No. A-06-_____

In The Supreme Court Of The United States

PHILIP WORKMAN,

Petitioner-Applicant,

v.

RICKY BELL, Warden,

Respondent.

APPLICATION FOR STAY OF EXECUTION:

**TO THE HONORABLE JOHN PAUL STEVENS,
CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EXECUTION DATE: May 9, 2007, 1:00 a.m.

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To The Honorable John Paul Stevens, Associate Justice For The United States Court Of Appeals For The Sixth Circuit:

Pursuant to 28 U.S.C. §§1651 and §2101(f), U.S.S.Ct.R. 23, and all other applicable law, Applicant Philip Workman respectfully requests that this Court grant a stay of execution for two reasons:

(1) The lower courts have denied him a stay after he received a certificate of appealability, in violation of Barefoot v. Estelle, 463 U.S. 880 (1983) and Lonchar v. Thomas, 514 U.S. 314 (1996); and

(2) A stay of execution is warranted to allow Workman to file a petition for writ of certiorari. See e.g., Colburn v. Cockrell, 537 U.S. 1015 (2002) (granting stay of execution pending timely filing of petition for writ of certiorari); Price v. North Carolina, 505 U.S. 1246 (1992); Laws v. Delo, 491 U.S. 913 (1989); Messer v. Kemp, 478 U.S. 1028 (1986).

I.
STAY PROCEEDINGS IN THE LOWER COURTS

In these proceedings under Fed.R.Civ.P. 60(b) and its Savings Clause, Philip Workman was denied equitable relief from judgment (R. 177)(Apx. 105-130) and the District Court denied his motion to alter or amend. R. 184 (Apx. 131-137). Workman v. Bell, W.D.Tenn.No. 94-2577. Workman filed timely notices of appeal. R. 181, 189. Workman sought a stay pending appeal (R. 186) which was denied. R. 188. He afterwards applied for a certificate of appealability (R. 196) and filed a motion for stay of execution to pursue his pending appeal. R. 197. The District Court granted a certificate of appealability (R. 205) but denied a stay of execution. R. 206 (Apx. 138-143).

Though the Sixth Circuit consolidated for briefing and submission his pending

appeals (6th Cir. Nos. 06-6451, 07-5031), the panel at no time issued a briefing schedule. Workman thus filed a motion for stay of execution in the Sixth Circuit. Apx. 1-28. He maintained, *inter alia*, that he was entitled to a stay of execution in his 60(b) appeal under Barefoot v. Estelle, 463 U.S. 800 (1983) because his case not only presented "substantial grounds upon which relief may be granted," (Apx. 1-17) but also because, having been granted a certificate of appealability, he was entitled to a merits review and decision on his pending appeal. Apx. 19-20. In a 2-1 decision, a Sixth Circuit panel denied the motion for a stay of execution. Apx. 29-35; 33 ("We deny the motion for a stay of execution.").

Workman then filed a petition for rehearing *en banc*. Apx. 36-97. Along with that petition, he filed two separate stay motions. While he sought a stay of execution pending the disposition of the rehearing petition (Apx. 98-99), he also requested that the Court grant a stay of execution under *Barefoot*, because the panel's order on the stay motion had not decided the merits of his still-pending appeals. Apx. 100-103. The Sixth Circuit denied *en banc* review, and in doing so explicitly did not rule on Workman's two motions for stay of execution. Apx. 104.

II.
Your Honor Should Grant A Stay Of Execution

A.
Workman Is Entitled To A Stay Under *Barefoot* and *Lonchar*

It is clear that once a habeas petitioner obtains a certificate of appealability to pursue an appeal, he is entitled to a decision of his appeal on the merits:

> When a certificate of probable cause [now appealability] 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 issues pending before the Sixth Circuit in Workman's pending appeals (6th Cir. Nos. 06-6451, 07-5031) involve Workman's entitlement to equitable relief from that initial habeas judgment. Further, the *Barefoot* rule (requiring a stay to address the merits following issuance of a certificate) applies to Rule 60(b) appeals as well. 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 Sixth Circuit's actions run directly counter to *Barefoot*. Indeed, on April 26, 2007, the Sixth Circuit entered an order consolidating Workman's appeals for "briefing and submission" but then did not order briefing. More significantly, under *Barefoot*, the Sixth Circuit made no decision regarding the merits of Workman's pending appeals. All the Sixth Circuit panel did was decide a stay motion (which included Workman's request for a *Barefoot* stay). See Apx. 33. 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);[1] See also *Workman*, slip op. at 6 (Cole, J., dissenting)(distinguishing between the stay inquiry and "the ultimate merit of Workman's claims"). Further, when Workman requested that the *en banc* Court grant him a stay to allow a merits determination of his pending appeals, the *en banc* Court refused to address his stay requests. Apx. 104.

