critical, as the prosecution told the jury to convict Workman because he had been "identified by Mr. Davis as being the shooter of Lt. Oliver."[7]

B.
Workman Alleged In Habeas Proceedings That
Terry Willis And Harold Davis Committed Perjury
And The Prosecution Withheld Exculpatory Evidence,
But The District Court Denied Relief

In federal habeas proceedings, Philip Workman asserted that both Willis and Davis committed perjury, and that the prosecution withheld exculpatory evidence showing that Willis and Davis had lied at trial. Petition For Writ Of Habeas Corpus, ¶¶117(d) & (f).[8] He also alleged that counsel was ineffective for failing to investigate Harold Davis to show that Davis lied about seeing the shooting. Id., ¶120(a)(4).[9]

During the habeas proceedings, the Respondent, through counsel, the State Attorney General, denied that Willis lied and denied that Davis lied,[10] and failed to

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[7] See R. 161: First Amended Motion For Equitable Relief, p. 7 & n. 14.

[8] R. 1: Petition For Writ Of Habeas Corpus.

[9] Id.

[10] "The facts presented by Petitioner . . . do not demonstrate that any witness committed perjury" and that the facts "offer no support to Petitioner's claims of prosecutorial misconduct, or to his claims of perjury by state witnesses." R. 45: (continued...)

comply with their ongoing duty to disclose exculpatory evidence,[11] while Respondent filed as part of the United States District Court record a document asserting that the state had complied with *Brady*.[12] The District Court denied Workman relief.

C.

After Habeas Proceedings Concluded,
The Attorney General Revealed Evidence Proving That Willis Committed Perjury;
Workman Established That Davis Lied And Was Intimidated
Throughout The Habeas Proceedings And Uncovered Previously-Withheld
Exculpatory Proof Of Friendly Fire

After habeas proceedings concluded, however, Philip Workman finally obtained proof that Willis and Davis lied. The first proof came from straight from the State Attorney General at a 2001 clemency hearing.

While the State Attorney General claimed in habeas that Willis had not lied,[13]

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[10](...continued)
Respondent's Memorandum In Support Of Motion For Summary Judgment, p. 46.

[11] See R. 161: First Amended Motion For Equitable Relief From Judgment, pp. 26-27, citing Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003 (1987) (duty of disclosure is ongoing); Smith v. Roberts, 115 F.3d 818, 820(10th Cir. 1997) ("We . . . agree, and the State concedes, that the duty to disclose is ongoing and extends to *all stages of the judicial process*."); Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9th Cir. 1992)(state has a "duty to turn over exculpatory evidence at trial, but . . . [also a] present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding.")

[12] See R. 161: First Amended Motion For Equitable Relief From Judgment, Ex. 5 & p. 28 (false statement of compliance with *Brady* filed as part of federal record).

[13] See p. 5 & n. 10, *supra*.

at the 2001 clemency hearing it was the Attorney General's Office (including Assistant Attorney General Glenn Pruden) as counsel for the state who presented evidence proving that Willis had, in fact, lied at trial.[14] Indeed, Willis found no bullet at all: The alleged fatal "bullet" did not linger at the crime scene for fourteen hours as Willis claimed. Rather, the proof presented by the Attorney General at the 2001 clemency hearing established that the alleged bullet purportedly found by Willis was actually found by Memphis Police Officer Clyde Keenan after the shooting.[15]

Similarly, at a 2001 state *coram nobis* hearing,[16] Harold Davis testified that he had not, in fact, seen the shooting as he claimed to the jury,[17] but that he had been threatened with bodily harm or worse if he ever revealed that he had not, in fact, seen

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[14] Workman elsewhere sued the State Attorney General for his role in presenting the state's evidence at the 2001 clemency hearing. See Workman v. Summers, 136 F.Supp.2d 896, 897 (M.D.Tenn. 2001)(challenging attorney general's triple role during 2001 clemency proceeding as prosecutor, counsel to the parole board, and counsel to the governor), *aff'd* 8 Fed.Appx. 371 (6th Cir. 2001).

[15] See R. 161: First Amended Motion For Equitable Relief From Judgment, Ex. 3 (Jan. 26, 2001 Clemency Proceeding, pp. 275-278: Testimony Of Clyde Keenan).

[16] At the *coram nobis* hearing, Workman also presented the testimony of Dr. Cyril Wecht, M.D., who presented uncontroverted proof that the bullet that killed Lieutenant Oliver did not come from Workman's gun. See R. 161: First Amended Motion For Equitable Relief From Judgment, p. 15 & nn.52-53.

[17] See R. 161: First Amended Motion For Equitable Relief, pp. 9-12 (discussing in detail Davis' recantation of his trial testimony).

Workman shoot Oliver.[18] As a result of the threats, Davis was intimidated into not revealing the truth during federal habeas proceedings: He didn't see the shooting at all.

Workman also found a photograph which, through enhancement, reveals an evidence cup at the crime scene which, he asserts, likely contained a police bullet (the evidence under the cup does not appear on the crime scene diagram and the evidence it contained has not otherwise been disclosed, even to this day).[19]

In addition, a former Memphis Police Officer who was on duty at the time of the shooting has come forward, stating that the shooting was initially described as friendly fire.[20] Another former Memphis Police trainee has also come forward, explaining that the Oliver shooting was taught at the police academy as a possible friendly-fire incident.[21]

D.

Philip Workman Has Sought, But Been Denied, Equitable Relief From Judgment

In light of the Attorney General's proof at the 2001 clemency hearing which

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[18] *Coram Nobis* Transcript, pp. 173, 351-355, 381-382 (Davis testimony concerning officials' threats to him and family)

[19] See R. 161: First Amended Motion For Equitable Relief From Judgment, Ex. 4 (enhanced photograph showing evidence cup).

[20] R. 170: Supplemental Evidence In Support Of Motion For Equitable Relief.

[21] R. 175: Supplemental Motion For Equitable Relief.

directly contradicted the state's position in the habeas proceedings (while proving Workman's constitutional claim); in light of the new proof from the 2001 *coram nobis* hearing establishing that Davis lied at trial but was threatened into silence by state officials; and in light of new proof that the crime scene contained an evidence cup (which potentially contained a police bullet which struck Oliver), Workman has filed a motion for equitable relief from judgment pursuant to U.S.Const. Art. III, Fed.R.Civ.P. 60(b) and its Savings Clause. See generally R. 161: First Amended Motion For Equitable Relief From Judgment.

In his motion, Workman has asserted that his habeas proceedings were tainted by fraud, misconduct and misrepresentation, given the state's later presentation of evidence about Willis which directly contradicts their position in the habeas proceedings. Moreover, Respondent filed as part of the District Court record a document professing compliance with *Brady*, even as Respondent withheld exculpatory evidence (concerning Willis, Davis, and showing friendly fire) in violation of their ongoing obligation to disclose such evidence during the habeas proceedings.[22]

The District Court has denied relief, asserting that Workman has not

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[22] See e.g., R. 161: First Amended Motion For Equitable Relief From Judgment, pp. 26-29 (Workman was misled, the victim of fraud and misconduct, decepti[on], and fraudulent conduct).

established "fraud upon the court," based, in part, on the false impression that Respondent's counsel was not complicit in the alleged fraud. As noted *supra*, that is not true: Among other things, it is undisputed that the Attorney General presented testimony at the 2001 clemency hearing proving the falsity of the Respondent's position in the habeas proceedings.

Moreover, in focusing on "fraud upon the court," the District Court has similarly overlooked whether Workman may be entitled to equitable relief (including in an independent action in equity)[23] based on "misconduct" in the federal proceedings and/or "misrepresentation" occurring during the federal proceedings where Respondent allegedly filed a false document with the District Court and failed to comply with his ongoing obligation to disclose exculpatory evidence.[24] See also Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988)(misconduct and misrepresentation provide *separate and distinct* grounds for equitable relief apart from fraud); Wasatch Mining Co. v. Crescent Mining Co., 148 U.S. 293 (1893) (independent action in equity, which remains preserved by Rule 60(b)'s Savings Clause, not limited to allegations of fraud).

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[23] Like a motion for fraud upon the court, an independent action in equity can be filed at any time. In Re West Texas Marketing Corp., 12 F.3d 497 (5th Cir. 1994

[24] See e.g., R. 161: First Amended Motion For Equitable Relief From Judgment, pp. 2, 28-29.

The District Court has, however, acknowledged that "[p]erhaps" Workman may be entitled to relief on appeal,[25] "frankly acknowledged" the serious questions which inhere in its rulings,[26] and granted him a certificate of appealability to pursue his appeal in this Court. Specifically, the District Court has granted a certificate finding that Workman deserves appellate consideration of his claims that he is entitled to equitable relief because, as a result of misconduct, misrepresentation and/or fraud, Workman was denied a fair District Court's disposition of his *Brady*/false testimony claim related to Terry Willis (Petition ¶117(d)), *Brady*/false testimony claim related to Harold Davis (Petition ¶117(f)), and ineffectiveness claim related to counsel's failure to investigate Davis (Petition ¶120(a)(4)).

II.
THIS COURT SHOULD GRANT A STAY OF EXECUTION

The Supreme Court held that, in a capital case, the "granting of a stay [of execution] should reflect the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, 463 U.S. 880, 895 (1983). That is exactly what this Court found when granting a stay of execution in Johnson v. Bell, No. 05-6925 (6th Cir. Oct. 19, 2006), and that is the exact situation here. This Court should therefore

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[25] R. 184, p. 7.

[26] R. 188, p. 4.

grant Philip Workman a stay of execution.

A.
Workman Is Entitled To A Stay Under *Johnson*

In *Johnson*, during initial habeas proceedings, the Attorney General filed an affidavit from a witness which led to the denial of habeas corpus relief. After the habeas proceedings concluded, however, Johnson obtained information establishing that the affidavit presented during the habeas proceedings was false. In addition, Johnson was misled about the state's compliance with its *Brady* obligations. See Johnson v. Bell, W.D.Tenn.No. 97-3052.

In *Johnson*, Johnson maintained that this Court should grant a stay of execution given the balance of stay equities (See e.g., Nader v. Blackwell, 230 F.3d 833, 834 (6th Cir. 2000); Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)),[27] and because Sixth Circuit case law requires a stay when the movant "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued." See Johnson v. Bell, 6th Cir. No. 05-6925, Motion For Stay Of Execution, pp. 4-5, citing Friendship Materials Inc. v. Michigan Brick, Inc.,

[27] As explained in *Nader* and *Griepentrog*, those equities are (a) the movant's likelihood of success on the merits; (b) irreparable harm to the movant absent a stay; (c) the prospect that others will be harmed; and (d) the public interest.

679 F.2d 100, 105 (6th Cir. 1982). See also Hilton v. Braunskill, 481 U.S. 770, 778 (1987)(where stay applicant "can . . . demonstrate a substantial case on the merits" stay appropriate if movant faces irreparable harm and public interest weighs in favor of stay). This Court agreed that Johnson's appeal required more measured, deliberate treatment, and thus not only granted a stay of execution (Exhibit 1), but denied a motion for expedited proceedings.

Here, as in *Johnson*, when balancing the traditional stay equities, it is clear that Workman faces irreparable harm, that there is no harm to the state in declining to enforce a tainted federal court judgment, and that the public interest lies in enforcing only valid judgments, not those tainted by fraud or misconduct. Moreover, the public has no interest in executing an innocent man. As in *Johnson*, therefore, those three (3) equities clearly weigh in favor of a stay of execution. The remaining question is whether there is any likelihood of success on the merits. There certainly is.

Indeed, Workman's case on the merits is essentially identical to Johnson's. In this case, for example, it is undisputed that after denying that Terry Willis committed perjury during initial habeas proceedings, the Attorney General presented Clyde Keenan's testimony at the 2001 clemency which establishes that *Willis did, in fact, commit perjury at trial – exactly as Philip Workman claimed in his habeas petition.*

As in *Johnson*, therefore, Philip Workman has stated an actionable claim for

fraud or fraud upon the court. Under Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993):

> [T]he elements of fraud upon the court. . . consist[] of conduct: 1. On the part of an officer of the court; 2. That is directed to the 'judicial machinery' itself; 3. That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court.

Id. at 348. "[T]he intent requirement 'is satisfied by proof of actual intent to defraud, of wilful blindness to the truth, or of a reckless disregard for the truth." Id.; See Alley v. Bell, 405 F.3d 371, 373 (6th Cir. 2004)(en banc)(Cole, J., concurring)(where attorneys for party acted "willfully" or "recklessly" in concealing truth, fraud has occurred).

Indeed, it clearly appears that the Attorney General, while claiming to the habeas court that Willis was not lying, at least willfully or recklessly failed to reveal that Willis was lying: The Attorney General later presented proof establishing this fact. This constitutes an actionable claim for relief under both of the seven-judge opinions in Workman v. Bell, 227 F.3d 331 (6th Cir. 2000)(en banc).

The Attorney General also filed as part of the federal court record a document which professed compliance with *Brady*, when it now clearly appears that such compliance simply didn't occur: Clyde Keenan's clemency testimony is clearly

exculpatory, for it proves that Willis was lying, while clearly indicating that the police tampered with the ballistics evidence at the scene. As Judge Cole has stated, such a false assertion of compliance with *Brady* presented as part of the United States District Court record also raises the specter of fraud, which must be investigated at a hearing. See Alley v. Bell, 405 F.3d at 372-373 (Cole, J., concurring).[28]

Moreover, Workman has another separate basis for relief where it is clear that the Respondent has an ongoing duty to disclose exculpatory evidence throughout habeas proceedings (See p. 6 & n. 11, *supra*). Judge Merritt's seven-judge opinion in Workman v. Bell, 227 F.3d 331, 335 (6th Cir. 2000) supports Workman's entitlement to relief here: "[W]hen the prosecution fails to reveal exculpatory evidence to the defense" before a final habeas judgment is rendered, there arises a "fraud upon the court . . . that calls into question the very legitimacy of a judgment."). That opinion was in clear conformity with this Court's jurisprudence that a party's withholding of evidence during federal proceedings despite an obligation to disclose such evidence provides a basis for relief from judgment. See e.g., Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425 (6th Cir. 1996); Summers v. Howard University, 374 F.3d 1188 (D.C.Cir. 2004)(actionable misconduct occurred when

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[28] Indeed, the very document filed as part of the record here was the same type of document filed by Respondent in the District Court in *Alley*. Under Judge Cole's opinion in *Alley*, Workman is therefore entitled to a hearing.

party failed to disclose evidence in discovery).[29]

Ultimately, where it is undisputed that the Attorney General demonstrated Terry Willis' perjury during the 2001 clemency hearing; where it is undisputed that Respondent filed as part of the District Court record a document alleging compliance with *Brady*; and where the Respondent was under an ongoing obligation to disclose exculpatory evidence, Workman is entitled to a stay because this appeal presents "substantial grounds upon which relief may be granted." Barefoot v. Estelle, 463 U.S. at 895. Workman demonstrates a strong likelihood of success on the merits under *Demjanjuk*, *Workman*, *Abrahamsen*, and Judge Cole's opinion in *Alley*. Therefore, this Court should issue a stay of execution.

The same can be said of Workman's claims concerning withheld evidence concerning Harold Davis' false testimony at trial and counsel's failure to investigate Davis. Having been denied a hearing by the District Court, Workman has, up to this point, been hampered in being able to prove actual "fraud upon the court." Nevertheless the threats made to Davis and the withholding of the existence of those

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[29] As noted *supra*, it clearly appears that there is additional exculpatory evidence which still has yet to be disclosed, including the physical evidence located beneath the evidence cup which appears in the photographic enhancement submitted by Workman to the District Court. See R. 161, First Amended Motion For Equitable Relief, Ex. 4. That physical evidence is *Brady* material and, as Workman contends, would provide physical proof of other officer(s)' firing at Lieutenant Oliver.

threats, coupled with Davis' exculpatory proof that he did not see the shooting, at a minimum, fall within the ambit of *Abrahamsen*, Judge Cole's opinion in *Alley*, and the seven-judge opinion of Judge Merritt in *Workman*. There has been actionable misconduct and misrepresentation, and perhaps, fraud. But as Judge Cole made clear in *Alley*, whether fraud has occurred is a question of fact to be decided at a hearing. Workman cannot be faulted for not proving his case at this point, because he has been denied a hearing and the opportunity to conduct necessary discovery concerning the Davis issues. This Court should order such a hearing.

As in *Johnson*, because Workman shows a likelihood of success on the merits, he is entitled to a stay of execution.[30]

B.
This Court Should Grant A Stay Given Serious Questions
About The Appropriate Standards Governing This Appeal

In addition, as the District Court recognized, the question of the standards

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[30] It is also worth noting that the claims raised in the motion for equitable relief are consistent with an acknowledged practice of witness manipulation and other misconduct in this case. Indeed, this Court previously recognized the troubling nature of the police's interference with witness Steve Craig. Workman v. Bell, 178 F.3d 759, 772 (6th Cir. 1998). In addition, after the 2001 clemency hearing, the Medical Examiner who testified for the state (O.C. Smith) was indicted by the federal government for what the United States Government believed to be a fabricated assault and subsequent lies. According to the United States, Smith wrapped himself in a bomb in an attempt to discredit Philip Workman. See United States v. O'Brian Cleary Smith, W.D.Tenn. No. 2:04-CR-20054-BBD-dkv (Indictment). A federal jury was unable to reach a verdict against Smith.

governing claims such as Workman's are not crystal clear. That is undisputed and it underlines the fact (as in *Johnson*) that Philip Workman's appeal requires a stay because it involves "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued." Friendship Materials Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982); In Re Delorean Motor Co., 755 F.2d 1223 (6th Cir. 1985).

This Court has made clear that when assessing the likelihood of success on the merits in the course of balancing the stay equities, so long as "the merits present a sufficiently serious question to justify further investigation," a stay is warranted when the other stay factors support relief. In Re DeLorean Motor Co., 755 F.2d 1223, 1230 (6th Cir. 1985)(application of four-factor test); Family Trust Foundation of Kentucky v. Judicial Conduct Commission, 388 F.3d 224, 227 (6th Cir. 2004)(serious questions going to the merits); Baker v. Adams County/Ohio Valley School Board, 310 F.3d 922, 928 (6th Cir. 2002)(same). That was the situation in *Johnson* and that is the situation here.[31]

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[31] The District Court seemed to think that the *Friendship Materials* standard was distinct from the traditional balance of equities. Hilton v. Braunskill, 481 U.S. 770 (1987), *cited supra*, p. 13, and *In Re DeLorean Motor Co.* make clear the error in the district court's view. *Hilton* and *Delorean* make clear that the existence of "serious questions" or a "substantial case" on the merits is merely an explication of the degree of success required on the merits under the traditional balancing test when

(continued...)

In fact, this Court and other courts have not hesitated to grant a stay of execution in a Rule 60(b) case, when the appropriate standards governing Rule 60(b) motions remained unsettled. See e.g., See In Re Abdur'Rahman, Nos. 02-6547, 02-6548 (6th Cir. June 6, 2003)(en banc); Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002)(granting stay of execution). The same can be said here. Given uncertainty in the standards governing fraud claims – fully acknowledged by the District Court – the prudent course is for the Court to enter a stay of execution given the "serious questions" involved.[32] "Further investigation" is certainly warranted.

C.
This Court Should Grant A Stay Under *Barefoot*

Finally, a stay is warranted under Barefoot v. Estelle, *supra*, which holds that where a habeas petitioner has received a certificate granting him an appeal, a court of appeals should issue a stay of execution when necessary to avoid the mooting of

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[31](...continued)
other factors weigh in favor of relief. Such tests are but an application, therefore, of this Court's settled jurisprudence that the four factors "are factors to be balanced, not prerequisites that must be met." Nader v. Blackwell, 230 F.3d at 834.

