IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN,	)	
Petitioner,	)	
	)	
v.	)	**Nos. 06-6451/07-5031**
	)	**Capital Case**
RICKY BELL	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC, TO MOTION TO EN BANC COURT FOR STAY OF EXECUTION, AND TO MOTION FOR STAY OF EXECUTION PENDING REHEARING

The Supreme Court has said that, after a federal court of appeals issues a mandate denying federal habeas relief, the State's interests in finality and in enforcing its own criminal judgments are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 558 (1998). This Court issued its mandate denying federal habeas relief in this case seven and a half years ago, on October 12, 1999. Workman's legal efforts to forestall the lawful execution of his sentence have continued unabated since then, and execution of that sentence has in fact been delayed on five prior occasions.

In 2000, having apparently convinced himself that he did not shoot Memphis Police Lieutenant Ronald Oliver in 1981,[1] Workman sought to reopen his habeas

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[1] As the panel correctly observed, Workman testified to the contrary at his trial.

appeal by alleging fraud on the court, and the execution was stayed twice by this Court on the basis of those allegations. His claims were rejected. *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (en banc). In 2001, Workman vehemently insisted that if he could only secure a hearing, he would present evidence that would prove he was innocent. On March 29, 2001, the Tennessee Supreme Court obliged him and gave him his hearing. *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001). But Workman did not prove he was innocent — indeed, the state courts concluded that there was not even a reasonable probability that Workman's evidence would have changed the result of his trial. *Workman v. State*, 111 S.W.3d 10 (Tenn.Crim.App. 2002).

In 2004, Workman again sought to reopen his habeas case with new, though markedly similar, allegations of fraud on the court. The district court rejected his claim. In apparent response to the district court's finding that Workman had not alleged any fraud on the court because he had alleged no misconduct against any of the state's habeas attorneys, Workman's motions now feature a claim of misconduct against a member or members of the State Attorney General's Office. Workman's seemingly never-ending fraud allegations would be offensive if they were not so baseless. In any event, Workman's fraud claims do not entitle him to yet another stay pending his appeal of the district court's denial of his Rule 60(b) motion, because Workman simply cannot win his appeal. How profound an injury it would work to

the State's and the public's interests in finality in this case if this Court were to stay Workman's execution for the *sixth* time in seven years, only to reach, months or more from now, the only conclusion that it could reach in this case — that the district court did not abuse its discretion. Furthermore, as discussed below, because *that* issue would be the *only* issue on appeal, Workman's appeal would not implicate, much less resolve, what he refers to as the "intra-circuit" split regarding the standard to be applied in cases alleging fraud on the court by imputation.

I. THERE IS NO BASIS FOR A STAY OF EXECUTION BECAUSE THERE IS NO LIKELIHOOD OF SUCCESS ON THE MERITS OF PETITIONER'S APPEAL.

It is well-settled that in order to warrant a stay of execution, a prisoner must demonstrate a likelihood of success on the merits, s*ee Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (before granting stay of execution, federal court must consider the likelihood of success on the merits); *see also Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006) (prisoner seeking stay of execution must show a "significant possibility of success on the merits"); and in this instance, petitioner must demonstrate a strong likelihood of success on the merits of his appeal from the denial of relief. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (factors regulating issuance of stay pending appeal include "whether the stay applicant has made a strong showing that he is likely to succeed on the merits"). Contrary to petitioner's assertions, he has not shown, and

cannot show, any likelihood of success, much less a strong one.

Relying on *Barefoot v. Estelle*, 463 U.S. 880 (1983), petitioner touts the fact that the district court granted him a certificate of appealability on his claim that certain of his habeas claims should be reopened because the judgment on those claims had been procured by a fraud on the court. But as petitioner himself emphasized to the district court, and as the district court itself observed, the question whether to grant a COA has nothing to do with the merits of a claim. *See* R. 205, Order Granting Certificate of Appealability, p. 6 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337, 342) ("[A] COA does not require a showing that the appeal will succeed. . . . The question is the debatability of the underlying constitutional claim, not the resolution of that debate."). So, even in the regular case, the issuance of a COA says little about a petitioner's likelihood of success on appeal.