That Workman has been denied his rights under *Barefoot* is apparent when one considers the possible disposition of his pending appeals were he executed. The pending appeals for which he has received a certificate would be dismissed as moot. But, as this 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). That is precisely what has occurred here.

Workman's entitlement to a full merits review of his pending appeals is even more pronounced, given that the Sixth Circuit is equally divided (7-7) on the question of Workman's entitlement to relief under the circumstances presented. See Workman v. Bell, 227 F.3d 331 (6th Cir. 2001)(*en banc*). Especially given this conflict (properly noted by Judge Cole below), where Workman has been denied a stay under *Barefoot*, a stay from Your Honor is especially warranted.

Because Workman's pending appeals have not been decided on the merits, he is entitled to a stay of execution under *Barefoot* and *Lonchar*. He is entitled to receive a merits decision on the substantial issues presented in his pending appeals before he were to be

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[1] In *Messer*, much like the situation here, this Court granted a stay of execution pending the filing of a certiorari petition, after which the Eleventh Circuit ultimately considered Messer's appeal on the merits. See e.g., Messer v. Kemp, 478 U.S. 1028 (1986), cited p. 1, *supra*.

executed and his appeals mooted. Your Honor should therefore grant him a stay of execution to allow full merits review in the Sixth Circuit.

B.
Your Honor Should Grant A Stay Of Execution
Given The Stay Equities

Though the Sixth Circuit has not addressed Workman's appeals on the merits, it is clear that he presents "substantial issues upon which relief may be granted." Barefoot, 463 U.S. at 895. Indeed, even when addressing Workman's request for a stay, the Sixth Circuit panel divided 2-1. Apx. 29-33 (majority opinion on motion for stay); Apx. 34-35 (Cole, J., dissenting). The split in the panel on the stay issue is not surprising, given the vital issues presented in Workman's pending appeals.

Workman has maintained his innocence because the proof shows that Lieutenant Oliver was killed by friendly fire, and Workman is therefore innocent of first-degree murder under Tennessee law. Apx. 3 *et seq.* He has always alleged that, notwithstanding his innocence, he was convicted because his trial was tainted by the perjury and withholding of evidence concerning the two key prosecution witnesses: Terry Willis, who claimed to find the fatal bullet which the prosecution said came from Workman's gun (Habeas Petition ¶117(f)); and Harold Davis, who claimed that he saw Workman shoot Lieutenant Oliver (Habeas Petition ¶117(d)). See Apx. 3-8.

Only after the habeas corpus proceedings concluded, however, did Workman first learn information which demonstrates that his habeas corpus proceedings were tainted by serious misconduct and apparent fraud.

Most notably, the facts show that in Workman's initial habeas corpus proceedings, he alleged in his habeas petition that the prosecution presented false testimony from Terry

Willis and withheld exculpatory evidence showing the falsity of Willis' testimony about finding the alleged fatal bullet (Q1). Apx. 5. The evidence also shows that during federal habeas proceedings, the State Attorney General's Office stated to the United States District Court that there had been no false testimony. Apx. 5-6. In addition, 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*, 373 U.S. 383 (1963). Apx. 6.

Then, after the federal habeas proceedings concluded, the State Attorney General's Office presented testimony at a clemency hearing establishing that, in fact, Terry Willis lied at trial, and there existed at the time of trial exculpatory evidence proving that Willis lied. Specifically, at that hearing, the Attorney General sponsored testimony in which former Memphis Police Officer Clyde Keenan unequivocally stated that the police – not Willis – found the bullet (Q1). Apx. 7, 46-49, 53-97.[2]

While Judge Cole clearly agrees that Workman should be granted a stay to further pursue on appeal his claims of misconduct and/or fraud under Fed.R.Civ.P. 60(b) and its Savings Clause (Apx. 34-35), the panel majority has disagreed (Apx. 29-33). Without full breiefing on the merits, however, the majority has misconstrued critical facts during the

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[2] Workman has recounted the actual falsity of Willis' trial testimony in his petition for rehearing, in which he discusses the prosecution's theory of the fatal bullet, Willis' testimony and the testimony of law enforcement personnel at trial, the testimony of Keenan and now-defrocked medical examiner O.C. Smith at the clemency hearing, and the testimony of Cyril Wecht, M.D. at a *coram nobis* hearing – all of which demonstrate that Willis claimed to find Q1 the day after the shooting, while Keenan said unequivocally that the police found Q1 the night of the shooting. Apx. 46-49, 53-97. As Workman has stated, Keenan's testimony clearly establishes that Willis' testimony was false, and indicates that the bullet claimed to have been found by him was planted. Compare Kyles v. Whitley, 514 U.S. 419, 446 (1995)(capital defendant convicted, in part, based on planted evidence).

truncated stay proceedings. Specifically, the panel erroneously believed that Willis and Keenan found two different bullets. As Workman has shown in great detail, that simply is not true: Both claimed to have found the same bullet, Q1. See Apx. 46-49.