[32] While *Johnson* is pending before this Court, this Court is also considering: (1) On remand from the United States Supreme Court) the application of Rule 60(b) in *Abdur'Rahman v. Bell*, 6th Cir. Nos. 02-6547, 02-6548; and (2) In *en banc* proceedings, *Bell v. Bell*, 6th Cir. No. 04-5596, dealing with the standards for granting relief on *Brady* claims such as those contained in Workman's underlying habeas petition. The impending decisions in *Bell* and *Abdur'Rahman* may both have an impact on the ultimate outcome of this litigation and further support a stay.

a case before the appeal can be properly heard. See Barefoot, 463 U.S. at 894, 103 S.Ct. at 3395 (where petitioner obtains certificate of probable cause to appeal, appellate court should grant stay of execution where necessary to prevent case from becoming mooted by petitioner's execution); Zeigler v. Wainwright, 791 F.2d 828 (11th Cir. 1986)(granting certificate of probable cause and stay of execution on 60(b) appeal).

Here, in granting the certificate of appealability, the District Court has acknowledged the need for a considered appeal. The District Court has likewise acknowledged this Court's power – as in *Johnson* – to enter a stay "to the extent necessary to preserve its ability to thoroughly review" this appeal. R. 206, p. 6 n. 1 (Order). Especially where this Court is faced with thorny issues, a stay of execution is appropriate, at least to allow full briefing and argument in this most serious of cases – where Workman's innocence is at issue, and where the fraud and misconduct at issue led the federal courts to deny habeas relief despite the fact that Workman's claims of constitutional error appear meritorious.

Thus, for example, in the 60(b) appeal in Alley v. Bell, 6th Cir. No. 04-5596 (6th Cir. May 28, 2004)(Exhibit 3) a panel of this Court (Boggs, Batchelder, Ryan, JJ.) upheld a stay of execution, but set the case for expedited briefing and oral argument, where the appeal involved unsettled issues concerning applicable standards of review.

Such a course of action would likewise be appropriate here, in light of the issues presented.

CONCLUSION

As the District Court recognized, this is a most serious case. As in *Johnson v. Bell*, 6th Cir. No. 05-6925, this Court should grant a stay of execution where Philip Workman's appeal involves actionable grounds for equitable relief, given fraud, misconduct and/or misrepresentation occurring during the federal habeas corpus proceedings. He establishes a likelihood of success on the merits and irreparable harm, and the state and public have no interest in enforcing a tainted federal judgment. This Court should also grant a stay of execution to facilitate resolution of the serious issues concerning the standards governing fraud upon the court claims. In addition, where the District Court has granted a certificate of appealability and where the issues presented warrant full briefing and oral argument, this Court should grant a stay under *Barefoot*, set an appropriate briefing schedule, and set the case for oral argument.

Respectfully Submitted,

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Paul R Bottei

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by hand delivery to Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this 1st day of May, 2007.

Paul R Bottei

Exhibit 1

Johnson v. Bell
6th Cir. No. 05-6925
(October 19, 2006)

Order Granting Stay Of Execution

No. 05-6925

FILED

OCT 19 2006

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNIE E. JOHNSON,

Petitioner - Appellant,

v.

RICKY BELL,

Respondent - Appellee.

ORDER

Before: BOGGS, Chief Judge; NORRIS and CLAY, Circuit Judges.

Donnie E. Johnson is Tennessee death row inmate whose execution is scheduled for Wednesday, October 25, 2006. The panel has for its consideration Petitioner's Motion for Stay of Execution, a Supplement to the Motion and the state's Response to the Motion for Stay. Having fully considered the arguments presented by the parties, the court grants the Petitioner's Motion for Stay and the execution is stayed until further order of this court.

It is so ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Exhibit 2

In Re Abdur'Rahman
6th Cir. Nos. 02-6547/6548
(June 6, 2003)

En Banc Order Granting Stay Of Execution

Nos. 02-6547/6548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JUN 06 2003

LEONARD GREEN, Clerk

IN RE: ABU-ALI ABDUR'RAHMAN,

Movant (02-6547).

IN RE: ABU-ALI ABDUR'RAHMAN,

Petitioner-Appellant (02-6548),

v.

RICKY BELL, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: MARTIN, Chief Judge; BOGGS, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and these cases are restored to the docket as a pending appeal. It is further ORDERED that the execution of sentence is stayed pending further order of this Court.

The Clerk will direct the parties to file supplemental briefs and will schedule these cases for oral argument at a later date.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

Exhibit 3

Alley v. Bell
6th Cir. No. 04-5596
(May 28, 2004)

Order Denying Motion To Vacate
Stay Of Execution,
Ordering Expedited Briefing And Oral Argument

No. 04-5596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 28 2004
LEONARD GREEN, Clerk

SEDLEY ALLEY,
Petitioner - Appellee

v.

RICKY BELL, Warden,
Respondent - Appellant

ORDER

Before this panel is the motion of appellant Warden Ricky Bell to vacate the stay of execution that was entered by the district court on May 19, 2004 in response to appellee Sedley Alley's first amended motion requesting relief in the exercise of the court's inherent authority and/or relief from judgment and/or certificate of appealability. The panel declines to vacate the stay at this time, and sets the matter for oral argument in Cincinnati at 2:00 P.M. on Wednesday, June 16, 2004.

The parties may file briefs not to exceed 25 pages each by the close of business on Tuesday, June 8, 2004. The briefs should address the following questions:

(1) Is Fed.R.Civ.P. 60(b) a proper vehicle by which to raise the claims asserted in Mr. Alley's first amended motion?

(2) In particular, is Fed.R.Civ.P. 60(b) a proper vehicle by which to challenge the constitutionality of the Tennessee "heinous, atrocious, or cruel" aggravator instruction given in Mr. Alley's trial, as potentially impacted by this court's recent decision in *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004)?

(3) Is the resolution of the foregoing questions likely to be influenced by the decision in the pending *en banc* case of *In re: Abdur'Rahman*, Nos. 02-6547/6548 (argued December 3, 2003), in light of the arguments advanced to the *en banc* court in that case?

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0160p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PHILIP RAY WORKMAN,

Petitioner-Appellant,

v.

RICKY BELL, Warden,

Respondent-Appellee.

Nos. 06-6451; 07-5031

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 94-02577—Bernice B. Donald, District Judge.

Decided and Filed: May 4, 2007

Before: SILER, COLE, and SUTTON, Circuit Judges.

OPINION

SILER, J., delivered the opinion of the court, in which SUTTON, J., joined. COLE, J. (pp. 6-7), delivered a separate dissenting opinion.

SILER, Circuit Judge. Philip Ray Workman seeks a stay of execution in connection with his appeal from the denial of a motion under FED. R. CIV. P. 60(b), a motion contending that the Attorney General for the State of Tennessee ("State Attorney General") perpetrated a fraud upon the district court during Workman's habeas corpus proceedings. Because Workman has been given considerable process during the 25 years since a state court jury found that he murdered Lieutenant Ronald Oliver, because Workman cannot seriously contend that his allegations have any bearing on a claim of actual innocence given that he testified at the state court trial that *he* killed Lieutenant Oliver and that *he* shot and injured Officer Aubrey Stoddard during the incident, *see Workman v. Bell*, 178 F.3d 759, 768 (6th Cir. 1998); *State v. Workman*, 667 S.W.2d 44, 46–47 (Tenn. 1984); *State v. Workman*, 111 S.W.3d 10, 12 (Tenn. Ct. Crim. App. 2002), because the claims of fraud on the court are exceedingly attenuated and vague, and because the Tennessee Court of Criminal Appeals has rejected the premises of two of the claims, *see Workman*, 111 S.W.3d at 18–20, Workman has little to no likelihood of success in showing that the district court abused its discretion in rejecting his Rule 60(b) motion. We therefore deny his motion for a stay.

I.

Workman was convicted of killing Lieutenant Oliver for which he received a capital sentence in 1982. Since that time, Workman was denied his final appeal on the merits by the Tennessee Supreme Court, *State v. Workman*, 667 S.W.2d 44 (Tenn.), *cert. denied*, *Workman v. Tennessee*, 469 U.S. 873 (1984), and he has concluded traditional federal habeas relief, *Workman v. Bell*, 178 F.3d

759 (6th Cir. 1998), *cert. denied*, 528 U.S. 913 (1999). Post-habeas, Workman's execution has been delayed on five occasions. He has been back through the state courts and has also had a clemency hearing.

Workman's contentions stem from alleged new evidence that he suggests will show Lieutenant Oliver was killed by friendly fire from a fellow officer. He initially points to the testimony of Lieutenant Clyde Keenan during Workman's 2001 clemency hearing. Lieutenant Keenan testified that he, not Terry Willis, found the bullet that killed Lieutenant Oliver at the crime scene. According to Workman, this supports his theory that Lieutenant Oliver was killed by friendly fire.

Workman next points to witness Harold Davis, who testified at the trial as an eyewitness linking Workman to the shooting. During a 2001 state *coram nobis* hearing, Workman alleges that Davis stated that he had not, in fact, seen the shooting as he claimed (but had observed the incident from a different vantage point), and alleges that Davis falsely testified after receiving threats. Workman, finally, points to a crime scene photograph showing a cup that may have contained the police bullet that killed Lieutenant Oliver and testimony from Memphis police officers suggesting that the shooting may have been a friendly fire incident.

II.

We consider the following factors in deciding whether to grant Workman a stay of execution: 1) whether there is a likelihood he will succeed on the merits of the appeal; 2) whether there is a likelihood he will suffer irreparable harm absent a stay; 3) whether the stay will cause substantial harm to others; and 4) whether the injunction would serve the public interest. *See Capobianco v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004); *see also In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997), *abrogated on other grounds by Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007). As the Supreme Court recently has indicated, a claimant must show a "significant possibility of success on the merits" in order to obtain a stay. *Hill v. McDonough*, ___ U.S. ___, 126 S. Ct. 2096, 2104 (2006).

The success-on-the-merits inquiry here relates to the district court's rejection of Workman's Rule 60(b) motion, which he filed after our court rejected his habeas corpus petition. Our review of the denial of a Rule 60(b) motion is limited: We may reverse such a decision only when the trial court abuses its discretion. *See Futernick v. Sumpter Twp.*, 207 F.3d 305, 313 (6th Cir. 2000). "An abuse of discretion occurs when the district court relies on clearly erroneous findings of fact, . . . improperly applies the law, . . . or . . . employs an erroneous legal standard." *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 296 (6th Cir. 2007) (internal quotation marks omitted).

In our view, Workman has not met his burden of showing "a significant possibility" that the district court abused its discretion. Workman argues that the alleged perjurious testimony of Davis and Willis and the other exculpatory evidence amount to a fraud on the court by the State Attorney General during the habeas proceedings.[1] In making this serious allegation against the Attorney General, however, Workman offers nothing serious to show that the Attorney General sponsored this false testimony or knew about it during the federal habeas proceeding. The alleged perjury came to light in state proceedings and not until 2001—five years after the district court's denial of his federal habeas petition and three years after a panel of our court affirmed that decision. Nothing about this time line, save sheer speculation, shows or even suggests that the State Attorney General was aware of the alleged perjury at the time of the federal habeas proceedings. Workman offers no

[1]The elements of fraud on the court include conduct: 1) on the part of an officer of the court; 2) that is directed at the judicial machinery itself; 3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; 4) that is a positive averment or a concealment when one is under a duty to disclose; and 5) that deceives the court. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993).

evidence showing that the State Attorney General was aware of the missing evidence cup, knew that Davis or Willis made statements at trial that may have been incorrect, or had heard statements by Memphis police officers that Lieutenant Oliver's death was a possible friendly fire incident.[2] Even assuming for the sake of argument that Davis and Willis lied at the state court trial, Workman has failed to show that the conduct in question was "on the part of an officer of the court" as required by *Demjanjuk*. 10 F.3d at 348.

The district court also did not exceed its discretion in declining to impute the conduct of other state and local officials to the State Attorney General. In *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (en banc), our court was equally divided on whether fraud on the court turns on whether the fraud was "perpetrated by an attorney"—namely, by a state attorney during the habeas proceeding. *Id.* at 341. A district court's acceptance of a point of law on one side of an intra-circuit split, like a district court's decision to answer an unresolved question of law within the circuit, does not constitute an abuse of discretion. *See Surles*, 474 F.3d at 297–98.

No less importantly, Workman has not shown how the imputation question would affect the outcome of this case. While Workman focuses most of his fraud-on-the-court allegations on the testimony of Davis and Willis, he has not made a meaningful showing that their testimony was indeed materially false.

The testimony of Davis at the state *coram nobis* proceeding consumes roughly 300 pages of transcript. *State v. Workman*, 111 S.W.3d 10, 15 (Tenn. Ct. Crim. App. 2002). At times, Davis says he did not see Workman shoot the Lieutenant Oliver; at other times, Davis says he does not remember whether he saw Workman shoot Lieutenant Oliver. *Id.* According to the Tennessee Court of Criminal Appeals, the essence of Davis's testimony "can be best summarized" by the following exchange:

> Prosecutor: You're not saying you lied, right?
>
> Davis: Right.
>
> Prosecutor: Ok. In the trial, you're not saying-
>
> Davis: Right.
>
> Prosecutor: -You lied about that?
>
> Davis: Right. I'm not saying that.
>
> Prosecutor: You just don't know.
>
> Davis: I just don't remember. I just don't know . . . .

Id.

The Tennessee courts thus considered this evidence and concluded that it did not show that Davis lied at the trial. The state trial court found that the testimony did not amount to a recantation and did not show that Davis had lied during the trial. *Id.* at 16–17. The Tennessee Court of Criminal Appeals, "[b]ased upon [its] review of his testimony," found "it difficult to conclude otherwise." *Id.* at 18. If the Tennessee courts failed to find that Davis had recanted his trial

[2]Nor has Workman put forth any facts suggesting that the State Attorney General should have accepted these statements as credible.

testimony or lied at trial, it is difficult to believe that the federal courts could conclude that Davis prevaricated at the same trial.

The state *coram nobis* proceeding also undermines Workman's claim as it relates to Terry Willis. The Tennessee Court of Criminal Appeals expressed skepticism about Workman's claim that "it was the state's theory at trial that this recovered bullet [the one found by Willis] was, in fact, the bullet that killed the victim." *Id.* at 20. The state's opening statement at trial, the state appellate court acknowledged, "arguably might indicate the fatal bullet would be produced at trial." *Id.* But later developments undermined the notion that this was the state's theory of the case. During closing argument, Workman argued that the state did not make good on its promise, as it did not prove that the bullet introduced into evidence was the one that killed Lieutenant Oliver. *Id.* During rebuttal, however, the state did not take issue with this statement, but it instead pointed to an FBI laboratory worker's testimony that "the bullet [introduced as Exhibit 35 and found by Willis] was perfectly consistent . . . with *going through the arm of Officer Stoddard. That's what that slug was.*" *Id.* (emphasis added). Recall that the evidence at trial showed (and Workman's own testimony confirmed) that Workman shot Lieutenant Oliver *and* Officer Stoddard. Viewed in this light, Lieutenant Keenan's testimony during the state clemency proceeding that he found the bullet that killed Lieutenant Oliver at the crime scene is perfectly consistent with Willis's trial testimony that he found *a* bullet at the crime scene. *Compare* First Amended Motion for Equitable Relief at 7 ("Willis claimed that he found Exhibit 35 in the parking lot the following morning . . . . He claimed that he thought the bullet . . . was a 'ball bearing.' He claimed that he then took this used 'ball bearing' inside and placed it in his toolbox.") (internal footnotes omitted), *with* Clemency Tr. at 276 ("I'm talking about the round that the police found at the scene. The toolbox round I'm not exactly sure when they found that.") (testimony of Lieutenant Keenan).

In the face of this record, it seems quite doubtful that the trial testimony targeted by Workman was indeed false. And, at any rate, it remains pure conjecture to say that the State Attorney General knew anything about the allegations of falsity (much less the potentially false allegations of falsity) until well after Workman's federal habeas proceeding had concluded. Under these circumstances, we have considerable sympathy for this observation by the district court in explaining its denial of Workman's Rule 60(b) motion:

> The prospect of holding a hearing which would necessarily require the Defendant to prove grave ethical and professional misconduct on the part of the state's habeas attorneys strikes the Court as particularly untoward in the absence of any colorable allegation of such misconduct.

D. Ct. Op. at 18–19.

Workman's reliance on our one-paragraph order granting a stay in *Johnson v. Bell*, No. 05-6925 (Oct. 19, 2006), does not alter this conclusion. That this court has granted a stay in one capital case involving a Rule 60(b) fraud-on-the-court motion of course does not mean that we must grant a stay in every capital case involving such a Rule 60(b) motion. And that is particularly so here since Johnson had not received the same degree of state and federal judicial consideration that Workman has received over the last 25 years.

On this record, Workman has not met his burden of showing a likelihood of success in demonstrating that the district court abused its discretion. Nearly twenty-five years after Workman's capital sentence and five stays of execution later, both the state and the public have an interest in finality which, if not deserving of respect yet, may never receive respect. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998) ("A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief."). Although Workman will

undeniably suffer irreparable harm if executed, the other factors weigh heavily in favor of denying the stay.[3]

For these reasons, we deny the motion for a stay of execution.

[3]To the extent Workman means to suggest that the district court's grant of a certificate of appealability means that we should grant a stay, he is wrong on two fronts. The two standards, to begin with, are quite different: The one requires showing a likelihood of success on the merits, while the other requires showing that reasonable jurists could debate the matter. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("Under the controlling standard, a petitioner must sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.") (citation and internal quotation marks omitted). A district court's certificate of appealability decision, moreover, by no means controls a court of appeals' merits determination.

DISSENT

R. GUY COLE, JR., Circuit Judge, dissenting. I would grant Workman's stay of execution and therefore I respectfully dissent.

The majority denies Workman's motion for a stay on the grounds that his allegations of fraud are not meritorious. The majority concludes that Workman has not established that fraud was committed "by an officer of the court" because Workman has not presented sufficient evidence showing that the Tennessee Attorney General knew about the alleged witness perjury, the missing evidence, or the statements by Memphis police describing Oliver's death as the possible result of friendly fire.

Further, the majority takes it upon itself to review the record in the state-court proceedings and based on that record, concludes that Workman has failed to make "a meaningful showing that [Davis's and Willis's testimony] was indeed materially false." The State does not argue before this Court, nor did it argue before the district court, that Workman's showing as to the falsity of Davis's and Willis's testimony is lacking. In addition, the district court did not rely on this as a basis for denying Workman's motion for relief from judgment. Indeed, the district court appears to have come to the opposite conclusion in light of its statement that "Petitioner's fraud claims are replete with allegations, *in part corroborated by the sworn testimony of Davis*—a witness with relevant and personal knowledge—concerning the manufacturing of evidence, solicitation of perjury, and intimidation of witnesses by police officers investigating the shooting of Lt. Oliver." (Dist. Ct.'s Order On Workman's First Amended Motion For Equitable Relief at 17) (emphasis added). That the majority chooses to rely on a conclusion not pressed by the State or adopted by the district court strikes me as curious.

In any event, contrary to the majority's reasoning, the ultimate merit of Workman's claims has nothing to do with whether a stay of execution is warranted. *See Alley v. Bell*, 405 F.3d 371, 373 (6th Cir. 2005) (en banc) (Cole, J. concurring) ("Perhaps Alley's allegations of fraud are true, and perhaps they are not—obviously it will be up to the district court to consider the Rule 60(b) motion and determine if fraud actually occurred."). Workman's entitlement to a stay instead turns on whether he has shown a likelihood of success in arguing that he is entitled to an evidentiary hearing to prove his fraud claims. This in turn depends on whether the allegedly fraudulent conduct of State officials during Workman's trial can be imputed to the State's federal habeas counsel. I believe that Workman has made the necessary showing that he is likely to succeed on this inquiry.

The district court properly recognized that the central question here of whether fraud committed by State officials during Workman's trial can be imputed to the State's habeas counsel "continues to be 'open and controversial' in this Circuit." (Dist. Ct.'s Order Granting In Part And Denying In Part Petitioner's Application For Certificate Of Appealability at 8) (quoting *Buell v. Anderson*, 48 F. App'x. 491, 499 (6th Cir. 2002)). Because of this lack of clarity, the district court stated that it was "forced to analyze Petitioner's fraud-upon-the-court claim subject to a persisting ambiguity in circuit precedent governing whether and to what extent the alleged trial court fraud or misconduct of state officials can be imputed to the state's habeas attorneys when fraud upon the federal habeas court is alleged." (Dist. Ct.'s Order On Workman's First Amended Motion For Equitable Relief at 15-16).