But the issuance of a COA in petitioner's case, in particular, says *nothing* about his likelihood of success on appeal; this is so because, while at the COA stage the district court inquired only if it can be debated whether the court resolved petitioner's Rule 60(b) motion *correctly*, on appeal this Court reviews the district court's resolution of petitioner's motion only for an *abuse of discretion*. *Futernick v. Sumpter*

Township, 207 F.3d 305, 313 (6th Cir. 2000).[2] Indeed, the district court itself stated that "it [could not] conclude that Petitioner has demonstrated a likelihood or 'significant possibility' of success on the merits of his appeal," due in part to "the narrowed scope of appellate review in an appeal of a district court's denial of a Rule 60(b) motion." (R. 206, Order Denying Motion for Stay of Execution, p. 6).

Petitioner's reliance on *Barefoot*, therefore, is seriously misplaced. *Barefoot* was decided long before the Supreme Court emphasized in *Miller-El* that success on the merits of the appeal was not a factor in the determination whether to grant a COA. Moreover, *Barefoot* involved an appeal from the denial of a habeas petition; it did not involve an appeal from the denial of a Rule 60(b) motion seeking relief from the denial of a habeas petition. Indeed, it would be profoundly inconsistent with the

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[2]Respondent urged the district court to incorporate this standard of appellate review into the standard for determining whether to issue a COA in the first place. *See* R. 198-1, Response in Opposition to Petitioner's Application for a Certificate of Appealability, pp. 1-4. The district court "acknowledg[ed] the appealing logic of Respondent's contention that a COA should not issue because 'it makes little sense to inquire, as a threshold matter, about the debatability of whether the district court was *correct* in deciding the way it did, only then to abandon correctness and inquire on appeal only whether the district court *abused its discretion* in deciding the way it did.'" (R. 205, Order Granting Certificate of Appealability, pp. 4-5) The court nevertheless opted to apply the standard set forth by this Court in footnote 1 of its opinion in *United States v. Hardin*, __ F.3d __, 2007 WL 817267 (6th Cir. Mar. 20, 2007), which merely reiterates the standard from *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Respondent maintains that had the district court incorporated the abuse of discretion standard, no COA would have issued.

Court's statement in *Calderon* that the State's interests in finality became compelling and effectively paramount after this Court denied habeas relief in 1999, to say that this Court is "obligated" to grant a stay simply because the denial of Workman's bid to reopen his original habeas case has been certified for appeal.

On that appeal, petitioner must be able to show, not that the district court was wrong to deny his claim under Rule 60(b) that the state perpetrated a fraud on the court, but that the district court *abused its discretion* in denying this claim under Rule 60(b). An abuse of discretion occurs only when the district court relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard. *Apanovitch v. Houk*, 466 F.3d 460, 476 (6th Cir. 2006). Petitioner is unable to show any of these things; indeed, he makes no effort in support of his motion for a stay to show that he can.

In denying petitioner's Rule 60(b) motion, the district court concluded that petitioner "[did] not properly set forth the elements of a 'fraud on the court claim' . . . or attempt to demonstrate how his motion properly fits within the parameters of such an action." (R. 177, Order Denying Motion for Relief from Judgment, p. 13) The court found that petitioner had failed to lodge any credible allegation of fraudulent conduct on the part of the state's habeas attorneys.

> The prospect of holding a hearing which would necessarily require the Defendant to prove grave ethical and professional misconduct on the part of the state's habeas attorneys strikes the Court as particularly untoward in the absence of any colorable allegation of such misconduct. This Court will not provide the forum for a spectacle of desperate accusation by allowing the Petitioner to recklessly seek to impugn the professional, indeed moral, character of attorneys against whom he cannot even muster sufficient evidence to make a non-frivolous allegation of fraud.

(*Id.*, pp. 18-19)[3] The district court acknowledged, in rejecting petitioner's claim, that this Court had split evenly in a prior proceeding in this case, *Workman v. Bell*, 227 F.3d 331 (6th Cir. 200) (en banc), with respect to the standard for determining whether the allegedly fraudulent conduct of state officials can be imputed to the state habeas attorneys in federal court — a "broader" and a "more stringent" standard. (*Id.*, pp. 14-15 (quoting *Buell v. Anderson*, 2002 WL 31119679 (6th Cir. Sept. 24, 2002)).[4]

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[3]As pointed out above, petitioner's motion for a stay references an allegation against a member or members of the State Attorney General's Office, but such an allegation did not appear in his Rule 60(b) motion for relief from judgment, *see* R.161, First Amended Motion for Equitable Relief from Judgment, pp. 13, 25, 29, and appears to be nothing more than a *post hoc* response to the district court's finding that "Petitioner [did] not direct any of his various allegations of fraud or misconduct at the state habeas attorneys who litigated this matter previously." (R. 177, Order Denying Motion for Relief from Judgment, p. 14)

[4]This thus marks not just the second but the *third* time that petitioner has cried "fraud on the court" in this case, *see also Workman v. Bell*, 245 F.3d 849 (6th Cir. 2001), an accusation that is generally regarded as "rare." *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005); *see id*. (reopening a final judgment on the basis of fraud on the court "must be not just a high hurdle to climb but a steep cliff-face to scale").