Moreover, there is extensive evidence that Harold Davis was threatened into silence during the habeas proceedings (Apx. 7-8, 49), thereby preventing Workman from obtaining from him truthful evidence in support of Workman's habeas claims, *viz.*, that Davis did indeed lie at trial. Habeas Petition ¶117(d). Not only that, it clearly appears at this stage of the proceedings that, during habeas proceedings, Workman was also denied additional critical exculpatory evidence including: (1) proof from an on-duty Memphis Police Officer who received information that the shooting was friendly-fire (Apx. 8); and (2) proof that an apparent police bullet was found at the scene, though never disclosed, which would have confirmed that Oliver was hit by friendly fire. Id.[3]

All told, therefore, Workman has made out serious and uncontroverted allegations of misconduct, misrepresentation, and/or fraud in the federal habeas proceedings, such that he may be entitled to relief from judgment under Fed.R.Civ.P. 60(b) and its Savings Clause. This is especially true where Workman's appeal not only presents clear indications of misconduct traceable to the Respondent's counsel (regarding Willis), but where it is

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[3] As Workman has noted elsewhere, while the Memphis Police have steadfastly proclaimed that no other officer fired his weapon during the confrontation with Workman, their own contemporaneous records say otherwise. "There on the Holiday Auto Parts lot there was an exchange of gunfire between the *officers* and the suspect. (There was) an exchagne 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 shortly after the shooting." See Apx. 3.

likewise apparent that extensive exculpatory evidence was withheld throughout the habeas process, including Keenan's testimony, Davis' recantation, witness statements about friendly fire made to the police, and the police bullet found at the scene.

This Court has made manifest that the duty to disclose exculpatory evidence is "ongoing." Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003 (1987). The Ninth and Tenth Circuits have also 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."). Where exculpatory evidence is withheld in violation of a party's ongoing obligation to disclose, relief from judgment is available. See e.g., Summers v. Howard University, 374 F.3d 1188 (D.C.Cir. 2004)(actionable misconduct occurred when party failed to disclose evidence in discovery).

Moreover, as a theoretical matter, the Sixth Circuit's denial of a stay flies in the face of this Court's settled *Brady* and disclosure jurisprudence, which is equally applicable to federal habeas proceedings as much as it is to criminal trials. Just as state attorneys are obligated to disclose exculpatory evidence at trial to insure a fair trial under *Brady*, *Pennsylvania v. Ritchie* clearly appears to impose that continuing obligation in habeas, which, when not honored, ought properly provide a basis for equitable relief (either as fraud or misconduct). Further, Banks v. Dretke, 540 U.S. 668 (2004) makes clear that federal habeas courts can 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 fail to provide exculpatory evidence (including after filing as part of the federal record a document asserting compliance with *Brady*, as occurred here) the principles of *Banks* and *Kyles* apply with equal force. For if these identical principles don'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 at trial, while that same federal court would be powerless to remedy unfairness flowing from the withholding of evidence in its own proceedings in the same case.

For these reasons, it thus clearly appears that Philip Workman is entitled to a stay of execution under the traditional stay equities. In light of *Pennsylvania v. Ritchie, Banks, Kyles* and Judge Cole's dissent below, Workman demonstrates a likelihood of success on the merits of his pending Sixth Circuit appeals. Workman faces irreparable harm. There is also a strong probability that four members of this Court would grant certiorari in this matter. The panel's decision conflicts with *Pennsylvania v. Ritchie*, the principles and policies enunciated in *Banks* and *Kyles*, and those stated by the Ninth Circuit in *Thomas* and the Tenth Circuit in *Smith*. Likewise, it conflicts directly with *Barefoot* and *Lonchar*. See pp. 2-5, *supra*.

CONCLUSION

Accordingly, under 28 U.S.C. §1651 &2101(f) and U.S.S.Ct.R. 23, Your Honor should

grant a stay of execution under *Barefoot* and/or pending the timely filing of a petition for writ of certiorari. Messer v. Kemp, 478 U.S. 1028 (1986).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion for stay has been served upon Joseph Whalen, Office of the Attorney General and Reporter, 425 Fifth Avenue North, Nashville, Tennessee 37243, this the 8th day of May, 2007.

Paul R Bottei