The district court drew on *Buell*, where Chief Judge Boggs characterized our evenly divided en banc opinions in *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000), as setting forth a "broader" and a "more stringent" standard of what a habeas petitioner must show to be entitled to an evidentiary

hearing on a Rule 60(b) motion alleging that the habeas court's judgment was procured through fraud. Under the "broader" view, allegations of misconduct by the State's trial counsel are sufficient to entitle a habeas petitioner to an evidentiary hearing on whether the State's federal habeas counsel was aware of the fraud. Under the "more stringent" view, allegations of fraud against State officials during state-court proceedings cannot be attributed to the State's federal habeas counsel. Although the district court here adopted the "more stringent" view, it nonetheless acknowledged that "[u]nder the 'broader' standard . . . Petitioner has perhaps stated a claim of fraud upon the court deserving of further inquiry." (Dist. Ct.'s Order On Workman's First Amended Motion For Equitable Relief at 16).

I would therefore grant Workman's motion for a stay due to the prevailing uncertainty about the applicable standard for determining whether his allegations entitle him to an evidentiary hearing. But a further consideration remains.

A panel of this Court, comprised of Chief Judge Boggs and Judges Norris and Clay recently granted a stay of execution in *Johnson v. Bell*, No. 05-6925, under, as the district court put it, "similar circumstances." (Dist. Ct.'s Order Denying Motion For Stay Of Execution at 6, fn. 1). *Johnson* stood in the same procedural posture as this case at the time the stay there was granted. After federal review of Johnson's habeas petition had run its course, Johnson filed a Rule 60(b) motion in the district court on the grounds that the district court's denial of his habeas petition was procured by fraud. The district court denied both Johnson's Rule 60(b) motion and his motion for a stay. Moreover, Johnson's allegations of fraud are similar to Workman's in that Johnson alleged that the State's habeas counsel filed false documents in the district court and allowed a witness to testify falsely at trial. As here, the district court in *Johnson* (the same district court that has presided over Workman's case), noted that the resolution of "whether the 'broader' or 'more stringent' standard [for reviewing claims of fraud by State officials] applies could be determinative of whether Petitioner is entitled to an evidentiary hearing on his fraud-upon-the-court claim." *Johnson v. Bell*, No. 97-3052, Order Denying Motion For Stay Pending Appeal, dated Oct. 17, 2006, at 5. The only conceivable difference between *Johnson* and *Workman* then is that Johnson's execution has been stayed, but unless the en banc Court or the U.S. Supreme Court intervenes, Workman's will not be.

The situation is even more troubling when one considers that the *Johnson* panel could very well resolve the ambiguity surrounding what legal standard applies to Johnson's and Workman's claims of fraud and hold that Johnson is entitled to an evidentiary hearing on that basis. If that occurs, a manifest miscarriage of justice will ensue: Johnson will get his hearing, a hearing that Workman too would get, but for the fact that he will already have been executed. I simply cannot conclude that this inconsistency in the administration of the death penalty is permissible, especially where it can so easily be eliminated.

For these reasons, I believe that Workman is entitled to a stay of execution, and I therefore respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN	)	
	)	
Petitioner-Appellant	)	No. 06-6451
	)	07-5031
vs.	)	
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee	)	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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STATEMENT IN SUPPORT OF PETITION FOR HEARING *EN BANC*

I believe that this proceeding involves one or more questions of exceptional importance:

I.

What standards govern a habeas petitioner's claims for equitable relief from judgment alleging fraud upon the court? Compare Workman v. Bell, 227 F.3d 331, 332-338 (6th Cir. 2001)(Opinion of Merritt, J.) with Workman v. Bell, Id. at 338-342 (Opinion Of Siler, J.)

II.

Under Fed.R.Civ.P. 60(b), has Philip Workman stated a claim for fraud upon the court sufficient to allow an evidentiary hearing where: (1) He claimed in his habeas petition that the prosecution presented false testimony from Terry Willis and withheld exculpatory evidence showing the falsity of Willis' testimony; (2) During federal habeas proceedings, the State Attorney General's Office stated that there had been no false testimony; (3) During federal habeas proceedings, the State Attorney General's Office filed as part of the record a document stating that exculpatory evidence had been disclosed under *Brady v. Maryland*; and (4) After the federal habeas proceedings concluded, the State Attorney General's Office presented testimony establishing that, in fact, Terry Willis lied at trial and there existed at the time of trial exculpatory evidence proving that Willis lied?

The panel decision in this case conflicts with the following decisions:

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)(state has "ongoing duty" to disclose exculpatory evidence); Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997)(duty to disclose exculpatory evidence extends to all stages of the judicial process; Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9th Cir. 1992)(state attorneys have obligation to disclose exculpatory evidence during federal habeas proceedings)

Abrahamsen v. Trans-State Express Inc., 92 F.3d 425 (6th Cir. 1996)(granting relief from judgment on basis of misconduct or misrepresentation where, *inter alia*, party failed to comply with discovery obligations)

Banks v. Dretke, 540 U.S. 668 (2004)(state may not be rewarded for telling petitioner and the courts that it has disclosed exculpatory evidence while holding back exculpatory evidence; petitioner is entitled to habeas review of claims based on non-disclosed evidence); Kyles v. Whitley, 514 U.S. 419 (1995)

_____

Counsel for Philip Workman

Philip Workman's case stands at a crossroads in this Court's jurisprudence. In light of the 7-7 tie in *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2001)(en banc), there is no settled jurisprudence on whether a habeas petitioner may obtain equitable relief based on fraud or misconduct when the Respondent fails to disclose exculpatory evidence during habeas proceedings. The 7-judge opinion authored by Judge Merritt says Workman has a claim; the 7-judge opinion of Judge Siler says otherwise. The panel believes that Workman cannot merit a stay under these circumstances: On the contrary, this intra-circuit split is precisely the reason why this Court should grant rehearing *en banc* and, as Judge Cole properly notes, grant a stay to settle the law applicable to this case.

Rehearing is also warranted because the panel majority has made most serious legal and factual errors. With regard to the Terry Willis claim, the panel majority completely misapprehends the state record – an error induced, no doubt, by the absence of a requested hearing below. The majority also essentially blames Workman for not showing actual fraud – even though he has clear proof, at this point, that, after the habeas proceedings concluded, the Attorney General *proved* that his own assertions in habeas were false and that Workman's claim was meritorious. What more does the panel majority expect Workman to "prove" at the motion stage?

More fundamentally, the panel has overlooked operative case law and principles governing the duty to disclose exculpatory evidence. The Supreme Court's decision in *Pennsylvania* v. *Ritchie* makes clear that this duty is "ongoing" such that it extends to the federal habeas process. The Court's decision in *Banks v. Dretke* also makes clear that state attorneys may not play hide-and-seek with exculpatory evidence. Ultimately, this Court must confront the question: Who should bear the cost of the Respondent's failure to disclose exculpatory evidence which not only shows that Workman was convicted based on perjury, but that Officer Oliver's death was, in fact, caused by friendly-fire? The panel says Workman (with his life). Justice dictates otherwise: Respondent must be held to

answer for the unfair habeas proceedings in this case.

Where the panel has denied a stay of execution, this Court should grant rehearing *en banc* and grant a stay of execution, and order further proceedings on the vital issues presented by Philip Workman's pending appeals.

I.
THIS COURT SHOULD GRANT REHEARING *EN BANC*

A.
The *En Banc* Court Should Grant Rehearing And A Stay To Resolve The Ongoing Intra-Circuit Split On The Availability Of Equitable Relief Following Failure To Disclose Exculpatory Evidence During Habeas Proceedings

What are the rights of petitioners to disclosure of exculpatory evidence during federal habeas proceedings? And what are the duties of Respondent to disclose such exculpatory evidence during habeas proceedings? As Judge Cole has noted, this issue remains subject to "prevailing uncertainty" in this circuit, given the competing opinions from the equally divided court in Workman v. Bell, 227 F.3d 331 (6th Cir. 2001)(en banc). *Workman*, slip op. at 6-7. This presents a classic situation for *en banc* review. On this basis alone, rehearing should be granted.[1]

---

[1] The panel majority misapprehends the significance of this conflict. Given this conflict, the panel seems to think that the District Court could not have abused its discretion in denying relief. That begs the question whether the District Court has applied the proper standard in the first place. The majority's reasoning also conflicts directly with Agostini v. Felton, 521 U.S. 203 (1997). In *Agostini*, the movant sought 60(b) relief on the grounds that prevailing law applicable to the case (*Aguilar*) was no longer good law. The District Court denied relief in light of *Aguilar* and the Second Circuit affirmed. Agostini, 521 U.S. at 408-409. The Supreme Court then overruled *Aguilar* in *Agostini*, but applied its new governing principle in *Agostini*. *Agostini* proves the illogic in the panel's assertion that there was no "abuse of discretion" here. If the District Court chose the wrong legal theory (to be determined by this Court *en banc*), it did abuse its discretion. If the panel's reasoning here were correct, then the Supreme Court could not have reversed in *Agostini*, because *Aguilar* hadn't been overruled when the district court ruled, and the Supreme Court would have had to affirm the District Court as not abusing its discretion for having applied still good precedent. *Workman*, slip op. at 3. That, of course, didn't occur.

Further, the circumstances of this case are particularly conducive to answering the questions posed by this uncertainty. Indeed, Workman currently has unrefuted proof that his habeas proceedings were tainted by fraud and/or misconduct: (1) After habeas proceedings, the Attorney General presented evidence completely contradicting his position in federal court with regard to Workman's constitutional challenge to Terry Willis' alleged false trial testimony (See *infra*, pp. 9-10); (2) Respondent filed as part of the District Court record a document falsely claiming compliance with *Brady v. Maryland*, because: (a) Workman was never provided exculpatory evidence that trial witness Harold Davis did not see the shooting (as he claimed at trial); (b) Workman was never provided evidence that Davis had been threatened into silence during habeas proceedings, such that he refused to reveal that he had not seen the shooting; and (c) Workman was not provided exculpatory proof from a Memphis Police Officer who was told by witnesses that they had witnessed one officer shoot another. As Judge Cole has noted, such failings of state actors and Respondent's habeas counsel – whether deliberate, or reckless – may indeed provide a basis for equitable relief.

Rather than granting a stay and ordering a hearing, the panel majority has instead overlooked the fact that the Supreme Court made clear twenty years ago that, in criminal matters, the obligation to disclose exculpatory is "ongoing." Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003 (1987)(duty of disclosure is ongoing). And indeed, the Ninth and Tenth Circuits have explicitly declared that the state's obligation to disclose exculpatory evidence continues throughout the federal habeas process. Smith v. Roberts, 115 F.3d 818, 820(10th Cir. 1997) ("We . . . agree, and the State concedes, that the duty to disclose is ongoing and extends to *all stages of the judicial process.*"); Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9th Cir. 1992)(state has a "duty to turn over exculpatory evidence at trial, but . . . [also a] present duty to turn over exculpatory evidence relevant

to the instant habeas corpus proceeding.").

That obligation was not honored here. Because of that, Workman's habeas petition was unfairly denied, and the panel says that there is nothing to be done about it, even though: (1) Workman was absolutely right that he was entitled to habeas relief because Terry Willis lied at trial about finding the supposed fatal bullet, but the state allowed Willis to lie while withholding exculpatory proof (from Clyde Keenan, See pp. 9-10, *infra*) which proves that Willis lied (Habeas Petition ¶117(f); (2) Workman was not told about witnesses revealing to Memphis Police that Officer Oliver's death was caused by friendly-fire (See R. 170: Affidavit of Charlotte Creasy); (3) Workman was never provided (including through the habeas process) what likely is a police bullet found at the crime scene, which would confirm friendly-fire (See R. 161: Motion For Equitable Relief, Ex. 4); (4) Respondent never disclosed proof that Harold Davis lied at trial, while Davis was induced by threats not to reveal during habeas proceedings that his trial testimony was false.

In denying a stay, the panel unfairly faults Workman for not showing that Respondent's counsel knew about all this evidence during habeas proceedings. "Sheer speculation," the majority contends. *Workman*, slip op. at 2. The record reveals otherwise. We have a clear record of the Attorney General saying, during habeas proceedings, that there was no perjury at trial. We have a clear record that the Attorney General filed as part of the District Court record a document asserting compliance with *Brady*.

With regard to the Terry Willis claim, we have a clear record that the Attorney General presented proof at a 2001 clemency that Willis lied. See pp. 9-10, *infra*. What more does the majority reasonably expect Workman to have done at this stage of the proceedings to obtain further process? What could possibly be enough *prima facie* evidence of fraud if this weren't enough? Workman has

shown a likely false statement to the habeas court. He is entitled to a hearing to flesh this out.[2]

Unlike the situation with the Terry Willis Claim (discussed in greater detail *infra*), Workman does not currently have direct evidence of the Attorney General's Office being complicit in threatening Harold Davis, nor is it yet clear the extent of the Attorney General's actual knowledge of Davis' perjury, the contemporaneous friendly-fire reports from witnesses, or of any police bullet under the evidence cup. Further process may answer that question either affirmatively or negatively, which is why Workman is entitled to a hearing on such matters. See Alley v. Bell, 405 F.3d 371, 372-373 (Cole, J., concurring)(question of recklessness or actual fraud are factually intensive matters to be investigated by district court).

Even so, justice also dictates that, even absent actual fraud, Workman can still obtain relief from judgment if he can establish that Respondent withheld material exculpatory evidence. This establishes "misconduct" within the meaning of Rule 60(b). Compare Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988)(discussing varying degrees of culpability governing misconduct, misrepresentation and fraud).

Where there now is evidence that Workman should have received habeas relief, the District Court is not enslaved by its prior tainted judgment. For it is clear that the duty to disclose exculpatory evidence rests with the State of Tennessee and its counsel – whoever they may be. It is the reason why the Supreme Court declared in *Ritchie* that the duty to disclose is ongoing and why the Ninth and Tenth Circuits have required ongoing disclosure in habeas proceedings. It is the reason why the Supreme Court declared in Banks v. Dretke, 540 U.S. 668 (2004) that we do not live in a world

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[2] These allegations also indicate why this case presents a more appropriate vehicle for *en banc* review than, for example, in Buell v. Anderson, 48 Fed.Appx. 491 (6th Cir. 2002), which lacked this direct link between federal habeas counsel and the alleged misconduct and/or fraud.

where those opposing the criminal defendant may hide exculpatory evidence, placing the burden on the defendant to find it himself.

Thus, just as state attorneys are obligated to disclose exculpatory evidence at trial to insure a fair trial, *Ritchie* imposes that continuing obligation in habeas, which, when not honored, ought properly provide a basis for equitable relief (either as fraud or misconduct). Under *Banks*, federal habeas courts can and do hold state attorneys responsible for failing to disclose exculpatory evidence when that non-disclosure renders a state judgment unfair. And Kyles v. Whitley, 514 U.S. 419 (1995) makes clear that this duty requires disclosure even absent direct knowledge by the state attorneys. So it must be in federal court: When a federal judgment is unfair because state attorneys failed to provide exculpatory evidence, the principles of *Banks* and *Kyles* apply with equal force. For if these identical principles didn't apply with regard to exculpatory evidence in federal court proceedings, the system would be turned on its head: The federal habeas court could undo the state judgment based on failure to provide exculpatory evidence while being powerless to revise its own judgment in the very same case. That certainly can't be the law.

This explains why Judge Merritt's seven-judge opinion in *Workman* correctly concludes that failure to disclose exculpatory evidence during the habeas proceedings provides grounds for equitable relief from a judgment so tainted. Workman, 227 F.3d at 335. This discussion also explains why, in the non-habeas context, this Court has recognized that a party's failure to comply with its disclosure obligations during federal proceedings may entitle an aggrieved party to equitable relief from judgment under Rule 60(b). Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425 (6th Cir. 1996). See also Summers v. Howard University, 374 F.3d 1188 (D.C.Cir. 2004)(actionable misconduct occurred when party failed to disclose evidence in discovery).

Moreover, any contrary rule will lead to the very type of tainted federal judgment we see here. The withholding of material exculpatory evidence during habeas – if established, as it is here – provides enough "misconduct" to justify equitable relief under Rule 60(b). Were it otherwise, the system will create the adverse incentive for state attorneys simply to ignore or otherwise violate their duty to disclose exculpatory evidence until the habeas proceedings are over, after which they can reap the benefit of such inaction.

At bottom, the panel majority is overly stringent not only in its view of how much fraud or misconduct Workman has to prove without a hearing, but who should ultimately bear the cost of the state withholding evidence – when the state and its attorneys bear the ongoing obligation to disclose. The panel ruling undermines the fairness of the federal habeas process, while making the federal courts unwilling participants in injustice, as they are here. Workman alleged in his habeas petition that Willis and Davis lied, and that the state withheld exculpatory evidence showing that Oliver was killed by friendly fire. Workman now has the exculpatory proof which was withheld during the habeas proceedings: Keenan's testimony, Davis' recantation, the apparent police bullet under the evidence cup, and a Memphis Police Officer's knowledge from witnesses that the police hit Oliver in the fray. The panel's denial of a stay means that Workman gets executed based on a tainted judgment – despite clear proof that he is not even guilty of first-degree murder.

The *en banc* court should therefore intervene and resolve the current stalemate over the law in this circuit governing such claims for relief from judgment. Such intervention is especially warranted, where, by granting *en banc* rehearing, this Court can insure the equal application of the law to this case and *Johnson v. Bell*, 6th Cir. 05-6925 – which presents identical issues, and for which this Court did grant a stay of execution, unlike the panel here. Through *en banc* review, this

Court can uphold the principles of *Ritchie* and those expressed by the Ninth Circuit in *Thomas* and the Tenth Circuit in *Smith* – all of which conflict directly with the panel's analysis. See Fed.R.App.P. 35(b)(1)(A) & (b)(1)(B). This Court should therefore grant *en banc* review, grant a stay of execution, and order briefing and argument.

B.

The Court Should Grant Rehearing *En Banc* Because
The Panel Has Denied A Stay Based On The Clearly Erroneous
Finding That The "Willis Bullet"And The "Keenan Bullet" Are Different. They Are Not.
They Are One And The Same:
The Q1 Bullet Allegedly Found By Willis And Presented To The Jury As The Fatal Bullet
Is The Same Bullet Actually Found By Keenan And The Police

Without the benefit of Workman's requested evidentiary hearing, the panel has made a fatal factual error, believing that the "bullet" which Keenan found is different from the "bullet" found by Willis. *Workman*, slip op. at 4. The panel is categorically wrong on this point. Review of the trial and clemency hearing transcripts (which Workman attaches for the Court's benefit) proves the fatal error in the panel's factual analysis. ***The "Willis Bullet" and the "Keenan Bullet" are one and the same: That bullet is the Q1 bullet – the bullet which the state has always claimed to be the fatal bullet from Workman's gun***. Because of that, Keenan's testimony proves that Willis lied at trial.

Contrary to the panel's claim, the prosecution didn't say it *might* produce the fatal bullet: The prosecution told the jury in no uncertain terms: "You *will* . . . hold in your hand the bullet that came from [Workman's] pistol. The bullet that entered Officer Oliver and eventually killed Officer Oliver." Trial Tr. 496.

To that end, the prosecution's trial proof was as follows: Terry Willis claimed that he found a bullet, which was identified as Trial Exhibit 35. Trial Tr. 914 (Trial Transcript Excerpts Attached

as Appendix A).[3] Memphis Police Sergeant Brawner then supposedly photographed Trial Exhibit 35 and put it into a pill bottle. Trial Tr. 916-918. Sergeant Barney Wright then sent Workman's pistol (Trial Exhibit 7) and the Willis Bullet (Exhibit 35) to the F.B.I. Trial Tr. 927-929. At the F.B.I., Agent Gerald Wilkes tied the Willis Bullet (Exhibit 35) to Workman's gun (Exhibit 7). Wilkes testified that "this bullet, Exhibit 35, was in fact fired from this particular weapon to the exclusion of all other weapons in the world." Trial Tr. 942. ***Exhibit 35 was identified by the F.B.I. as Q1.*** Trial Tr. 961.[4] The "Willis Bullet" was Q1.

