

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 (6<sup>th</sup> 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 (10<sup>th</sup> Cir. 1997)(duty to disclose exculpatory evidence extends to all stages of the judicial process; Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9<sup>th</sup> Cir. 1992)(state attorneys have obligation to disclose exculpatory evidence during federal habeas proceedings)

Abrahamsen v. Trans-State Express Inc., 92 F.3d 425 (6<sup>th</sup> 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)

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Counsel for Philip Workman

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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 (6<sup>th</sup> 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 (6<sup>th</sup> 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.<sup>1</sup>

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<sup>1</sup> 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(10<sup>th</sup> 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 (9<sup>th</sup> 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.<sup>2</sup>

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 (1<sup>st</sup> 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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<sup>2</sup> 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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*, 6<sup>th</sup> 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).<sup>3</sup> 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.<sup>4</sup> 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 Traugher: ***This is the round that took Lieutenant Oliver's life[?]***  
[O.C. Smith]: ***Yes, sir, I believe it is.***

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<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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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<sup>5</sup> 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.<sup>6</sup> 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 appealability (R. 205), this

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<sup>6</sup> 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 6<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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 (11<sup>th</sup> 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.<sup>7</sup>

## CONCLUSION

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

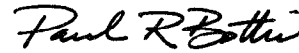
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<sup>7</sup> The panel’s assertions about the age of this case also miss the mark. The reason this case has been litigated for so long is because Workman’s conviction was based on false testimony of key witnesses, and the withholding of exculpatory 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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\_\_\_\_\_

**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 7<sup>th</sup> day of May, 2007.

  
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## Appendix A

### Trial Transcript Excerpts Concerning Q1, The Alleged Fatal Bullet

1 them. Do not pass the envelope to the jury.

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

4 MR. PETERSON: No questions.

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

6 MR. THOMPSON: No questions, Your Honor.

7 THE COURT: You're excused. Call your next wit-  
8 ness.

9 (WITNESS EXCUSED)

10 MR. PETERSON: Mr. Terry Willis.

11  
12 TERRY WILLIS was called and after having been duly  
13 sworn was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. PETERSON:

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

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

19 Q By whom are you employed?

20 A Holiday Auto Parts.

21 Q What do you do out at Holiday Auto Parts?

22 A Right now I'm assistant manager.

23 Q How long have you been employed out there?

24 A About four years.

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

1 A Yes, sir.

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

4 A Yes, sir.

5 Q What did you find?

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

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

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

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

17 A Yes, sir.

18 Q What is that?

19 A The round I found that day.

20 Q All right, sir.

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

23 THE COURT: Yes.

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

1 A Yes, sir.

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

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

6 Q How close to the curb was it?

7 A Oh, just about a foot or less.

8 Q All right, sir.

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

12 THE COURT: So mark it.

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

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

17 A At first I put it in my tool box and then I con-  
18 tacted the North Precinct and they sent an officer out there  
19 again.

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

22 A Yes, sir.

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

1 A Yes, sir.

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

4 A No, sir.

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

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

8 Q Thank you.

9 MR. PETERSON: No further questions.

10 MR. JONES: No questions.

11 THE COURT: You're excused. Call your next wit-  
12 ness.

13 (WITNESS EXCUSED)

14 MR. PETERSON: F. D. Brawner.

15  
16 F. D. BRAWNER was called and after having been duly  
17 sworn was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. PETERSON:

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

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

23 Q By whom are you employed and in what capacity?

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

1 Q How long have you been with the Crime Scene?

2 A Twelve years.

3 Q On August the 6th, 1981, around 1:45 in the after-  
4 noon, did you go to the Holiday Auto Parts at 3289 North  
5 Thomas?

6 A Yes, I did.

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

9 A I had a partner.

10 Q And what was his name?

11 A Sergeant R. T. Montgomery.

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

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

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

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

25 Q Just to kind of highlight it?

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

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

4 A Yes, sir, I did.

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

8 A Yes, sir, they do.

9 Q Sir, would you take that grease pencil beside you  
10 on the shelf and circle the slug in each of those three photo-  
11 graphs?

12 A (Witness complied.)

13 Q All right, sir.

14 MR. PETERSON: Your Honor, the State would ask that  
15 those three photographs be marked as State's Collective Exhibit  
16 36.

17 THE COURT: So ordered.

18 (WHEREUPON, State's Collective Exhibit

19 Number 36 was marked and filed.)

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

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



1 Q And what's inside there?

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

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

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

9 A R. M.

10 Q Would you place that back in that container?

11 A (Witness complied.)

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

14 A Yes, sir, they are.

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

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

20 (WHEREUPON, State's Exhibits Numbers  
21 35 and 36 collectively were tendered to  
22 the jury for examination.)