But whether or not this presents a "thorny issue," as petitioner has put it, is of no matter here, because it would be of no matter on petitioner's appeal. Whatever may be said about the district court's decision to apply the "more stringent" standard to reject petitioner's claim, it cannot be said to constitute an abuse of discretion, because the court did not employ an *erroneous* legal standard. The "more stringent" standard fully comports with this Court's precedent, *see Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993) (fraud on the court is conduct "on the part of an officer of the court").[5] The opinion in *Workman* advocating application of a "broader" standard, representing as it does one of the two opinions of an evenly divided en banc court, has no precedential effect, *see United States v. Grey Bear*, 863 F.2d 572, 573 (8th Cir. 1988); indeed, the en banc order that it accompanies rejects petitioner's fraud on the court claim. *See Workman*, 227 F.3d 331.[6] In short, petitioner cannot win on appeal; there is thus no basis at all on which to grant a stay of execution.

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[5]In contrast, the so-called "broader" standard, which would allow alleged misconduct of state officials to be imputed to the state's federal habeas attorneys and thus create a sort of "constructive fraud" on the court, tends to fly in the face of this Court's precedent and to distort the essence of what it means to perpetrate a fraud on the court.

[6]The district court also determined that "the only known appellate case to resolve this issue clearly applied the 'more stringent' standard." (R. 177, Order Denying Motion for Relief from Judgment, p. 18 (citing *Fierro v. Johnson*, 197 F.3d 147, 155-156 (5th Cir. 1999)).

II. BALANCING THE RESPECTIVE INTERESTS WEIGHS HEAVILY IN FAVOR OF DENYING A STAY.

Nearly twenty-six years have passed since petitioner's murder of Memphis Police Lieutenant Ronald Oliver. This Court affirmed the denial of habeas relief in petitioner's case in 1998, *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), and the Supreme Court denied certiorari a year later. *Workman v. Bell*, 528 U.S. 913 (1999). Petitioner has thus been engaged in post-habeas litigation in an effort to forestall the execution of his sentence for the last seven-and-a-half years. As stated above, the execution of that sentence has been delayed on five prior occasions — twice by stays granted by this Court in 2000 and 2001,[7] once by a stay granted by the Tennessee Supreme Court in 2001,[8] once by executive reprieve in 2003,[9] and once by the federal district court in 2004.[10] If the State's interests in enforcing its own criminal judgments are "all but paramount" at the conclusion of federal habeas proceedings, *see Calderon*, 523 U.S. at 557, then at this juncture, the State's interests in enforcing

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[7] *Workman v. Bell*, 209 F.3d 940 (6th Cir. 2000); *Philip Workman v. Ricky Bell*, Nos. 96-6652/00-5367 (6th Cir. Jan. 26, 2001).

[8] *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001).

[9] *See Workman v. Bell*, No. 03-2660 (W.D.Tenn. Sept. 15, 2003) (docket minutes reflecting withdrawal of motion for stay of execution in light of executive reprieve).

[10] *Philip Workman v. Ricky Bell*, Nos. 94-2577; 03-2660 (W.D.Tenn. Sept. 2, 2004).

this particular judgment must be *nothing* but paramount. "The State and the surviving victims [of this crime] have waited long enough for some closure" in this case. *Jones v. Allen*, __ F.3d__ , 2007 WL 1225393, at *4 (11th Cir.Apr. 27, 2007), cert. denied, __ S.Ct. __, 2007 WL 1257938 (May 3, 2007).

CONCLUSION

For these reasons, petitioner's motion to the En Banc Court for stay of execution, petitioner's motion for stay of execution pending rehearing, and the petition for rehearnig en banc should all be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by facsimile and by first-class mail, postage prepaid, to Paul Bottei, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this the 7th day of May, 2007.

/s/ Joseph F. Whalen

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JOSEPH F. WHALEN
Associate Solicitor General