It turns out that the "Keenan Bullet" discussed at the 2001 Clemency Hearing was also Q1. Indeed, the testimony presented by the Attorney General at the clemency hearing included testimony from O.C. Smith, the now-defrocked Shelby County Medical Examiner. Smith testified that "Q1 is the bullet that was recovered from the parking lot. *I believe that that is the bullet that went through Lieutenant Oliver's body without expanding* . . . ." Clemency Tr. 302 (Clemency Hearing Transcript Excerpts Attached as Appendix B). Smith described in great detail Q1 (Id., p. 339). After that, the following colloquy occurred:

> Chairman Traughber: ***This is the round that took Lieutenant Oliver's life***[?]
> [O.C. Smith]: ***Yes, sir, I believe it is.***

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[3] As Workman has noted in his May 1, 2007 motion for stay, the "Willis Bullet" was supposedly found the afternoon of the day after the shooting (August 6) at 2:25 p.m. Motion For Stay Of Execution, p. 4 & n.4.

[4] Contrary to the panel's claim that the prosecution alleged that Exhibit 35 was a bullet that hit Stoddard, *the prosecutor said nothing of the sort.* After defense counsel queried Wilkes on cross-examination how Oliver could have been killed by Q1 when Q1 was nearly pristine, the prosecutor proffered to Wilkes a theory that "the bullet, Exhibit 35, passed through a soft portion of one's tissue remain[ed] as it was eventually sent to you." Trial Tr. 965-966 (Attached in Appendix A). This was a question about ***Oliver's soft tissue***, not Stoddard's. The attached transcript speaks for itself: The bullet that everyone was talking about in Wilkes' testimony was Q1, the Willis Bullet, Exhibit 35, the supposed fatal bullet.

Clemency Tr. 341.

Sponsored by the Attorney General, Clyde Keenan testified that "the round that is attributed to taking Lieutenant Oliver's life" (Clemency Tr. 275) – which we now is Q1 – was a ***"round that the police found at the scene"*** (Clemency Tr. 276) "*into the morning hours*" after the 10: 30 p.m. shooting. Clemency Tr. 275. According to Keenan, it was the police – not Willis – who found Q1.

In sum, Willis told the jury he found Q1, the alleged fatal bullet, the afternoon of August 6. Keenan told the Parole Board the exact opposite: Police found Q1, the alleged fatal bullet, in the early morning hours of August 6 when combing the crime scene. The transcripts speak for themselves.[5] The panel's assertion that it is "doubtful" that Willis' testimony is false cannot be squared with the evidence. The foregoing careful review of the evidence reveals that *there is no doubt that Willis lied.* Keenan himself made eminently clear that "the round that is attributed to taking Lieutenant Oliver's life" was a "round that the police found at the scene."

The trial record and the clemency record make it clear beyond any doubt that Willis and Keenan identified *the same bullet.* There was only one alleged fatal bullet: Willis claimed he found it. Sponsored by the Attorney General, Keenan proved that Willis was lying. Contrary to the panel's claims, *the Willis Bullet and the Keenan Bullet are one and the same.* And because of that, Keenan's Attorney-General-sponsored testimony not only states a claim for equitable relief, it clearly indicates that Workman's underlying false testimony and *Brady* claims are meritorious. We thus have Willis lying about finding a Workman bullet which he never found, and we likely have under the evidence cup a police bullet which has never been disclosed. Why would Willis claim to find *the* critical piece

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[5] And so does the *state coram nobis* transcript, in which Dr. Cyril Wecht specifically testified that Q1 did not kill Lieutenant Oliver. See *Coram Nobis* Transcript (Appendix C).

of physical evidence against Workman hours after the crime scene was combed – but after Workman had been arrested and his gun impounded? Once explanation is that the bullet was planted. See Kyles v. Whitley, 514 U.S. 419, 446 (1995)(planted evidence in capital case).

All told, Keenan's testimony proves that Workman never received a fair hearing on his claims in habeas. Without the benefit of a hearing, however, the panel has denied a stay based on clearly-erroneous factual assertions.[6] Workman is entitled to a hearing on his motion for equitable relief. This Court should grant rehearing, grant a stay, and order further proceedings.

C.
This Court Should Grant Rehearing *En Banc* Because The Panel Denied A Stay In Violation Of *Barefoot v. Estelle*, 463 U.S. 880 (1983)

Because the District Court granted Philip Workman a certificate of appealabilty (R. 205), this

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[6] The panel's treatment of the Harold Davis claims is likewise one-sided and misses the point. In asserting that Davis didn't really recant, the panel quotes from a portion of Davis' testimony in which he equivocated (after being grilled on cross-examination for days). The panel overlooks both the fact that Workman raised a *Brady* claim along with a false testimony claim in his habeas petition (Petition ¶117(d)), as well as the extensive exculpatory evidence divulged during the *coram nobis* hearing.

For instance, Davis stated that he didn't see the struggle between Workman and the officers as he claimed a trial (*Coram Nobis* Tr. 144), that his prior recantation was true (Id. at 149), that his testimony was the product of threats against his life (Id. at 172), that he didn't see what happened with the shooting (Id. at 177), and that he didn't see Workman shoot Oliver. Id. at 344. Davis repeated twice that his trial testimony was not true (Id. at 361, 364) and he remembered "clearly that I did not see him." Id. at 396.

Workman would have been able to have a jury consider all of Davis' exculpatory statements, along with his equivocation. Even if Workman were unable to prove the actual falsity of trial testimony as part of his false testimony/*Brady* claim, taking the good with the bad, a jury hearing Davis' *coram nobis* testimony would undoubtedly have put very little credence in Davis' claim that he saw the shooting. This would have precluded the prosecution from making the damning argument it used to convict Workman – despite all the proof we have now that Workman didn't shoot Oliver:

> [From] approximately two feet away is what I believe Mr. Davis said and a shot was fired. *He coolly and deliberately pulled this trigger and sent the bullet down this barrel and into the body of that man right there....* [Workman has] been identified by Mr. Davis as being the shooter of Lt. Oliver.

Trial Tr. 1056-1057, 1065

Court is required to issue a stay of execution under Barefoot v. Estelle, 463 U.S. 880 (1983), so that this Court can decide the merits of his pending appeal in 6th Cir. Nos. 06-6451, 07-5031.

As the Supreme Court held in *Barefoot*, when a habeas petitioner obtains a certificate of probable cause to appeal (now certificate of appealability), the court of appeals *must decide the case on the merits*:

> When a certificate of probable cause is issued . . . petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal.

Barefoot v. Estelle, 463 U.S. 880, 893 (1983). See Garrison v. Patterson, 391 U.S. 464, 466 (1968)(per curiam). Ford v. Haley, 179 F.3d 1342 (11th Cir. 1999)

While *Barefoot* involved an appeal from an initial habeas petition, that distinction is immaterial here. The question before this Court is whether Workman's *first habeas* should be reopened. Further, the *Barefoot* rule (requiring a stay to address the merits following issuance of a certificate) applies to Rule 60(b) appeals. See Zeigler v. Wainwright, 791 F.2d 828, 830 (11th Cir. 1986)(per curiam)(granting certificate of probable cause in 60(b) case, granting stay of execution, and ordering expedited briefing). In fact, as the *en banc* Eleventh Circuit has held, the *Barefoot* rule even applies to second habeas petitions, when a certificate has been granted. Messer v. Kemp, 831 F.2d 946, 957-958 (11th Cir. 1987)(en banc)(granting certificate and addressing merits of claims raised in second habeas petition).

The panel's actions run directly counter to *Barefoot*. Indeed, on April 26, 2007, this Court entered an order consolidating Workman's appeals for "briefing and submission" but then did not order briefing. More significantly, under *Barefoot*, there has been no decision on the merits of the pending appeals. All the panel has done is decide a stay motion (which included Workman's request

for a *Barefoot* stay). That decision was *not* a decision on the merits:

> Although a decision by the Court to grant a stay may take into account 'whether the applicant has a reasonable probability of prevailing on the merits of the case,' R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 17.19 (6th ed. 1986)(*citing* Rostker v. Goldberg, 448 U.S. 1306, 1308, 101 S. Ct. 1, 2, 65 L. Ed. 2d 1098 (Brennan, Circuit Justice 1980)), ***it is not a merits decision.***

Messer v. Kemp, 831 F.2d at 957 (emphasis supplied).

That Workman has been denied his rights under *Barefoot* is apparent when one considers the possible disposition of his appeals were he executed. The pending appeals for which he has received a certificate would be dismissed as moot. But, as the Supreme Court has made manifest, a court may not fail to decide a case on the merits by denying a stay and thereby mooting the proceedings. Lonchar v. Thomas, 514 U.S. 314, 320 (1996).

Because the panel's decision conflicts directly with *Barefoot*, the *en banc* court should grant rehearing *en banc* and grant a stay of execution. It should order briefing and argument, which, under *Barefoot*, may be expedited.[7]

CONCLUSION

This Court should grant rehearing *en banc* and grant a stay of execution.

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[7] The panel's assertions about the age of this case also miss the mark. The reason this case has been litigated for so long is because Workman's conviction was based on false testimony of key witnesses, and the withholding of exculpatory evidence showing that he didn't shoot Lieutenant Oliver – evidence which was never timely disclosed to Workman and only surfaced after the habeas proceedings concluded. Like Workman and the federal courts, the state does not have a legitimate interest in enforcing a tainted federal judgment – especially under the circumstances recounted here.

Respectfully Submitted,

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Paul R Bottei

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by fax to Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this 7th day of May, 2007.

Paul R Bottei

Appendix A

Trial Transcript Excerpts Concerning Q1, The Alleged Fatal Bullet

them. Do not pass the envelope to the jury.

(WHEREUPON, Exhibits 33 and 34 were tendered to the jury for examination.)

MR. PETERSON: No questions.

THE COURT: Mr. Thompson, do you have any questions?

MR. THOMPSON: No questions, Your Honor.

THE COURT: You're excused. Call your next witness.

(WITNESS EXCUSED)

MR. PETERSON: Mr. Terry Willis.

TERRY WILLIS was called and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PETERSON:

Q Would you please tell us your name, sir, and spell your last name for the record?

A Terry Willis, last name W-I-L-L-I-S.

Q By whom are you employed?

A Holiday Auto Parts.

Q What do you do out at Holiday Auto Parts?

A Right now I'm assistant manager.

Q How long have you been employed out there?

A About four years.

Q Were you working out there on August the 6th, 1981?

A Yes, sir.

Q Did you find any sort of object out there which alerted you to contact the Memphis Police Department?

A Yes, sir.

Q What did you find?

A At first I thought it was an automotive type bearing, but it turned out to be a round.

Q Where did you find it at and what were you doing at the time?

A Well, I found it between the parking lots of Holiday and Wendy's, just about middle ways between the buildings. At the time, I was checking a car to see what type of problem it had.

Q All right, sir. I want to tender to you an object and if you would look inside this envelope and see if you can identify the object in there. (Envelope tendered to witness.)

A Yes, sir.

Q What is that?

A The round I found that day.

Q All right, sir.

MR. PETERSON: If I may approach the chart, Your Honor, and the witness.

THE COURT: Yes.

Q Sir, can you identify what's depicted in this chart and tell what that is?

A Yes, sir.

Q Can you show us using this pencil right here, just point to the place where you found that silver round.

A Let's see. It would have been right about in this area right here (Indicating).

Q How close to the curb was it?

A Oh, just about a foot or less.

Q All right, sir.

MR. PETERSON: Your Honor, the State would move that slug and the vial it's in into evidence as the next exhibit, I believe it's 35.

THE COURT: So mark it.

(WHEREUPON, State's Exhibit Number 35 was marked and filed.)

Q Mr. Willis, after you saw it, what did you do with it?

A At first I put it in my tool box and then I contacted the North Precinct and they sent an officer out there again.

Q Were you present when the photographs were taken by the police officers of the incident?

A Yes, sir.

Q Was it placed back on the ground after being taken out of your tool box in the position that it was at when you found it?

A Yes, sir.

Q Did you make any markings on this slug, Exhibit 35, at all?

A No, sir.

Q Did it go into the possession of anyone other than yourself or police officers?

A No, sir. It went from me to the Crime Scene.

Q Thank you.

MR. PETERSON: No further questions.

MR. JONES: No questions.

THE COURT: You're excused. Call your next witness.

(WITNESS EXCUSED)

MR. PETERSON: F. D. Brawner.

F. D. BRAWNER was called and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PETERSON:

Q Sir, would you state your name to us and spell your last name?

A Sergeant F. D. Brawner, B-R-A-W-N-E-R.

Q By whom are you employed and in what capacity?

A With the Memphis Police Department, the Crime Scene Bureau.

Q How long have you been with the Crime Scene?

A Twelve years.

Q On August the 6th, 1981, around 1:45 in the afternoon, did you go to the Holiday Auto Parts at 3289 North Thomas?

A Yes, I did.

Q Were you in a one-man Crime Scene car or did you have a partner?

A I had a partner.

Q And what was his name?

A Sergeant R. T. Montgomery.

Q When you-all went out to Holiday Auto Parts on August the 6th, 1981, what did you do?

A There was a bullet found out there on the parking lot of Holiday Auto Parts between Wendy's and the Holiday Auto Parts. We photographed this bullet and made measurements of its location and tagged it.

Q All right, sir. I'm going to hand you three photographs. (Photographs tendered to witness.) Can you identify what's depicted on those photographs?

A Yes, sir. These are photographs showing the location of the bullet on the parking lot. I have laid down a pen there indicating where the bullet is so I could show the location on this one.

Q Just to kind of highlight it?

A Yes, sir. This is the same photograph, and then this one is a close-up of the bullet itself.

Q All right, sir. Did you take those photographs?

A Yes, sir, I did.

Q Do they clearly and accurately depict what they're photographs of, the bullet as it lay on the Holiday Auto Parts lot?

A Yes, sir, they do.

Q Sir, would you take that grease pencil beside you on the shelf and circle the slug in each of those three photographs?

A (Witness complied.)

Q All right, sir.

MR. PETERSON: Your Honor, the State would ask that those three photographs be marked as State's Collective Exhibit 36.

THE COURT: So ordered.

(WHEREUPON, State's Collective Exhibit Number 36 was marked and filed.)

Q I'll hand you an envelope and ask if you can identify the writing on the envelope and also the contents inside of it. (Envelope tendered to witness.)

A Yes, sir. This is the envelope that we placed the container that contained the bullet in. This is my writing on the envelope.

Q And what's inaide there?

A A plastic pill bottle which indicates one spent bullet, 3289 North Thomas, has mine and my partner's name and the date on it.

This is the same spent bullet we collected out there. It does have mine and my partner's initials on it.

Q And your initials appear as F.B. and your partner's appear as what?

A R. M.

Q Would you place that back in that container?

A (Witness complied.)

Q And that is one and the exact same bullet that appears in the photograph, the three photos of Exhibit 36?

A Yes, sir, they are.

MR. PETERSON: Your Honor, the State would request that Exhibits 35, the spent round, just the vial itself, and the three photographs of Exhibit 36 be passed.

THE COURT: All right. We can do it quicker than that. Take it out of the vial.

(WHEREUPON, State's Exhibits Numbers 35 and 36 collectively were tendered to the jury for examination.)

JUROR ALLEN: Your Honor, may I know the date that's on the brown bag?

THE COURT: What was that?

JUROR ALLEN: The date that's on the little brown bag, the date this was picked up.

THE COURT: The question is not what's on the brown bag, but what is the date that you're asking for, please, ma'am?

JUROR ALLEN: I would like to have the date that the officers went out to Wendy's or to the auto parts and picked up this bullet.

THE COURT: Mr. Brawner, can you answer that?

THE WITNESS: It was on the 6th.

THE COURT: The 6th of what month?

MR. PETERSON: Would the report refresh your memory, sir?

THE WITNESS: Yes.

(Document tendered to witness.)

THE WITNESS: The 8th month, the 6th day of '81, at 13:45 p.m.

THE COURT: Yes, ma'am?

JUROR DUGAN: Has it been indicated what caliber bullet this was, a .45 or .38?

THE COURT: I don't know if this witness is qualified to answer that.

MR. PETERSON: I don't believe he is.

THE COURT: He's not qualified to answer that, please, ma'am.

Yes, ma'am?

JUROR ASHBY: Was there any indication as to whether the bullet ricocheted off the building, or how did it get to the ground?

THE COURT: I'm afraid the witness is not qualified as an expert to answer that. You'll have to do your own thinking in the absence of proof.

MR. PETERSON: No questions.

MR. THOMPSON: No questions, Your Honor.

THE COURT: All right. You're excused. Call your next witness.

(WITNESS EXCUSED)

MR. PETERSON: R. L. Hannah.

R. L. HANNAH was called and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PETERSON:

Q Would you please state your name and spell your last name for the record?

A R. L. Hannah, H-A-N-N-A-H.

Q And for whom do you work?

A Memphis Police Department.

Q And you're apparently a Sergeant with the Memphis Police Department.

duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STROTHER:

Q State your name, please.

A Barney G. Wright.

Q Would you spell your last name for the record?

A W-R-I-G-H-T.

Q And by whom are you employed?

A By the Memphis Police Department.

Q What rank or rate do you hold with that department?

A Lieutenant.

Q How long have you been with the police department?

A Almost twenty-one years.

Q To what division or bureau are you currently assigned?

A Assigned to the Crime Scene Squad.

Q In connection with the investigation into the killing of Officer Ronald Oliver, did you have an occasion to gather certain pieces of evidence for the purpose of transporting or gathering that evidence and sending it to the F.B.I. for some tests by them?

A Yes, sir.

Q I'd ask that the witness be passed State's Exhibit Number 7, the automatic pistol, Collective Exhibit 24 also.

(Pause)

THE COURT: Now, wait a minute. What's your next number?

MR. STROTHER: Exhibit 12 and Exhibit 35.

THE COURT: And Exhibit 35. All right.

(WHEREUPON, the abovementioned exhibits were tendered to the witness.)

Q Now, Officer Wright, would you examine those items and tell us if you packaged and sent all of those items presented to you to the Federal Bureau of Investigation?

A (Witness complied.) Yes, sir, I can. The only item in this bag was this particular item, the exhibit that was sent that I see.

Q I believe you're referring to Collective Exhibit 12, and you're saying that you're identifying the shirt as an item which was sent, and I believe there was also a pair of trousers and other items in that bag that you did not send. Is that correct, sir?

A Yes, sir.

Q But you sent all of those other items to the Federal Bureau of Investigation?

A Yes, sir.

Q Did you accompany that with a letter written by yourself giving them instructions or requesting that they perform certain tests upon those items?

A Yes, sir.

Q What tests did you ask them to perform?

A I requested that the cartridge cases and the fragmented bullet collected from the crime scene be examined in conjunction with this .45 caliber pistol.

Q And I believe you're referring to Exhibit Number 7?

A Exhibit Number 7, yes, sir. To determine if they had been fired from this particular weapon.

Also on the police uniform shirt, I requested that a powder residue test be conducted to try to determine the distance at which the shot had been fired.

Q And have you since that time received those items back from the Federal Bureau of Investigation?

A Yes, sir.

Q And turned them over to the Criminal Court Property Room?

A Yes, sir.

MR. STROTHER: Pass the witness.

MR. THOMPSON: No questions.

THE COURT: You're excused.

(WITNESS EXCUSED)

THE COURT: Let's get these exhibits placed back in the proper order on the table there. Are they placed back in the proper sacks and everything?

THE BAILIFF: Yes, Sir.

THE COURT: All right.

MR. PETERSON: The State would call Mr. Jerry Wilkes.

GERALD F. WILKES was called and after having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PETERSON:

Q Sir, would you please state your name and spell your last name for us?

A Gerald F. Wilkes, W-I-L-K-E-S.

Q By whom are you presently employed?

A I'm a Special Agent with the Federal Bureau of Investigation.