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

25 THE COURT: What was that?

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

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

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

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

10 THE WITNESS: It was on the 6th.

11 THE COURT: The 6th of what month?

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

14 THE WITNESS: Yes.

15 (Document tendered to witness.)

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

18 THE COURT: Yes, ma'am?

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

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

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

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

1 Yes, ma'am?

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

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

8 MR. PETERSON: No questions.

9 MR. THOMPSON: No questions, Your Honor.

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

12 (WITNESS EXCUSED)

13 MR. PETERSON: R. L. Hannah.

14  
15 R. L. HANNAH was called and after having been duly  
16 sworn was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. PETERSON:

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

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

22 Q And for whom do you work?

23 A Memphis Police Department.

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

1 duly sworn was examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MR. STROTHER:

4 Q State your name, please.

5 A Barney G. Wright.

6 Q Would you spell your last name for the record?

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

8 Q And by whom are you employed?

9 A By the Memphis Police Department.

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

11 A Lieutenant.

12 Q How long have you been with the police department?

13 A Almost twenty-one years.

14 Q To what division or bureau are you currently as-  
15 signed?

16 A Assigned to the Crime Scene Squad.

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

22 A Yes, sir.

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

25 (Pause)

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

3 MR. STROTHER: Exhibit 12 and Exhibit 35.

4 THE COURT: And Exhibit 35. All right.

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

7 Q Now, Officer Wright, would you examine those items  
8 and tell us if you packaged and sent all of those items pre-  
9 sented to you to the Federal Bureau of Investigation?

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

13 Q I believe you're referring to Collective Exhibit  
14 12, and you're saying that you're identifying the shirt as  
15 an item which was sent, and I believe there was also a pair of  
16 trousers and other items in that bag that you did not send.  
17 Is that correct, sir?

18 A Yes, sir.

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

21 A Yes, sir.

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

25 A Yes, sir.

1 Q What tests did you ask them to perform?

2 A I requested that the cartridge cases and the frag-  
3 mented bullet collected from the crime scene be examined in  
4 conjunction with this .45 caliber pistol.

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

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

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

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

13 A Yes, sir.

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

16 A Yes, sir.

17 MR. STROTHER: Pass the witness.

18 MR. THOMPSON: No questions.

19 THE COURT: You're excused.

20 (WITNESS EXCUSED)

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

24 THE BAILIFF: Yes, Sir.

25 THE COURT: All right.

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

3

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

6 DIRECT EXAMINATION

7 BY MR. PETERSON:

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

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

11 Q By whom are you presently employed?

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

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

16 A For twelve years.

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

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

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

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

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

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

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

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

10 A Yes.

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

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

17 Q Yes, sir.

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



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

3 A Yes, sir.

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

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

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

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

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

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

25 Q And as you made your comparison on that examining

1 microscope, what did you find?

2 A Well, I found that--you mean did I draw a con-  
3 clusion as to those results?

4 Q Yes.

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

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

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

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

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

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

3 A Absolutely.

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

6 A (Witness complied.)

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

10 A Yes, sir, they are.

11 MR. PETERSON: Your Honor, the State would move  
12 that envelope and items inside of it as Exhibit 41 Collective-  
13 ly.

14 THE COURT: So ordered.

15 (WHEREUPON, State's Collective Exhibit

16 Number 41 was marked and filed.)

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

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

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

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

1 you referred to.

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

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

7 A The bullets?

8 Q Yes. The slugs themselves.

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

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

14 A Yes, sir.

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

17 A Yes, sir.

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

20 A Yes, sir.

21 Q The whole bullet.

22 A Yes, sir.

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

25 A (Witness complied.)

1 tridge itself?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE WITNESS: Not necessarily.

8 BY MR. THOMPSON (Continuing Cross-Examination):

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

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

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

18 A It's possible, yes, sir.

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

21 A You are correct, yes, sir.

22 REDIRECT EXAMINATION

23 BY MR. PETERSON:

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

1 remain as it was eventually sent to you?

2 A Yes, sir, that's possible.

3 Q Thank you.

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

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

8 MR. PETERSON: No, Sir.

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

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

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

15 Yes, ma'am?

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

18 THE WITNESS: Would you repeat that, please?

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

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

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

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

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

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

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

8 THE WITNESS: Which one are you referring to?

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

12 Mrs. Brugge?

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

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

18 MR. PETERSON: No questions.

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

21 (WITNESS EXCUSED)

22 MR. PETERSON: May we approach the bench?

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



## Appendix B

### Clemency Hearing Transcript Excerpts Concerning Q1, The Alleged Fatal Bullet

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

11 MR. DALTON: Thank you.

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

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

25 CHAIRMAN TRAUGHBER: Did your

1 team take possession of it?