Q And how long have you been a Special Agent with the F.B.I.?

A For twelve years.

Q During your twelve-year period of time, what have been your various duties and assignments within the bureau?

A I've been assigned as a field agent to the Milwaukee Division, the New Haven Division, the New York Division. For the past almost nine years now I've been assigned to the firearms unit of the F.B.I. laboratory in Washington, D.C.

Q What formal education do you have and specialized training to work within the firearms identification unit?

A I have a Bachelor of Science degree in civil en-

A I identified both the container and the pill box because it has my identifying symbol and specimen number which I placed upon it when I received it.

Q All right, sir. And what is in that pill box, that being Exhibit 35?

A It's a .45 auto caliber aluminum jacketed bullet.

Q Could you tell either in your manual examination--first of all, did you conduct a manual examination without the microscope?

A Yes.

Q Could you tell either in your manual examination of that slug or in your microscopic examination whether or not that slug, Exhibit 35, ricocheted off of any device before it finally landed?

A Well, this particular type--you're speaking of a ricochet off of a hard surface such as a wall?

Q Yes, sir.

A Well, this bullet is very, very soft. Aluminum is a soft metal and the lead core is also very soft. Bullets of this type are designed to attain a muzzle velocity of about a thousand feet per second, and when a bullet which is this soft strikes a hard object at that type of velocity, I would expect to see a great deal more mutilation than I see here now. But, I cannot exclude the possibility that this bullet ricocheted off of a hard surface.

Q Did you compare your two test rounds with the slug that you have in your hand now, Exhibit 35?

A Yes, sir.

Q And would you explain to us how you compared them?

A Yes, sir. I first examined this particular bullet under a relatively low-powered microscope called a binocular microscope to determine if in my opinion the bullet did bear sufficient unique microscopic characteristics for identification purposes.

Based upon that examination, I determined that in my opinion the bullet did bear sufficient microscopic marks.

I then test-fired this particular weapon, Exhibit 7, using the same type of ammunition, retrieved the test bullets, and by means of a high-powered microscope, called a comparison microscope, I simultaneously compared this bullet with the test bullets I obtained by test-firing this particular pistol.

The comparison microscope is a microscope equipped with two stages. It has a dual optical system which enables me to look at both stages of that microscope at the same time. I'm able to examine microscopic characteristics on objects placed on either of those stages simultaneously.

I mounted this particular bullet on the left stage of my microscope, and the test bullets one at a time, on the right stage and simultaneously made my comparison.

Q And as you made your comparison on that examining

microscope, what did you find?

A Well, I found that--you mean did I draw a conclusion as to those results?

Q Yes.

A Yes. I determined from that examination that this bullet, Exhibit 35, was in fact fired from this particular weapon to the exclusion of all other weapons in the world.

Q How can you say that, that it came out of that particular weapon and not any other in the world?

A Well, when the weapon is manufactured, it goes through a series of operations which entails the forging, shaping, rifling of the bore of the weapon with other steel objects. The machinery which is used in making these weapons, being a metal, is itself changing as the machinery is utilized.

Microscopic differences in weapons can be attributed to the use of the weapon or the misuse of the weapon, and because of all these reasons, no two weapons which exist in the world have exactly the same microscopic characteristics. As ammunition components are fired from and through this weapon as well as any other weapon, the weapons can impart to the various ammunition components their own unique microscopic characteristics, and these are the characteristics which enable me to identify a bullet or cartridge case with a particular weapon.

Q And in your expert opinion, that slug, that .45

caliber round, Exhibit 35, was fired from that weapon and no other in the world?

A Absolutely.

Q The test rounds that you fired and placed back in your pocket, sir, would you take those out once again?

A (Witness complied.)

Q And are those the same bullets and cartridge casing and fragments that you test-fired up in Washington and out of that weapon, Exhibit 7?

A Yes, sir, they are.

MR. PETERSON: Your Honor, the State would move that envelope and items inside of it as Exhibit 41 Collectively.

THE COURT: So ordered.

(WHEREUPON, State's Collective Exhibit Number 41 was marked and filed.)

MR. PETERSON: Your Honor, I believe we have a question.

JUROR ALLEN: Your Honor, I would like to ask the witness to explain to us about the reaction that item 7 would have on a hard surface. I'd like to know what affect it would have being at close range on a human being.

THE COURT: If you know that, you may answer, please.

THE WITNESS: The affect would depend entirely on what organs and tissues the bullet penetrated or struck. I

you referred to.

A Exhibit 35 was the manila envelope which contained the Q1 bullet. I assume you mean this.

Q Yes. Now, referring to your test-firing Exhibit 41, would you hold those up again and show us the condition of those bullets that were fired?

A The bullets?

Q Yes. The slugs themselves.

A (Witness complied.) The bullets have mushroomed, being hollow-point bullets, and have had a portion of the jacket mutilated and separated from the original jacket.

Q And these were fired into a water tank. Is that correct?

A Yes, sir.

Q And they were recovered from the tank shortly after being fired?

A Yes, sir.

Q And these are the same make and type of bullet as Exhibit 35?

A Yes, sir.

Q The whole bullet.

A Yes, sir.

Q All right, sir. And would you just for comparison purposes show us Exhibit 35?

A (Witness complied.)

tridge itself?

JUROR NEVINS: Yes. Why would this whole thing be out?

THE COURT: I believe you've got the Q1, Exhibit 35, your Q1.

JUROR NEVINS: Is that possible for--(Interrupted)

MR. PETERSON: No, Sir. Excuse me. That's part of Collective Exhibit 24. That's a live round.

THE COURT: Well, my eyes, I thought it was the silver slug. Is it the cartridge case?

JUROR NEVINS: It's the whole thing. It's the whole bullet.

THE COURT: Well, that's the danger of doing this type of thing. Would you look at the vial, please, ma'am, and see if you can tell us what it says? Somebody help her.

JUROR FRANKLIN: It says .45 cartridge from parking lot at 3275 Thomas.

MR. THOMPSON: Your Honor, I think the jury is going to have to tough it out themselves as far as what he's saying it represents rather than someone telling them.

MR. PETERSON: I believe that's what witnesses are for. If I could give this to--(Interrupted)

THE COURT: No, the Court will keep the evidence straight for the purposes of the jury and the record. There's no problem there.

hitting a bone or anything, what kind of indication would it be?

THE WITNESS: It might very well mutilate to an appreciable extent and it may not.

JUROR PARKS: Would it be like these right here that were in the water?

THE WITNESS: Not necessarily.

BY MR. THOMPSON (Continuing Cross-Examination):

Q You would expect some degree of mutilation if it had passed through as that shirt indicates from front to back or back to front?

A I would normally expect some degree of mutilation, yes, sir.

Q Can you tell me if that bullet had been fired in the air straight up or almost straight up in the air, would it be possible for that to start tumbling on its fall and to hit on its side, and thus to escape the mutilation?

A It's possible, yes, sir.

Q Because the side actually is more durable, so to speak, than the end?

A You are correct, yes, sir.

REDIRECT EXAMINATION

BY MR. PETERSON:

Q Mr. Wilkes, is it possible also that the bullet, Exhibit 35, passed through a soft portion of one's tissue and

remain as it was eventually sent to you?

A Yes, sir, that's possible.

Q Thank you.

MR. THOMPSON: Your Honor, I don't have anymore questions.

THE COURT: Do you have anymore questions of the witness?

MR. PETERSON: No, Sir.

THE COURT: Now, have we got our exhibits back in proper order?

MR. PETERSON: Would you like me to approach and check, Sir?

THE COURT: We'll need to be sure that that's been done.

Yes, ma'am?

JUROR TAYLOR: Would the hollow-point still have gone anywhere if it had struck metal?

THE WITNESS: Would you repeat that, please?

JUROR TAYLOR: You said they have a hollow-point on them. Could it have gone anywhere and not be in that bullet?

THE WITNESS: Yes, that's--(Interrupted)

JUROR TAYLOR: Would it still have gone anywhere if it had struck metal?

THE WITNESS: Well, that's the way it's manufactured.

JUROR TAYLOR: But it does go anywhere as it comes out of the gun?

THE WITNESS: No. It's that way upon manufacture. A hollow-point is a recess in the point of the bullet. As that characteristic--(Interrupted)

JUROR TAYLOR: Well, the whole bullet didn't look like that.

THE WITNESS: Which one are you referring to?

THE COURT: We can't discuss--I'm sorry, but we just can't get into a colloquy with the witness. That can't be done.

Mrs. Brugge?

JUROR BRUGGE: How far would a bullet shot from this gun travel in a horizontal plane if it didn't strike anything?

THE WITNESS: Oh, it could travel as much as two miles.

MR. PETERSON: No questions.

THE COURT: Anybody else? Thank you, sir. You're excused.

(WITNESS EXCUSED)

MR. PETERSON: May we approach the bench?

(WHEREUPON, a bench conference was held off the record in the presence of the jury but out of its hearing, after which the

Appendix B

Clemency Hearing Transcript Excerpts Concerning Q1, The Alleged Fatal Bullet

Lieutenant Oliver other than Mr. Workman would have been if Lieutenant Oliver shot himself with his own gun, and that didn't happen. There's no way. I am 100 percent sure of that, having been there that quick, having seen what happened, having been privy to Mr. Workman's statements immediately after he was arrested. There's not one doubt in my mind as I live and breathe that anyone shot Ronnie Oliver but Mr. Workman.

MR. DALTON: Thank you.

CHAIRMAN TRAUGHBER: The round that is attributed to taking Lieutenant Oliver's life, it was not located that evening?

THE WITNESS: Yes, sir, it was found that morning -- we didn't know exactly what it was. We were into the morning hours and everything was preserved, nothing was moved. It was found on the scene that particular -- within the hours after that, yes. We may not have known exactly at that moment that it was the one until the ballistics test and everything.

CHAIRMAN TRAUGHBER: Did your

team take possession of it?

THE WITNESS: The Crime Scene Squad did. My team was responsible for securing. The crime scene technicians are actually the ones that come in and tag it and put it in the envelope and take it to be examined.

MR. DALTON: Is this the same round that was found by the mechanic or whatever next door that was put in a toolbox, or is this something that one of the police officers found?

THE WITNESS: No, sir, I'm talking about the round that the police found at the scene. The toolbox round I'm not exactly sure when they found that.

MR. DALTON: How distorted was the bullet that you-all found that you understood killed --

THE WITNESS: Not very distorted at all. I did not examine it closely because obviously we didn't want to touch it in any way. But it was not very distorted at all, which is not uncommon based on as many shootings as I've made. You never know.

These bullets -- and I speak from having --

Following my assignment after this assignment, I took over command for years of the police department's homicide squad as a captain, and later for years as the commander of its SWAT Team. I have seen a lot of people shot with a lot of weapons and, I mean, there's no way to predict just exactly what a slug is going to look like after somebody has been shot with it. Sometimes they pass clean through, sometimes they come out in a million pieces, sometimes they come out completely intact. It just depends, and every case is different.

I do not remember this round being that distorted but I didn't touch it. I mean, I didn't get down and examine it or anything. We located it, it was going to be properly examined. It was our job just to secure it.

MR. HASSELL: One thing, sir: Where was this bullet laying in relation to Lieutenant Oliver?

THE WITNESS: As best I can recall it would have been slightly to the --

1/25/01 Board Hearing

CHAIRMAN TRAUGHBER: We're back with the Executive Clemency Commutation Hearing of Mr. Philip R. Workman, Case No. 95920, January 25, 2001, at Riverbend Maximum Security Institution. We're continuing with the presentation by the State, and they've called Dr. O. C. Smith as a witness.

And Dr. Smith, would you raise your right hand and take an affirmation.

O. C. SMITH, M.D.,

having been called as a witness on behalf of the State, was sworn, and testified as follows:

CHAIRMAN TRAUGHBER: And Dr. Smith, would you give us your full name, and spell it for the stenographer, and the address that you can be reached and a number that you can be reached at in the event the Governor's office needs to contact you?

THE WITNESS: My name is O'Brian, O-b-r-i-a-n, Cleary, C-l-e-a-r-y, Smith, S-m-i-t-h. The address at which I can be reached is 1060 Madison Avenue, Memphis, Tennessee. That's the Regional Forensic

important later on.

Now hollow-point bullets basically are designed under ideal conditions to expand around up to 80 percent of their original caliber. So 80 percent plus. The pressures -- it does this by having pressures enter the cavity. The tissue pressures will enter that cavity and hopefully that pressure will be enough to drive the wall of the hollow point outward, making it blossom, and it must also try to overcome those outside pressures tending to collapse the bullet inward. Now that doesn't always happen in the real world. There are times when the outside pressures are greater than the intracavitary pressures, and instead of moving outward the bullet can collapse inward.

Now bullet Q1 is the bullet that was recovered from the parking lot. I believe that that is the bullet that went through Lieutenant Oliver's body without expanding, that it produced a small exit wound because again it didn't deform. It may have tumbled or, you know, twisted, flipped

over inside the body and may have penetrated most of the tissues base-first. A lot of bullets when they go in they flip over and continue base-first, which is a very stable position. It may not then have deformed after its initial nose deformation.

By striking the seventh rib, that strike alone is sufficient to induce instability or tumble in the bullet.

Now the FBI exemplars -- when the FBI did testing on Mr. Workman's gun using Silvertip ammunition to make comparisons for the ballistics test, they fired into water. Now water can cause some of the most extreme deformation of a bullet known. More than gelatin and certainly more than the human body. So when they shoot into water to look at the rifling marks you get expansion much beyond this typical deformation even in gelatin, and it's a more than you even expect to see in the human body. I have shot a lot of bullets into water and I have retrieved a lot of bullets from the human body, and I've shot a lot of bullets into gelatin. The maximum expansion occurs when you shoot into

shirt, as well as a chip of bone, and is very easily displaced. It comes out very easily; jst tip it upside down and tap it.

There is the nose with the contents removed.

There is the nose of Q1 from the parking lot.

There is the side of the test bullet.

There is the side of Q1.

So why do we know that the Silvertip bullet killed Lieutenant Oliver? Well, basically only two guns were fired, from the circumstances I was able to uncover. Leutenant Oliver did not shoot himself. With that pistol that he had, if he shot himself there would have been powder burns. There are no powder burns on his wound at all.

The clothing defect is consistent with it, the skin wound is consistent with it, the crime scenes lines up, Bullet Q1 has the appropriate features, and the model explains why it did not expand.

Now that was the same conclusions I reached last year, but it's been a whole

year almost, and one of the things that we do is try to make sure that we can identify metallic bullet residues in skeletal trauma. We had no skeletal trauma here retained, but we did have histology sections.

So what I did was obtain a pig's foot and shot a Silvertip ammunition through it and then excised the wound and had it analyzed by a state of the art instrument called a scanning electron microscope with energy dispersant analysis of x-rays.

And we see here that there are aluminum residues in the wound of this experimental firing.

And in this control you see there's a tall peak for aluminum. I then took Lieutenant Oliver's gunshot wound of entrance, looking at this skin segment and at the muscle take was adjacent to the bone that was fractured by the passage of the bullet.

This is the skin. You can see that there's some gray metallic material here.

This is the muscle. You can see that there are some bits of shiny metal here.

This is the scanning electron micrograph of the muscle, and this is the EDX report on the skin. You see that there is a very definite aluminum peak in the skin, and in the muscle there is a even taller aluminum peak.

So in 2001, a year later, why do we know that it was a Silvertip bullet that killed Lieutenant Oliver? First, because for the same original reasons. The model certainly explains why the bullet did not expand, and now we know that the gunshot wound contains aluminum.

If we could have the lights please.

I have exemplars of this model bullet that I fired into the canine.

CHAIRMAN TRAUGHBER: This is the round that took Lieutenant Oliver's life.

THE WITNESS: Yes, sir, I believe that is. And this is the bullet which I shot into the model and I think that you can see that with one shot only, the same number of shots that went through Lieutenant Oliver, I was able to duplicate in main the

Appendix C

Coram Nobis
Transcript Excerpts
Concerning Q1,
The Alleged Fatal Bullet

COPY

IN THE CRIMINAL COURT OF TENNESSEE

FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

DIVISION III

PHILIP WORKMAN, Petitioner,	)	
VS.	)	Cause No. 81209
STATE OF TENNESSEE, Respondent.	)	

BEFORE THE HONORABLE JOHN P. COLTON, JR. PRESIDING JUDGE

HEARING ON OCTOBER 16, 2001

APPEARANCES

FOR THE STATE:

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Reported by:
Delora V. Weaver

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THE WITNESS: Well, yes, this is the x-ray that I recall seeing, and it does have Lieutenant Oliver's name on it for identification.

CONTINUATION BY MR. PIEROTTI:

Q. Okay. So that is the x-ray you referred to as having --

A. Yes, it was a single x-ray of the chest -- You can see a little bit of the neck, and you see a little bit of the upper abdomen.

Q. You have examined that under better light?

A. Oh, yes, yes.

Q. Okay.

A. Yes, I did examine it, of course, with --

MR. PIEROTTI: If we can, let's mark that as 1A, I guess.

THE COURT: No objection, lawyers?

MR. CAMPBELL: No, Your Honor.

THE COURT: Mark it 1A.

(WHEREUPON, the said x-ray was marked Exhibit No. 1A to the testimony of the witness.)

THE COURT: I don't need him to keep it, unless he wants. (Directed to the bailiff.)

CONTINUED BY MR. PIEROTTI:

Q. You also stated that you had -- Do you recall Lieutenant Wilkes' testimony? He testified about examining a

stint slug that he referred to as Q1?

A. Yes.

Q. All right. And have you seen pictures of that?

A. Yes.

Q. What is that slug? What type of slug is it?

A. That was a .45 caliber, aluminum jacketed, soft-lead core, hollow-point type ammunition.

Q. Now, the bases upon -- You reviewed the autopsy -- We talked about the x-ray and the stint slug -- Based upon your knowledge, skill, experience, training and education, do you have an opinion to a reasonable degree of medical certainty whether or not that slug that you saw from looking at that x-ray was the slug that caused Lieutenant Oliver's death?

A. Yes, I have an opinion.

Q. And what is that opinion?

A. With reasonable medical certainty, I do not believe that it was.

Q. Okay. Now, could you tell us why?

A. Yes, that bullet is essentially in tact. There is no deformation. There is no mushrooming, flattening, and no mutilation of the bullet. The jacket remains in place.

I find it very difficult to comprehend how that bullet --

MR. KITCHEN: Your Honor, I'm going to object at

this point, Dr. Wecht does not -- I've listened to some qualifications in the field of forensic pathology, but I didn't hear one thing about being a bullistics expert.

And we're talking about bullets now, and certainly that's outside his purview.

THE COURT: Mr. Pierotti.

MR. PIEROTTI: Your Honor, he's talking about how that particular projectile reacted when it hit the body, and we can ask him this question.

Dr. Wecht, how many --

THE COURT: Let me just say this fc
Now, I'm going to sustain the State's objecti
nothing in the testimony about Dr. Wecht bein
kind of an expert as far as any bullets or am
concern.

CONTINUED BY MR. PIEROTTI:

Q. Dr. Wecht, how many autopsies have where similar type ammunition, that has been individual's death?

A. That particular kind of ammunition?

Q. Yes.

A. Probably, a couple of dozen.

Q. All right. When you have examined -- done your autopsies on that type of death, what have you found?

A. I found in all the cases that I can recall, that

the bullet had not exited the body.

Q. And in this case, what did you find?

A. Well, in this case, it's not what I found, it's what has been represented as being found -- is that this bullet is supposed to have traversed Lieutenant Oliver's body from it's point of entrance on the left lateral chest wall in the midaxillary line to its point of exit in the right posterior back region, slightly higher.

After having broken the left seventh rib beneath the point of entry, then piercing the left lung, going through the diaphragm, the stomach, coming back up into the chest, lacerating the left ventricle and left atrium, piercing the right lung and, then, continuing on through to it's exit -- That is what -- was the trajectory that is described in the autopsy report. I agree with that trajectory. I have no difference of opinion regarding the trajectory of the missile that killed Lieutenant Oliver.

Q. All right. Now, with what you saw in the autopsy performed by Dr. Bell and others be typical or atypical to the type of ammunition that you have performed autopsies on before in similar ammunition to this?

A. This would be a highly atypical kind of scenario.

Q. Why is that?

A. Because this bullet is a bullet that hides a softer jacket -- aluminum is softer than copper -- and when that

bullet strikes and fracture a significant size bone, a rib of an adult male, then there is even a greater propensity for some degree of fragmentation and some kind of deformation.

The kind of ammunition that we're talking about here now is, in fact, designed not really to exit. That was the whole concept for its origination and other kinds of hollow-point type ammunition.

The fact that, that bullet that was found -- to which I think you have referred I think as Q1 -- shows no fragmentation, no deformation and, yet, it did break the bone is a highly atypical kind of a situation.

MR. PIEROTTI: Excuse me.

(Conferring with cocounsel.)

CONTINUED BY MR. PIEROTTI:

Q. Based upon your knowledge, skill, experience, training, and education, do you have an opinion to a reasonable degree of medical certainty whether Q1 -- that the bullet that was Q1 in Lieutenant Wilkes' testimony -- the .45 caliber -- is the bullet or the caliber bullet that killed Lieutenant Oliver --

(Conferring with cocounselor.)

-- looking at the wounds on the body?

A. Yes, I have an opinion.

Q. All right. What is that, sir?

A. It is not. The points I have made, I shall not

repeat. In addition, the entrance wound is considerably larger than the exit wound. Again, a very significant, atypicality for this kind of ammunition.

The hole on the left side of the chest was measured at one-half an inch in diameter. It's referred to as 50/100th -- one-half inch.

The hole at the point of exit, is described as 21.100 x 24.100, which roughly then is 1/5 x 1/4 of an inch, considerably smaller. This is highly atypical, especially then for a bullet which has struck a rib, which is then going to be tumbling. It's not going to be moving in a straight line trajectory. It is knocked eschew, so to speak.

So for all of these reasons, I find the Q1 to be highly unlikely as the missile that traversed Lieutenant Oliver's chest and produced all of the injuries that I referred to before.

Q. Is your opinion saying that any .45 caliber hollow-point bullet would have caused that wound?

A. Well, it would be somewhat similar; more so, however for this particular kind with the aluminum jacket -- described colloquially sometimes as -- or referred to colloquially sometimes as silver tip.

For the reason that I mentioned, the aluminum jacket is more frangible. It is more likely to fragment, or likely to break away from the soft lead core of the bullet.

MR. PIEROTTI: Excuse me.

(Conferring with cocounselor.)

Q. With the entrance wounds, exit wounds, with the traverse that you saw in the x-ray and also described in the autopsy report, what is your opinion as to whether or not the .45 silver tip, hollow point, caused the injury that Lieutenant Oliver succumbed?

A. It is my opinion that it did not.

MR. PIEROTTI: No further questions.

MR. KITCHEN: Your Honor, could we take a five minute recess?

THE COURT: Yes. We'll take a short recess.

(WHEREUPON, a ten minute recess was had.)

MR. PIEROTTI: Your Honor, before they cross, may I -- I omitted a couple of questions that I need to ask.

THE COURT: All right. Wait just a minute, now, can you hear? (Directed to the court reporter.)

MR. PIEROTTI: I omitted a couple of questions.

THE COURT: All right, sir, you may ask.

CONTINUED BY MR. PIEROTTI:

Q. Doctor, I believe that you testified that the exit wound was 21 x 24, if it was 21 x -- 20 x 64 -- 21 x 64, would your opinion be any different?

A. No, it would still be the same. I'm aware that in one place Dr. Bell had referred it as 64/100th, but in the

autopsy report it says 24.

So, I must say I had assumed that it had been corrected to the 24/100th from the 64, but -- but anyway the answer to your question is, no, my opinion would not be changed.

Q. Okay. Now, when you originally looked at this case back in 1999, it was unknown that there was an x-ray existed; is that correct?

A. As far as I'm aware. I did not receive one, and I'm sure I -- I would have asked -- but, I mean, I don't have a specific recollection. I guess, I better just say, I did not receive an x-ray at that time.

Q. Okay. Now that you have the x-ray, why is that important in forming your opinion?

A. Well, the importance, of course, will be determined by His Honor. The relevance for me is that it shows absolutely no fragments of any kind. There are no metallic fragments in that x-ray, which corroborates the fact that no fragmentation of the bullet that killed Lieutenant Oliver occurred inside the Lieutenant's body.

Q. And why is that important?

A Well, again, it's relevant to me because I recall -- and I think I addressed this previously that the... thought -- And I'm aware that it was discussed, and was a part of the hearings appeal processes referred to by one of

the Courts, I think.

And, so, well the bullet had probably fragmented, and that it was a fragment that had exited; and therefore, the smaller exit wound could be explained on the basis of it not being the exit site of the entire bullet, but rather of a fragment.

There was also some talk about the bullet maybe had fragmented in some additional pathways in the body, and one of the Courts, I think, had even on it's own gotten an article written by a doctor, which talked about another kind of ammunition.

So, the relevance for me then, to state it succinctly, is that there is no evidence of fragmentation -- none in the autopsy, and none in the x-ray taken of Lieutenant Oliver's body. This bullet that killed him did not fragment. Whatever bullet it was, did not fragment.

Q. It went through the body?

A. It went straight through the body, and that fits in with the autopsy report. The pathologist do not describe any anthillary pathways, and so there is no basis for that at all.

MR. PIEROTTI: Thank you.

THE COURT: All right. State.

MR. KITCHEN: Thank you, Your Honor.

CROSS EXAMINATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN	)	
	)	
Petitioner-Appellant	)	No. 06-6451
	)	07-5031
vs.	)	
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee	)	

MOTION FOR STAY OF EXECUTION
PENDING REHEARING

Philip Workman has this day filed a petition for rehearing and suggestion for rehearing *en banc*. As Workman notes, rehearing is warranted to resolve the open and controversial issues arising from this Court's 7-7 decision in *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2001)(en banc). Indeed, there is clear proof that Workman's trial was tainted by the perjury of two key witnesses, Terry Willis and Harold Davis, and the withholding of exculpatory evidence showing that Officer Oliver was actually hit by friendly-fire. Workman, however, was denied fair habeas proceedings on his due process claims through fraud and/or misconduct attributable to the Respondent and his counsel. Workman is therefore entitled to reopen his habeas proceedings under Fed.R.Civ.P. 60(b) and/or entitled to a hearing on his Rule 60(b) motion.

This Court should grant a stay of execution to allow full and proper consideration of the *en banc* petition, should grant the *en banc* petition, and order a

stay of execution pending the final disposition of the appeals in this case.

Respectfully Submitted,

Paul R. Bottei
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Paul R Bottei

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by fax to Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this 7th day of May, 2007.

Paul R Bottei

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN	)	
	)	
Petitioner-Appellant	)	No. 06-6451
	)	07-5031
vs.	)	
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee	)	

MOTION TO THE *EN BANC* COURT FOR STAY OF EXECUTION
UNDER *BAREFOOT v. ESTELLE*

Because the District Court granted Philip Workman a certificate of appealabilty (R. 205), this Court is required to issue a stay of execution under Barefoot v. Estelle, 463 U.S. 880 (1983), so that this Court can decide the merits of his pending appeals in 6th Cir. Nos. 06-6451, 07-5031.

As the Supreme Court held in *Barefoot*, when a habeas petitioner obtains a certificate of probable cause to appeal (now certificate of appealability), the court of appeals *must decide the case on the merits*:

> When a certificate of probable cause is issued . . . petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal.

Barefoot v. Estelle, 463 U.S. 880, 893 (1983). See Garrison v. Patterson, 391 U.S. 464, 466 (1968)(per curiam). Ford v. Haley, 179 F.3d 1342 (11th Cir. 1999)

While *Barefoot* involved an appeal from an initial habeas petition, that distinction is immaterial here. The question before this Court is whether Workman's *first habeas* should be reopened. Further, the *Barefoot* rule (requiring a stay to address the merits following issuance of a certificate) applies to Rule 60(b) appeals Zeigler v. Wainwright, 791 F.2d 828, 830 (11th Cir. 1986)(per curiam)(granting certificate of probable cause in 60(b) case, granting stay of execution, and ordering expedited briefing). In fact, as the *en banc* Eleventh Circuit has held, the *Barefoot* rule even applies to second habeas petitions, when a certificate has been granted. Messer v. Kemp, 831 F.2d 946, 957-958 (11th Cir. 1987)(en banc)(granting certificate and addressing merits of claims raised in second habeas petition).

The panel's actions run directly counter to *Barefoot*. Indeed, on April 26, 2007, this Court entered an order consolidating Workman's appeals for "briefing and submission" but then did not order briefing. More significantly, under *Barefoot*, there has been no decision on the merits of the pending appeals. All the panel has done is decide a stay motion (which included Workman's request for a *Barefoot* stay). That decision was *not* a decision on the merits:

> Although a decision by the Court to grant a stay may take into account 'whether the applicant has a reasonable probability of prevailing on the merits of the case,' R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 17.19 (6th ed. 1986)(*citing* Rostker v. Goldberg, 448 U.S. 1306, 1308, 101 S. Ct. 1, 2, 65 L. Ed. 2d 1098 (Brennan, Circuit Justice

1980)), ***it is not a merits decision***.

Messer v. Kemp, 831 F.2d at 957 (emphasis supplied).

That Workman has been denied his rights under *Barefoot* is apparent when one considers the possible disposition of his appeals were he executed. The pending appeals for which he has received a certificate would be dismissed as moot. But, as the Supreme Court has made manifest, a court may not fail to decide a case on the merits by denying a stay and thereby mooting the proceedings. Lonchar v. Thomas, 514 U.S. 314, 320 (1996).

CONCLUSION

Because the panel denied a stay of execution in violation of *Barefoot*, the *en banc* Court should grant such a stay and order further proceedings on Workman's appeals.

Respectfully Submitted,

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(615) 736-5047

Paul R Bottei

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by fax to Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this 7th day of May, 2007.

Paul R Bottin

Nos. 06-6451/07-5031

FILED

MAY 0 7 2007

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN,

Petitioner-Appellant,

v.

RICKY BELL, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing, with a suggestion for rehearing en banc of the May 4, 2007 order of the panel denying the petitioner's motion for stay of execution, and less than a majority of non-recused * active judges of the court having favored the suggestion,

It is ORDERED that the petition be and it hereby is DENIED. Accordingly, the court need not consider the motions for stay of execution.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Judge Gibbons recused herself in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILIP RAY WORKMAN,	)	
	)	
Petitioner,	)	
	)	
V.	)	**Nos. 94-2577-D**
	)	
RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION,	)	
	)	
Respondent.	)	

ORDER DENYING-IN-PART DEFENDANT'S FIRST AMENDED MOTION FOR EQUITABLE RELIEF IN THE EXERCISE OF THIS COURT'S INHERENT ARTICLE III POWERS, AND/OR RELIEF FROM JUDGMENT (doc. no. 161)
ORDER OF DISMISSAL

Petitioner Philip Ray Workman, a death-sentenced inmate incarcerated at the Riverbend Maximum Security Institution in Nashville, Tennessee, has filed a First Amended Motion For Equitable Relief In The Exercise Of This Court's Inherent Article III Powers, And/Or Relief From Judgment ("Motion for Relief"), seeking relief from this Court's judgment granting Respondent summary judgment as to all claims raised in Workman's Petition for Writ of Habeas Corpus. The pertinent facts of this matter have been catalogued numerous times over its journey through the state and federal judicial systems, see generally State v. Workman, 667 S.W.2d 44, 46-47 (Tenn. 1984), and will not be restated in this order. For present purposes, it suffices to say that Petitioner was convicted of first degree murder for the shooting of Memphis

Police Officer Lieutenant Ronald Oliver during an attempt to evade apprehension after robbing a Memphis area Wendy's restaurant on August 5, 1981. The sentencing jury found five statutory aggravating circumstances against Workman and no mitigating circumstance sufficient to outweigh those aggravators. Accordingly, Workman was sentenced to death. Id. at 47-48.

Workman's conviction and sentence were affirmed by the Tennessee Supreme Court. Id. at 52, cert. denied, 469 U.S. 873 (1984). Workman's initial petition for post-conviction relief was denied by the state courts. Workman v. State, 1987 WL 6724 (Tenn. Crim. App. 1987), cert. denied, 484 U.S. 873 (1987). A subsequent petition for post-conviction relief was dismissed by the state courts. Workman v. State, 868 S.W.2d 705 (Tenn. Crim. App. 1993), cert. denied, 510 U.S. 1171 (1994). This Court, the Honorable Julia Smith Gibbons, granted Respondent's motion for summary judgment and denied Workman's request for habeas relief. See Order on Cross Motions for Summary Judgment, Workman v. Bell, no. 94-2577, doc. no. 94 (Oct. 29, 1996), aff'd, 178 F.3d 759 (6th Cir. 1998), cert. denied, 528 U.S. 913 (1999). Workman's subsequent attempt to reopen his habeas corpus petition equally divided the en banc Sixth Circuit Court of Appeals and was, therefore, unsuccessful. Workman v. Bell, 227 F.3d 331 (6th Cir. 2000)(en banc), cert. denied, 531 U.S. 1193 (2001). A second request to reopen his habeas proceedings was denied by the Sixth Circuit.

Workman v. Bell, 245 F.3d 849 (6th Cir. 2001), cert. denied, 532 U.S. 955, and In re Workman, 532 U.S. 954 (2001). After completing state *coram nobis* proceedings, see State v. Workman, 111 S.W.3d 10 (Tenn. Crim. App. 2002), Petitioner filed his initial motion for relief from this Court's habeas judgment. See Workman, no. 94-2577, doc. no. 153. Petitioner filed the instant, amended, motion for equitable relief on August, 27, 2004. The Court stayed Petitioner's then scheduled execution pending its consideration of the instant motion subsequent to the imminent release of relevant appellate authority addressing under which circumstances a motion for relief from judgment in a habeas matter is properly construed as a "true" motion for relief rather than a prohibited attempt at circumventing the restrictions on second or successive habeas petitions imposed by the AEDPA, 28 U.S.C. § 2244(b). The United States Supreme Court has since issued its opinion in Gonzalez v. Crosby, 125 S.Ct. 2641 (2005), clarifying the circumstances under which a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) runs afoul of § 2244.

I. STANDARDS APPLICABLE TO THE INSTANT MOTION

Petitioner proffers the instant motion pursuant to this Court's "inherent authority" and Rule 60(b). This Court has previously held that there are no inherent Article III powers greater than those referenced in Rule 60(b) which would allow a court to grant relief from a previous habeas judgment. See Alley

v. Bell, no. 97-3159, doc. no. 169 at 3-8, aff'd 178 Fed. Appx. 538 (6th Cir. 2006); Johnson v. Bell, no. 97-3052, doc. no. 122 at 4-7. The Court need not rehash its analysis of that issue once again. Thus, to the extent that Petitioner appears to argue that the Court is free to grant relief from judgment on claims barred by the application of Rule 60(b) or relevant habeas statutes, see Motion for Relief at 16-24, the Court declines to so construe its "inherent" powers in such an expansive and unprincipled, indeed unprecedented, scope. Furthermore, Petitioner has conceded the principle central to the Court's analysis of this issue - that Rule 60(b) "is simply a vehicle for the expression of inherent Article III powers." See First Amended Motion for Relief, doc. no. 161 at 22. See also Johnson v. Bell, no. 97-3052, doc. no. 122 at 5-6. Because Rule 60(b), through its "'reservoir of equitable power'"[1] in subsection (6)[2] and its "savings clause," expresses the Court's historical equitable power over its own judgments, the Court need not expand its review of the instant motion beyond the strictures

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[1] In re Abdur'Rahman, 392 F.3d 174, 183 (6th Cir. 2004)(citing Compton v. Alton S.S. Co., Inc., 608 F.2d 96, 106 (4th Cir. 1979)).

[2] Rule 60(b)(6) is a "catch all" provision allowing relief "for any other reason justifying relief from the operation of the judgment." However, as discussed infra, pgs. 6-7, in applying Rule 60(b)(6), courts have confined the reach of its "reservoir of equitable power" to rare cases characterized by "extraordinary circumstances."

imposed by Rule 60(b)(6)[3] and the standards governing the "independent action" and "fraud upon the court" remedies alluded to in the "savings clause."

A. Relief Pursuant to the Express Provisions of Rule 60(b)

Rule 60(b) is not "expressly circumscribe[d]" by the AEDPA. Gonzalez, 125 S.Ct. at 2646. To the extent a motion for relief from judgment does not conflict with the express limitations on a district court's authority to consider claims for habeas relief in a second or successive petition, the motion may be properly considered a "true" motion for relief. Thus, in the habeas context, a proper motion for relief from judgment is one that attacks "some defect in the integrity of the federal habeas proceedings." Id. at 2648. If a motion for relief from judgment presents "claims" asserting a "federal basis for relief from a state court's judgment of conviction," such a motion is "if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the [the AEDPA]." Id. at 2647. Relevant to the Court's disposition of Petitioner's motion, a "claim" brought

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[3] Petitioner does not proffer any of his claims for relief under the authority of any particular provision of Rule 60(b). Rule 60(b) motions premised on subsections (1) through (3) and brought more than one year after the judgment is rendered may not by considered by the Court. In re G.A.D., Inc., 340 F.3d 331, 334 (6th Cir. 2003). Subsections (4) and (5) are plainly irrelevant to the instant motion. Thus, as far as the express provisions of Rule 60(b) are concerned, only subsection (6) is conceivably implicated by the instant motion.

in a purported motion for relief but barred from consideration by the district court may "seek leave to present 'newly discovered evidence' . . . in support of a claim previously denied . . . [or] contend that a subsequent change in substantive law is a 'reason justifying relief,' . . . [or] attack the previous resolution of a claim *on the merits*." Id. at 2647-48 (citations omitted)(emphasis in original). Thus, to the extent that Petitioner's motion can be characterized as bringing a "claim" seeking relief from his state court conviction or sentence, this Court is precluded from considering the motion. Id.; 28 U.S.C. § 2244(b)(3).

Because the Court has determined that Petitioner's motion can proceed, under the express provisions of Rule 60(b), only as a Rule 60(b)(6) motion, the Court must pause to elaborate on the special circumstances informing the determination of whether relief from judgment is appropriate under that provision. In the event that a motion for relief from judgment does not present a "claim" barred by § 2244(b), when proceeding under 60(b)(6) the movant must demonstrate "extraordinary circumstances" which "will rarely occur in the habeas context." Gonzalez, 125 S.Ct. at 2649. Accordingly, in Gonzalez, the Supreme Court determined that, though the motion was proper under Rule 60(b) because the movant sought only to reopen his habeas application in light of a subsequent Supreme Court decision demonstrating the district court's erroneous application of a statute of limitations, the movant was not

entitled to relief because the mere issuance of the decision was not a sufficiently "extraordinary circumstance" to warrant relief from judgment. Id. at 2650. Thus, the requirement that a 60(b)(6) movant demonstrate "extraordinary circumstances" in order to obtain relief effects a strict limitation on a district court's authority to grant relief in a particular case, even where the movant is able to demonstrate some error in the court's treatment of a dispositive non-merits aspect of the case.

B. Relief Pursuant to the "Savings Clause" of Rule 60(b)

The "savings clause" of Rule 60(b) specifically references two historical remedies which are not limited by the express provisions of the rule - an "independent action" to set aside a judgment and an action to set aside a judgment procured through fraud upon the court. These actions are distinct in nature and severally available when applicable. Buell v. Anderson, 48 Fed. Appx. 491, 497-500 (6th Cir. 2002)(unpublished decision).