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

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

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

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

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

1 These bullets -- and I speak from having --  
2                   Following my assignment after  
3 this assignment, I took over command for  
4 years of the police department's homicide  
5 squad as a captain, and later for years as  
6 the commander of its SWAT Team. I have seen  
7 a lot of people shot with a lot of weapons  
8 and, I mean, there's no way to predict just  
9 exactly what a slug is going to look like  
10 after somebody has been shot with it.

11 Sometimes they pass clean through, sometimes  
12 they come out in a million pieces, sometimes  
13 they come out completely intact. It just  
14 depends, and every case is different.

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

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

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

1 CHAIRMAN TRAUGHBER: We're back  
2 with the Executive Clemency Commutation  
3 Hearing of Mr. Philip R. Workman, Case No.  
4 95920, January 25, 2001, at Riverbend Maximum  
5 Security Institution. We're continuing with  
6 the presentation by the State, and they've  
7 called Dr. O. C. Smith as a witness.

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

10

11 O. C. SMITH, M.D.,  
12 having been called as a witness on behalf of  
13 the State, was sworn, and testified as  
14 follows:

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

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

1 important later on.

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

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

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

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

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

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

4 There is the nose with the  
5 contents removed.

6 There is the nose of Q1 from the  
7 parking lot.

8 There is the side of the test  
9 bullet.

10 There is the side of Q1.

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

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

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



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

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

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

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

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

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

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

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

15 If we could have the lights  
16 please.

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

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

21 THE WITNESS: Yes, sir, I  
22 believe that is. And this is the bullet  
23 which I shot into the model and I think that  
24 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. )

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BEFORE THE HONORABLE JOHN P. COLTON, JR. PRESIDING JUDGE  
HEARING ON OCTOBER 16, 2001

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APPEARANCES

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

4 CONTINUATION BY MR. PIEROTTI:

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

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

10 Q. You have examined that under better light?

11 A. Oh, yes, yes.

12 Q. Okay.

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

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

16 THE COURT: No objection, lawyers?

17 MR. CAMPBELL: No, Your Honor.

18 THE COURT: Mark it 1A.

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

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

23 CONTINUED BY MR. PIEROTTI:

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

1       stint slug that he referred to as Q1?

2             A.    Yes.

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

4             A.    Yes.

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

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

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

15            A.    Yes, I have an opinion.

16            Q.    And what is that opinion?

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

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

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

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

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

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

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

6 THE COURT: Mr. Pierotti.

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

10 Dr. Wecht, how many --

11 THE COURT: Let me just say this for  
12 Now, I'm going to sustain the State's objection  
13 nothing in the testimony about Dr. Wecht being  
14 kind of an expert as far as any bullets or ammunition  
15 concern.

16 CONTINUED BY MR. PIEROTTI:

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

20 A. That particular kind of ammunition?

21 Q. Yes.

22 A. Probably, a couple of dozen.

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

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



1 the bullet had not exited the body.

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

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

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

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

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

23 Q. Why is that?

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

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

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

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

12 MR. PIEROTTI: Excuse me.

13 (Conferring with cocounsel.)

14 CONTINUED BY MR. PIEROTTI:

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

21 (Conferring with cocounselor.)

22 -- looking at the wounds on the body?

23 A. Yes, I have an opinion.

24 Q. All right. What is that, sir?

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

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

4 The hole on the left side of the chest was measured  
5 at one-half an inch in diameter. It's referred to as  
6 50/100th -- one-half inch.

7 The hole at the point of exit, is described as  
8 21.100 x 24.100, which roughly then is 1/5 x 1/4 of an inch,  
9 considerably smaller. This is highly atypical, especially  
10 then for a bullet which has struck a rib, which is then going  
11 to be tumbling. It's not going to be moving in a straight  
12 line trajectory. It is knocked eschew, so to speak.

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

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

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

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

1 MR. PIEROTTI: Excuse me.

2 (Conferring with cocounselor.)

3 Q. With the entrance wounds, exit wounds, with the  
4 traverse that you saw in the x-ray and also described in the  
5 autopsy report, what is your opinion as to whether or not the  
6 .45 silver tip, hollow point, caused the injury that  
7 Lieutenant Oliver succumbed?

8 A. It is my opinion that it did not.

9 MR. PIEROTTI: No further questions.

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

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

13 (WHEREUPON, a ten minute recess was had.)

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

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

18 MR. PIEROTTI: I omitted a couple of questions.

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

20 CONTINUED BY MR. PIEROTTI:

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

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

1 autopsy report it says 24.

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

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

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

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

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

21 Q. And why is that important?

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

1 the Courts, I think.

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

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

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

17 Q. It went through the body?

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

22 MR. PIEROTTI: Thank you.

23 THE COURT: All right. State.

24 MR. KITCHEN: Thank you, Your Honor.

25 CROSS EXAMINATION