Courts have developed a functional test for determining when relief pursuant to the independent action is appropriate:

> The 'indispensable elements' of the independent action are: (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Barrett v. Sec'y of Health and Human Serv., 840 F.2d 1259, 1263 (6th Cir. 1987)(citations omitted). An "independent action" for relief from judgment is "available only in cases 'of unusual and exceptional circumstances'" where it is necessary to prevent a gross or "'grave miscarriage of justice.'" Id. (citations omitted). Thus, the independent action is generally not appropriate to remedy circumstances which are more properly the domain of subsections (1) through (3) of Rule 60(b) because allowing the independent action in such contexts would eviscerate the statute of limitations applicable to that portion of the rule. U.S. v. Beggerly, 524 U.S. 38, 46 (1998). Furthermore, and as relevant here, the Sixth Circuit has established that, because only Rule 60(b)(3) expressly abolishes the distinction between "extrinsic" and "intrinsic" fraud for motions pursuant to that subsection, an independent action for relief predicated on allegations of fraud in the prior proceedings is still controlled by the historical requirement that the movant demonstrate "extrinsic" fraud in order to obtain relief. Buell, 48 Fed. Appx. at 498. "'Extrinsic fraud is conduct which prevents a party from presenting his claim in court,'" id. (citations omitted), and therefore was not the subject of the previous litigation. Fierro v. Johnson, 197 F.3d 147, 155 (5th Cir. 1999). Mere perjury by an opposing party or its witnesses, a form of "intrinsic" fraud, cannot sustain the independent action based on fraud because the complainant was not prevented from presenting its

case and raising any issue related to perjury in the initial proceedings. Buell, 48 Fed. Appx. at 498. Intrinsic fraud, that is, fraud which is related to the issues before the court in the previous litigation and is appropriate for seeking relief from judgment pursuant to Rule 60(b)(3), will not sustain the independent action unless it was perpetrated by an officer of the court. H.K. Porter Co., Inc., v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1119 (6th Cir. 1976).

The above discussion of the independent action as it relates to allegations of fraud segues nicely into the other historical remedy recognized by the savings clause, the action to set aside a judgment for fraud upon the court. Once again, courts have developed a functional test for determining when relief is appropriate due to fraud upon the court:

> Fraud on the court is conduct: (1) on the part of an officer of the court; (2) that is directed to the judicial machinery itself; (3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; (4) that is a positive averment or a concealment when one is under a duty to disclose; (5) that deceives the court.

Workman v. Bell, 227 F.3d 331, 336 (6th Cir. 2000)(en banc). An action based on fraud upon the court seeks only to remedy conduct "that actually subverts the judicial process." Demjanjuk v. Petrovsky, 10 F.3d 338, 352 (6th Cir. 1993). Such an action confronts the reviewing court with the rather straightforward inquiry of whether or not its previous judgment was obtained

through the fraudulent conduct of the attorneys representing the prevailing party in the previous litigation. Id. Thus, where only intrinsic fraud not involving an officer of the court is alleged, such a claim is more appropriately presented in a motion pursuant to Rule 60(b)(3) and cannot form the basis for an action under the fraud upon the court prong of the savings clause.

Finally, it is important to note that construing Petitioner's motion for relief pursuant to the historical equitable remedies referenced in the savings clause does not immunize it from the strictures placed on second or successive habeas petitions. That is, the "independent action" for relief is, like a motion pursuant to the express provisions of Rule 60(b), still subject to the AEDPA to the extent it raises a "claim" warranting relief from a judgment of conviction. Gonzalez v. Sec'y For Dept. of Corr., 366 F.3d 1253, 1277 n.11 (11th Cir. 2004).

II. PETITIONER'S PROFFERED GROUNDS WARRANTING RELIEF FROM JUDGMENT

Petitioner seeks relief from the Court's judgment granting summary judgment to Respondent on several claims raised in the Petition for Writ of Habeas Corpus, including: (1) the State violated the Fourteenth Amendment by withholding exculpatory evidence and knowingly presenting false evidence related to its contentions that Harold Davis witnessed Petitioner shoot Lieutenant Oliver, see Petition at ¶ 117(d), and that Petitioner fired a particular bullet that was entered into evidence at his trial, see

Petition at ¶ 117(f); (2) Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment because counsel failed to investigate and offer evidence that Harold Davis did not witness Petitioner shoot Lieutenant Oliver, see Petition at ¶ 120(a)(iv); (3) counsel was further ineffective for failing to investigate and present mitigating evidence related to Petitioner's background, see Petition at ¶ 120(d); (4) the penalty-phase jury instructions at his trial violated the Eighth and Fourteenth Amendments because the Court did not instruct the jury that the failure to reach a unanimous verdict would result in a life sentence, see Petition at ¶ 134(f), or that a single juror could impose a life sentence, see Petition at ¶ 134(g); (5) Petitioner's death sentence violates the Eighth and Fourteenth Amendments because the jury found multiple aggravating circumstances based on the same factual finding, see Petition at ¶ 139; and (6) Petitioner's "death sentence violates the Eighth and Fourteenth Amendments because it does not carry a heightened degree of reliability," see Petition at ¶ 143. Pursuant to the standards outlined above, the Court will consider each claim for relief in turn.

III. ANALYSIS

A. Claims for Relief Based on "Official Misconduct"

Plaintiff asserts that he is entitled to relief from judgment on habeas claims ¶¶ 117(d), 117(f), and 120(a)(iv) because the

"Court's prior judgment on those claims was tainted by official misconduct which affected the integrity" of the judgment. Motion at 1. Specifically, Petitioner alleges that the state "sponsored" the perjury of key witnesses at trial, that state officials intimidated Harold Davis, the only witness who testified to observing the Petitioner shoot Lt. Oliver, in order to obtain his trial testimony and prevent him from admitting his perjury in habeas proceedings in this Court, and that the state has continued, throughout federal proceedings, to refuse to disclose exculpatory evidence demonstrating witness perjury and the intimidation of Davis. Petitioner bases his allegations of misconduct on evidence which has emerged since his habeas proceedings concluded in this Court, including the testimony of Davis during Petitioner's 2001 state *coram nobis* proceedings and the testimony of retired Memphis Police Officer Clyde Keenan during Petitioner's 2001 executive clemency proceedings.

The Court must first determine whether Petitioner's allegations of misconduct are more properly characterized as second or successive habeas "claims" because, if so construed, they may not be considered by the Court even if they are "couched in the language of a true" motion for relief. Gonzalez, 125 S.Ct. at 2647. It is clear that, whether denominated an "independent action" in equity or a motion pursuant to Rule 60(b)(6), Petitioner may neither reassert error in habeas claims denied on their merits

nor offer new evidence in support of claims already denied in order to obtain a new hearing of such claims. Gonzalez, 125 S.Ct. at 2647-2648. Thus, to the extent that Petitioner's motion offers the new evidence cited above as a demonstration that the Court's previous adjudication was erroneous, his motion is the equivalent of a second or successive petition and must be dismissed by the Court for failure to obtain pre-clearance by the Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3).

Rather, if the Court is to accept the instant motion, it must attack "some defect in the integrity of the habeas proceedings." Gonzalez, 125 S.Ct. at 2648. An allegation of "fraud on the federal habeas court is one example of such a defect." Id. at n.5. Petitioner attempts to satisfy this requirement in variously alleging fraud, deception, and general misconduct on the part of state "agents," see, e.g., First Amended Motion for Relief, doc. no. 161 at 25, 28, who, purportedly, "sponsored" perjury during Petitioner's trial, intimidated trial witnesses, and have withheld exculpatory evidence from Petitioner on a continuing basis. However, Petitioner does not properly set forth the elements of a "fraud upon the court claim" as discussed above or attempt to demonstrate how his motion properly fits within the parameters of such an action.

The first prong of the fraud upon the court inquiry, requiring conduct on the part of an officer of the court, is paramount.

Petitioner must show that an officer of the habeas court "intentionally or recklessly failed to disclose information to the court that would have the result of deceiving it." Workman, 227 F.3d at 336. Because Petitioner does not direct any of his various allegations of fraud or misconduct at the state habeas attorneys who litigated this matter previously, the Court must dig deeper in order to determine whether he has satisfied the first element of the fraud upon the court inquiry. As the Sixth Circuit has acknowledged, "[t]he question of what misconduct of a governmental official can be attributed to [habeas] counsel remains an open and controversial issue." Buell, 48 Fed.Appx. at 499 (citing Workman, 227 F.3d 331). In Workman, the en banc court evenly split over whether or not Petitioner was entitled to an evidentiary hearing on his fraud upon the court claims related to the state's failure to produce an x-ray of Lt. Oliver and whether or not Davis perjured himself at trial. Because of the split, Petitioner was denied the opportunity to hold a hearing on his fraud claim and, ultimately, reopen his petition. As subsequently discussed by the Sixth Circuit in Buell, the split in Workman leaves unanswered the question of whether and to what extent the allegedly fraudulent conduct of state officials in obtaining a conviction can be imputed to the state habeas attorneys defending that conviction in federal court. See Buell, 48 Fed.Appx. at 499-500. As Chief Circuit Judge Boggs explains, the two Workman opinions propose two separate

standards, which he characterizes as a "broader" and a "more stringent" standard, for answering this question. Id. Under the "more stringent" standard, the failure of the Medical Examiner's office to turn over the requested x-ray could not be imputed to the state's habeas counsel and, furthermore, any fraud flowing from the failure to disclose the x-ray was perpetrated on the state trial court alone, not the federal habeas court. Under the "broader" standard, "the allegation of non-disclosure by the medical examiner's office and state's trial prosecutors [was] sufficient to create the need for an evidentiary hearing on whether the state's federal habeas counsel had been privy to this fraud." In Buell, the Sixth Circuit declined to resolve the question left unanswered by Workman, determining that the petitioner's fraud claim "fails under either standard." Id.; see also Spirko v. Bradshaw, 161 Fed.Appx. 492, 493 (6th Cir. 2005)(declining to resolve whether district court erred in concluding "that a state prosecuting attorney was not an officer of the federal habeas court for purposes of a fraud-on-the-court claim" because the conduct attributed to the prosecutor was not fraudulent).[4] Thus, the Court

[4] As noted both in Buell and by this Court in its order dismissing a claim similar to Petitioner's in Johnson v. Bell, no. 97-3052, doc. no. 122 at 27-28, at least one circuit court has determined that, even if constructive knowledge of a trial witness's perjury can be imputed to the state prosecutor, it may not be so extended to the state's habeas attorneys in a fraud upon the habeas court claim absent some showing that the habeas attorneys were cognizant of the perjury while contesting allegations of trial court perjury. See Fierro, 197 F.3d at 155-

is forced to analyze Petitioner's fraud upon the court claim subject to a persisting ambiguity in circuit precedent governing whether and to what extent the alleged trial court fraud or misconduct of state officials can be imputed to the state's habeas attorneys when fraud upon the federal habeas court is alleged.

Under the "more stringent" standard discussed above, Petitioner's claim of a fraud upon the court clearly fails because he does not allege fraudulent conduct on the part of the state's habeas attorneys. Buell, 48 Fed.Appx. at 500. Petitioner's allegations that state "agents" and "actors" acted fraudulently simply do not, by their own terms, extend to officers of this Court during the habeas proceedings.

Under the "broader" standard discussed above, however, Petitioner has perhaps stated a claim of fraud upon the court deserving of further inquiry. "Under the broader standard, an allegation of fraud against the state trial prosecutors could be sufficient to mandate an evidentiary hearing on whether the state's habeas counsel committed the same fraud on the habeas courts." Id. Here, Petitioner's repeated allegations of fraud on the part of State "agents" and "actors" must be construed to include state prosecutors where, in his habeas petition, Petitioner specifically claimed that the state "knowingly presented false evidence" which precluded the jury from finding that Davis' testimony was

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56.

inaccurate. See Petition at 33 ¶ 117(d). Moreover, in elaborating on the "broader" standard, the Court in Buell explained that allegations of fraudulent conduct levied at a trial court judge cannot sustain a fraud on the habeas court claim because of the judge's relationship to the prosecution:

> A judge is not part of the prosecution team; he does not work in the same office; he is not under the prosecution's chain of command; his involvement with the case is structurally different and highly formalized; he does not even serve within the same branch of government. Therefore, no inference of misconduct on part of the state's federal habeas counsel can be drawn from an allegation of judicial misconduct.

Id. Law enforcement officials, such as police, bear a significantly closer relationship to the "prosecution team" and would appear to satisfy all of the criteria discussed in Buell. Thus, it is apparent that, under the "broader" standard, misconduct on the part of police and other state officers constituting the unified and coordinated "prosecution team" can perhaps support an "inference of misconduct on the part of the state's federal habeas counsel" deserving of an evidentiary hearing on the matter. Petitioner's fraud claims are replete with allegations, in-part corroborated by the sworn testimony of Davis - a witness with relevant and personal knowledge - concerning the manufacturing of evidence, solicitation of perjury, and intimidation of witnesses by police officers investigating the shooting of Lt. Oliver. Accordingly, under the "broader" standard articulated in both Workman and Buell, because Petitioner has demonstrated "sufficient

facts to create a material dispute," Workman, 227 F.3d at 336, as to whether state officials perpetrated a fraud at his trial, he would be entitled to an evidentiary hearing to determine "whether the state's habeas counsel committed the same fraud on the habeas courts." Buell, 48 Fed.Appx. at 500.

As noted above, the Sixth Circuit has not clearly determined whether the "broader" or "more stringent" standard is to be applied in instances such as this matter. Given the facts of this case, the Court finds that the "more stringent" standard should apply for several reasons. First, the only known appellate case to resolve this issue clearly applied the "more stringent" standard. See Fierro, 197 F.3d at 155-56 (finding that trial-court perjury of a police officer, even if constructively attributed to prosecutor, could not be extended to state's habeas attorneys for purposes of fraud upon the court claim). Second, Petitioner's allegations of fraud, repeatedly lodged at state "actors" and "agents" appear to be concerned with the police and, presumably, prosecutors who tried his case in the state courts. The court is unaware of any instance where the Petitioner has set forth a credible allegation of fraudulent conduct on the part of the state's habeas attorneys appearing before this Court. The prospect of holding a hearing which would necessarily require the Defendant to prove grave ethical and professional misconduct on the part of the state's habeas attorneys strikes the Court as particularly untoward in the

absence of any colorable allegation of such misconduct. This Court will not provide the forum for a spectacle of desperate accusation by allowing the Petitioner to recklessly seek to impugn the professional, indeed moral, character of attorneys against whom he cannot even muster sufficient evidence to make a non-frivolous allegation of fraud. Thus, the Court will adhere to the "more stringent" standard articulated in Workman and Buell. Accordingly, because the Court finds that Petitioner has failed to allege fraud on the part of an officer of the court, Petitioner's fraud upon the court claim is DENIED.

B. Claims for Relief Based on Intervening Case Law

Petitioner asserts that he is entitled to relief from judgment on several habeas claims that were either denied on their merits or procedurally barred because intervening decisions of the Sixth Circuit and Supreme Court purportedly establish error in this Court's disposition of those claims. The Court will examine each of Petitioner's arguments below.

1. Habeas Claims Denied on Their Merits: Petition ¶¶ 120(d) & 134(f) & (g)

Paragraph 120(d) of the habeas petition sets forth Petitioner's claim that his counsel was constitutionally ineffective for failing to investigate and present evidence of Petitioner's background and character as mitigating evidence at sentencing. The Court found that counsel's performance was not deficient and denied relief on the claim. See Order on Cross

Motions for Summary Judgment, doc. no. 94 at 48-51. Petitioner now argues that the Supreme Court's intervening decision in Wiggins v. Smith, 539 U.S. 510 (2003) "establishes that this Court's prior judgment denying relief on this claim was improper." Motion at 2.

In ¶ 134(f) and (g) of his habeas petition, Petitioner argued that jury instructions at the penalty phase of his trial were unconstitutional because the jury was not instructed that a sentence of life imprisonment results if the jury fails to reach a unanimous verdict and jurors were precluded from knowing that a single juror could impose a life sentence, thereby preventing "individual jurors from giving meaningful effect to mitigating evidence." Petition at 46 ¶ 134(g). The Court found no constitutional violation in either argument and denied relief on Petitioner's claims. See Order on Cross Motions for Summary Judgment, doc. no. 94 at 69-72. Petitioner now claims that the Sixth Circuit's intervening decision in Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003) "establishes that this Court's prior judgment denying relief on these claims was patently erroneous." Motion at 2.

As to claims denied on their merits, it is clear that Petitioner may not assert error in the Court's disposition of such claims in a motion for relief from judgment. Gonzalez, 125 S.Ct. at 2648 ("A motion can also be said to bring a "claim" [prohibited by the AEDPA] if it attacks the federal court's previous resolution

of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.")(emphasis in original). Furthermore, Gonzalez also specifically forbids claims for relief based on a "purported change in the substantive law governing the claim" from being considered in a post-judgment motion for relief. Id. at 2647. Thus, to the extent that Petitioner might proffer the intervening cases as representative of some change in the substantive law governing his claims, he is barred from doing so in a motion for relief from judgment. Given all of the above, the Court is required to treat Petitioner's motion for relief as to habeas claims ¶¶ 120(d) and 134(f) & (g) as an attempt to circumvent the AEDPA's restrictions on second or successive habeas petitions. This Court is without jurisdiction to consider such claims absent authorization from the Sixth Circuit Court of Appeals. 28 U.S.C. § 2244(b)(3). Accordingly, Petitioner's motion for relief as to claims ¶¶ 120(d) and 134(f) & (g) is DISMISSED.

2. Habeas Claim denied on Procedural Grounds: Petition ¶ 139

Paragraph 139 of the habeas petition sets forth Petitioner's argument that his sentence violates the Eighth and Fourteenth Amendments because his jury imposed death after finding multiple aggravating circumstances based on a single factual finding: "that Mr. Workman killed a policeman while fleeing from a felony."

Petition at 47 ¶ 139. The Court found the claim procedurally defaulted because Petitioner failed to properly exhaust the claim in the state courts and, further, the claim was not the sort of claim that the Tennessee Supreme Court would consider within the parameters of its mandatory review statute. See Order on Cross Motions for Summary Judgment, doc. no. 94 at 17-19. Petitioner now contends that he is entitled to relief from judgment on the Court's finding of procedural default based on the Sixth Circuit's intervening decision in Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), overruled on other grounds by Bell v. Cone, 543 U.S. 447 (2005)(per curiam). In Cone, the Sixth Circuit held that, under Tennessee's mandatory review statute, the Tennessee Supreme Court implicitly reviews any issue related to arbitrary imposition of a death sentence, "even if the issue is not explicitly raised on direct appeal." Id. at 793. Thus, the Sixth Circuit held that Cone's vagueness challenge to the heinous, atrocious, or cruel ("HAC") aggravator relied upon in sentencing him to death, though not presented in the state courts, was not procedurally defaulted because the Tennessee Supreme Court implicitly considered the claim in its review of Cone's death sentence for arbitrariness. Id. at 793-94. In overruling the Sixth Circuit's decision on separate grounds, the Supreme Court paused briefly to clarify what the AEDPA requires of state inmates to exhaust federal claims in the state

courts, thereby undermining the Sixth Circuit's implicit review holding:

> We do emphasize that, as a general matter, the burden is on the petitioner to raise his federal claim in the state courts at a time when state procedural law permits its consideration on the merits, even if the state court could have identified and addressed the federal question without its having been raised.

Bell, 543 U.S. at 451 n.3 (citing Baldwin v. Reese, 541 U.S. 27, 30-32 (2004)).[5]

Because this part of Petitioner's motion seeks relief from the Court's judgment on a non-merits basis, it is not a second or successive petition for habeas relief. Gonzalez, 125 S.Ct. at 2648 n.4 (noting that a habeas petitioner who "merely asserts that a previous ruling which precluded a merits determination was in error - for example a denial for such reasons as failure to exhaust [or] procedural default" - is not "making a habeas corpus claim."). Construing Petitioner's motion for relief as proper pursuant to Rule 60(b)(6) does not, however, automatically entitle Petitioner to a grant of relief. Rather, the Court must inquire whether the

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[5] The Court appreciates that the Sixth Circuit's holding regarding implicit review was not repudiated by the Supreme Court because it overruled Cone on other grounds and because the implicit review theory was merely the Sixth Circuit's interpretation of Tennessee statutory law as it has been applied in Tennessee cases. Because the State has vigorously contested the Sixth Circuit's holding as to implicit review, the Court notes the Supreme Court's brief interjection on the issue only to further demonstrate the precarious foundation of the implicit review theory and the resulting peril in relying exclusively on the Cone decision as a ground for relief from a previous habeas judgment.

Petitioner has satisfied the special requirements imposed on Rule 60(b)(6) motions. In Gonzalez, as noted above, the Court explained that the movant must demonstrate "extraordinary circumstances" which "will rarely occur in the habeas context." Id. at 2649. For example, in Gonzalez, though a subsequent decision of the Supreme Court enabled Gonzalez to demonstrate error in the district court's interpretation of a statute of limitations, the Supreme Court denied relief from the district court's judgment because he failed to show "extraordinary circumstances" warranting such relief. Id. at 2650-51. Gonzalez failed to make the requisite showing because he only offered the fact of the intervening decision to justify granting relief. The Court held as follows:

> The District Court's interpretation [of 28 U.S.C. § 2244(d)(2)'s statute of limitations] was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation of 28 U.S.C. § 2244(d)(2). It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation.

Id. at 2650.

Similarly, in the instant motion, Petitioner only offers the fact of the intervening decision in Cone to demonstrate error in this Court's finding of procedural default. However, it is clear that the Court's rejection of Petitioner's argument that the state supreme court reviewed this claim in its mandatory review "was by all appearances correct" when it was rendered in 1996, given that the Sixth Circuit refused similar arguments in 1998, see Coe v.

Bell, 161 F.3d 320, 336 (6th Cir. 1998), and did not adopt the implicit review theory until Cone was decided in 2004. Moreover, given the eventual Supreme Court opinion overruling Cone and clarifying the exhaustion requirement for state habeas applicants, it is apparent that Cone, standing alone, is not a sufficiently "extraordinary circumstance" to warrant relief from judgment pursuant to 60(b)(6). Accordingly, Petitioner's motion for relief from judgment as to claim ¶ 139 is DENIED.

C. Claim for Relief Based on Intervening Case Law and Newly Discovered Evidence (Petition ¶ 143)

Petitioner also asserts that he is entitled to relief from the Court's judgment denying his claim that his "death sentence violates the Eighth and Fourteenth Amendments because it does not carry a heightened degree of reliability." Petition, doc. no. 1 at 53 ¶ 143. The Court determined that this claim was "nothing more than an all-inclusive incorporation of every other ground previously asserted" in the petition and was thus devoid of merit in light of the Court's adjudication of the rest of the Petition. Order on Cross Motions for Summary Judgment, doc. no. 94 at 90. Petitioner asserts error in the Court's judgment based on the intervening case law discussed above and evidence discovered since the Court rendered its judgment. As set forth supra, pgs. 5-6, the Court is precluded from considering any claim for relief from a merits determination in a previous habeas judgment based on intervening case law and newly discovered evidence because such

claims are the equivalent of a second or successive habeas petition which requires pre-clearance from the Court of Appeals. Accordingly, Petitioner's motion for relief from judgment as to claim ¶ 143 is DISMISSED.

IV. CONCLUSION

For the reasons set forth above, Petitioner's Amended Motion for Relief From Judgment is either without merit or barred from consideration by the Court. Accordingly, Petitioner's Motion for Relief as to Petition ¶¶ 117(d), 117(f), 120(a)(iv), and 139 is DENIED. Petitioner's Motion for Relief as to Petition ¶¶ 120(d), 134(f) & (g), and 143 is DISMISSED.

IT IS SO ORDERED, this 17th day of October, 2006.

S/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILIP RAY WORKMAN,	)	
	)	
Petitioner,	)	
	)	
V.	)	**Nos. 94-2577-D**
	)	
RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION TO ALTER OR AMEND

Petitioner has filed a Fed. R. Civ. P. 59 Motion to Alter or Amend the Court's order and judgment denying his fraud upon the court claim as set forth in his First Amended Motion for Equitable Relief. In short, Petitioner contends that the Court has erred in its application of the "more stringent standard," as explicated in Buell v. Anderson, 48 Fed. Appx. 491 (6th Cir. 2002)(unpublished decision), to his fraud upon the court claim. For the reasons stated below, Petitioner's motion is DENIED.

I. STANDARDS APPLICABLE TO A MOTION TO ALTER OR AMEND

A motion pursuant to Rule 59 is not an opportunity to re-litigate a case. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998). Thus, a Rule 59 motion is not the proper forum for arguments that could, and should, have been raised prior to the subject judgment. Id. (quoting FDIC v.

World Univ. Inc., 978 F.2d 10, 16 (1st Cir. 1992)). Rather, a motion to alter or amend judgment should be granted only if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent a manifest injustice. GenCorp, Inc. v. American Intern. Underwriters, 178 F.3d 804, 834 (6th Cir. 1999)(citations omitted).

II. PETITIONER'S ALLEGATION OF ERROR

In order to frame the issue raised by the instant motion, the Court will briefly revisit its previous order. In his First Amended Motion for Relief, Petitioner presumably intended to articulate a fraud upon the habeas court claim. In essence, he charged that the Court's judgment denying on the merits his claims in Petition ¶ 117 (d) & (f) was procured through the fraudulent conduct of state "actors" and "officials." To the extent the Court was able to discern concrete allegations of fraudulent conduct on the part of such state "actors" and "officials," they were concerned with alleged misconduct occurring at Petitioner's trial. While those allegations seemed to reach the prosecutors who tried Petitioner's case, they did not appear to reach Respondent's attorneys and their conduct before this Court. In other words, Petitioner did not proffer any explicit and substantiated allegation of fraudulent conduct on the part of an officer of the federal habeas court. Thus, in the Court's view, Petitioner's fraud upon the court claim fell within a grey area of Circuit law concerned with "[t]he question of what misconduct of a governmental official can be attributed to [habeas] counsel" in a fraud upon the

habeas court claim. See Buell, 48 Fed. Appx. at 499. Though, in Buell, the Sixth Circuit deemed this issue "open and controversial," it has nevertheless declined to resolve it in at least three separate instances. Because the Court viewed Petitioner's fraud upon the court claim as once again raising the issue, the Court attempted to resolve it in accord with the Court's view of judicial policy and persuasive authority from the Fifth Circuit Court of Appeals. Thus, the Court applied what Chief Circuit Judge Boggs coined, in Buell, the "more stringent standard." Pursuant to the "more stringent standard," Petitioner's allegation of fraud failed because he did not allege fraudulent conduct on the part of Respondent's counsel during prior proceedings.

Petitioner now alleges error in the Court's application of the "more stringent standard." He contends that the Court mistakenly relied upon guidance from the Fifth Circuit's decision in Fierro v. Johnson, 197 F.3d 147 (5th Cir. 1999), which applied the equivalent of the "more stringent standard" and was cited in Buell, because a Sixth Circuit case, Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), also cited in Buell, purportedly controls this matter, conflicts with Fierro, and ultimately demonstrates Petitioner's entitlement to an evidentiary hearing on his fraud upon the Court claim.

III. ANALYSIS

Putting aside the issue of whether or not the allegation of error lodged in Petitioner's Rule 59 motion should even be considered by the Court,[1] it lacks merit. The short answer to Petitioner's contention that Demjanjuk requires application of the "broader" standard articulated in Buell is that, were Demjanjuk controlling, Chief Circuit Judge Boggs, who was well aware of Demjanjuk given his citation to that case, surely would have said as much in Buell rather than proceeding to opine on the contours of an issue which he viewed as "open and controversial" despite any perceived relevance of Demjanjuk. Furthermore, as noted in Buell, the division over whether the "broader" or "more stringent" standard applies appears to have originated in Workman v. Bell, 227 F.3d 331 (6th Cir. 2000), a case which also was fully cognizant of

[1] As noted above, a Rule 59 motion is not the proper forum for arguments that could, or should, have been raised prior to judgment. Petitioner's allegation of fraud upon the court was, at best, imprecisely pled in his First Amended Motion for Relief. Nowhere did Petitioner set forth the well-established elements of a fraud upon the court claim as discussed in Demjanjuk and reiterated by the Sixth Circuit in its prior disposition of a fraud upon the court claim by Petitioner. See Workman v. Bell, 227 F.3d 331, 336 (6th Cir. 2000). Given the history of this litigation, the instant Petitioner, perhaps more so than any other habeas petitioner, should be well acquainted with the elements of a fraud upon the court claim. That Petitioner nevertheless purported to allege a fraud on this Court without supplying the standards of such a claim and applying them to his case is telling. Perhaps such imprecise and incomplete pleading benefits a habeas petitioner by forcing the Court to adjudicate a vaguely articulated claim for relief in a vacuum where the Court is left to divine the intent and substance of a claim as well as its legal framework and ultimate viability, thus providing potentially fertile grounds for appeal in the event of an adverse decision. See, e.g., Johnson v. Bell, no. 97-3052, Order Denying Motion for Stay Pending Appeal, doc. no. 144 at 4 n.1 (noting that Johnson had failed to specifically plead his motion for relief pursuant to the standards governing any of the three vehicles for relief which, on appeal, he faulted the Court for either failing to apply or improperly applying). However, whatever its benefits, such imprecise and incomplete pleading should be disfavored, especially in matters as serious as capital habeas litigation. If, on the other hand, Petitioner's omission of the relevant standards governing his fraud upon the court claim was not tactical, it would seem to evince a lack of conviction in the strength of the fraud claim. In any event, Petitioner's contention that Demjanjuk establishes that the "broader standard" is the law of this Circuit arguably should have been submitted prior to the instant motion.

the reach and import of Demjanjuk, yet failed to resolve the instant issue despite the relevance Petitioner assigns to Demjanjuk. Thus, Petitioner's claim that Demjanjuk is controlling of this issue is not supported by the holdings of relevant Circuit precedent.

Petitioner's assertion that Demjanjuk is dispositive of this matter simply begs the question. In Demjanjuk, the Sixth Circuit succinctly summarized the circumstances under which it issued its fraud upon the court ruling as follows:

> Acting pursuant to Fed. R. Civ. P. 60(b)(6) and the All Writs Act, 28 U.S.C. § 1651, we reopened the habeas corpus case in which we denied relief from the extradition order to determine whether that proceeding had been tainted by fraud on the court or prosecutorial misconduct that required our intervention.

10 F.3d at 356. Thus, in Demjanjuk the Sixth Circuit reopened a habeas corpus appeal on the basis of fraud committed during the underlying extradition proceedings which continued through the habeas proceedings. Petitioner asserts that this Court is similarly empowered to grant relief from an adverse habeas judgment on the basis of fraud which, according to his own allegations, occurred at his underlying state court trial. Petitioner contends that Demjanjuk is controlling because he alleges fraud in a global sense against the government of Tennessee, thereby implicating apparently all Tennessee government attorneys in the alleged state court fraud whether those attorneys appeared at his trial or in habeas proceedings. Petitioner's contention in this regard does no more than reemphasize the Sixth Circuit split that originated in

prior litigation of this matter and was discussed in Buell. The fraud Petitioner complains of appears to be a fraud on the state court, not the federal habeas court. In Petitioner's prior attempt to reopen his habeas proceedings, the half of the en banc Sixth Circuit which disfavored reopening the appeal stated as follows:

> If there was any fraud on the court with regard to the testimony of Davis [or, likewise, testimony concerning the bullet at issue in Petition ¶ 117(f)], that would have been a fraud upon the state court, and should be presented to that court, not to our court. At argument, counsel for the petitioner admitted that if there was a fraud involving the testimony of Davis, it would have been a fraud on the state court only. However, he emphasized that it should be considered as a corroboration of fraud upon the federal court by the failure to produce the X-ray. Nevertheless, there is no fraud upon our court under the criteria set out in *Demjanjuk* which would authorize this extraordinary relief requested.

Workman, 227 F.3d at 341. Given this finding by half of the en banc Sixth Circuit, it is clear that there is no consensus that Demjanjuk controls the inquiry before the Court by virtue of Petitioner's First Amended Motion for Relief.

Petitioner's motion essentially asked the Court to grant relief from a habeas judgment under the precise circumstances under which the Sixth Circuit has already evenly divided over the propriety of granting relief due to some alleged fraud at Petitioner's trial. This Court is convicted that Petitioner's "privity of government attorneys" argument is not a legally sufficient basis upon which to attribute fraud to Respondent's attorneys appearing before this Court. Thus, this Court has applied the "more stringent standard" contemplated by half of the

Sixth Circuit. This decision also comports with the only known Circuit-level case to decide the issue. See Fierro, 197 F.3d at 155-56. Presumably, the issue will, once again, squarely confront the Court of Appeals, and this time with the benefit of a record reflecting a lower court's resolution of the Sixth Circuit's dispute. Perhaps Petitioner is correct and Demjanjuk dictates that the "broader standard" is the law of this Circuit, thus entitling him to an evidentiary hearing on whether or not any alleged fraud occurring at his trial may be imputed to Respondent's counsel. Ultimately, that decision is for the Sixth Circuit. What is clear at this point is that the Sixth Circuit has expressly refused to hold Demjanjuk controlling in instances such as this despite multiple opportunities to do so. Thus, Petitioner's present assertion of error is without merit. Accordingly, his Motion to Alter or Amend is DENIED.

IT IS SO ORDERED this 12th day of December, 2006.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILIP RAY WORKMAN,	)	
	)	
Petitioner,	)	
	)	
V.	)	**Nos. 94-2577-D**
	)	
RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION,	)	
	)	
Respondent.	)	

ORDER DENYING MOTION FOR STAY OF EXECUTION

Before the Court is Petitioner's Motion For Stay of Execution. Petitioner filed the motion contemporaneously with his Application For A Certificate of Appealability, which the Court granted-in-part and denied-in-part in a separate order. Petitioner contends that the Court should stay his pending execution, currently scheduled for May 9, 2007, in light of his appeal of this Court's order denying his motion for relief from the Court's judgment denying him habeas corpus relief. He asserts that "when a habeas petitioner obtains a certificate of appealability, a stay of execution pending appeal is appropriate." Motion For Stay of Execution, doc. no. 197 at 3. Petitioner also maintains that a stay is appropriate in light of the Sixth Circuit's grant of a stay under similar circumstances in Johnson v. Bell, no. 05-6925 (6th Cir. Oct. 19, 2006)(granting stay of execution pending appeal of district court's

denial of motion for relief from judgment). Finally, Petitioner asserts that a stay is appropriate in light of the pendency of Abdur'Rahman v. Bell, nos. 02-6547 and 02-6548, wherein, purportedly, the Sixth Circuit is expected to clarify what constitutes "extraordinary circumstances" for purposes of awarding relief from judgment pursuant to Rule 60(b)(6).

Respondent objects to the motion, arguing, in relevant part, that Petitioner cannot show a likelihood of success on appeal and, furthermore, that the question of whether Petitioner's execution should be stayed pending his appeal is for the Sixth Circuit.

I. STANDARDS APPLICABLE TO A MOTION TO STAY EXECUTION

In deciding whether to grant Petitioner a stay of execution, this Court considers whether 1) there is a likelihood of his success on the merits of the appeal; 2) there is a likelihood that he will suffer irreparable harm absent a stay; 3) the stay will cause substantial harm to others; and 4) the public interest supports granting the stay. Capobianco v. Summers, 377 F.3d 559, 561 (6th Cir. 2004). See also In re Sapp, 118 F.3d 460, 464 (6th Cir. 1997)(applying the traditional four-factor preliminary injunctive relief test in the stay of execution context). "These factors are not prerequisites but instead must be balanced." Capobianco, 377 F.3d at 561. Petitioner asserts that he is entitled to a stay under the "alternate" or "balance of hardships" test discussed in Friendship Materials, Inc. v. Michigan Brick,

Inc., 679 F.2d 100, 103-05 (6th Cir. 1982). Under Friendship Materials' "alternate" test, a court may "grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the" non-moving party. Id. at 105. In other words, under the "alternate" test, "'the likelihood of success that need be shown (for a preliminary injunction) will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.'" Id. (quoting Metropolitan Detroit Plumbing & Mechanical Contractors Association v. H.E.W., 418 F.Supp. 585, 586 (E.D. Mich. 1976)).

It is not entirely clear, even on the face of Friendship Materials itself, that the Sixth Circuit has adopted the "alternate" test as a valid alternative or modification of the traditional four-factor test. See Friendship Materials, 679 F.2d at 105 ("Whatever the merits of the alternate, or 'balance of hardships' test may be . . . ."). See also Warner v. Central Trust Co., 715 F.2d 1121, 1123 (6th Cir. 1983)(explaining that "the court in Friendship . . . did not expressly adopt the 'balance of hardships' test espoused in some other circuits"). But see In re Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)("In Friendship Materials, this Court approved a test that would allow a court to grant a preliminary injunction 'where the plaintiff

fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.'"). Thus, Petitioner's assertion that "governing Sixth Circuit precedent . . . requires a stay of execution" when "serious questions" are presented, see Petitioner's Reply On Motion For Stay Of Execution, doc. no. 201 at 1-2, should not be accepted without scrutiny.

It is clear that, in ruling on a death-sentenced inmate's motion for a stay of execution, the Sixth Circuit has repeatedly invoked the traditional four-factor test and applied its requirement of demonstrating some probability of success on the merits. See, e.g., Alley v. Little, 181 Fed.Appx. 509, 513 (6th Cir. 2006)(noting that despite the plaintiff's risk of irreparable harm (execution), the "small likelihood" of success on the merits prohibited a stay); In re Sapp, 118 F.3d at 464-65. Moreover, the Supreme Court has recently reiterated that, in seeking a stay of execution, the movant must show a "significant possibility of success on the merits" of his pending action under 42 U.S.C. § 1983. Hill v. McDonough, __ U.S. __, 126 S.Ct. 2096, 2104 (2006). Accordingly, the Court finds that Petitioner cannot rely merely on this Court's previous observation that "serious questions" are raised by Petitioner's appeal. Rather, accepting that he risks

irreparable harm absent a stay, Petitioner must still demonstrate, at least, that there is a "significant possibility of success on the merits" of his appeal.

In addition to the required showing of at least a "significant possibility of success," Petitioner must also show that the requested stay will not cause undue harm to others, i.e., whether the state's interests would be harmed by a stay, and whether the public interest supports the stay. In this inquiry, the state's interest "is not to be underestimated. The Supreme Court has instructed that the 'State's interests in finality are compelling' and that the 'powerful and legitimate interest in punishing the guilty' attaches to both 'the State and the victims of crime alike.'" Alley, 181 Fed.Appx. at 512 (quoting Calderon v. Thompson, 523 U.S. 538, 556 (1998)).

II. APPLICATION

This Court's inquiry hinges on whether, and to what extent, Petitioner has demonstrated a likelihood or probability of success on the merits of his appeal of the Court's order denying his motion for relief from judgment. There can be no doubt that Petitioner faces irreparable harm, or that the state has a substantial interest in bringing finality to its judgment, direct review of which concluded approximately twenty-three years ago. While, as Petitioner asserts, the public has no interest in "executing a faulty federal judgment tainted by fraud," the public undeniably

has an interest in the application of its laws and finality of criminal convictions.

Thus, resolution of Petitioner's motion requires the Court to assess the prospects of Petitioner's success on appeal and weigh those prospects, if any, against the competing interests already identified. For the reasons stated in the Court's previous orders, and in light of the narrowed scope of appellate review in an appeal of a district court's denial of a Rule 60(b) motion, the Court cannot conclude that Petitioner has demonstrated a likelihood or "significant possibility" of success on the merits of his appeal.[1] Petitioner's initial habeas proceeding has long since been decided and his original stay of execution has dissolved. Barring a remand of his Rule 60(b) motion, there is no habeas proceeding left pending before this Court. Thus, it would be improvident for this Court to enter a stay of execution. Accordingly, Petitioner's Motion For Stay of Execution is DENIED.

IT IS SO ORDERED this 27th day of April, 2007.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE

[1] That being said, the Court is fully aware that the Sixth Circuit entered a stay of execution under similar circumstances in Johnson v. Bell, 6th Cir. no. 05-6925 (Oct. 19, 2006), and that, to the extent necessary to preserve its ability to thoroughly review the instant petitioner's appeal, it presumably may do so in this case as well.