IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

PHILIP WORKMAN'S REPLY
ON MOTION FOR STAY OF EXECUTION

A stay is warranted given: Fraud and misconduct regarding Terry Willis; the criminal intimidation of Harold Davis; and fraud and misconduct from the ongoing withholding of exculpatory evidence, all of which tainted the habeas proceedings.

***Terry Willis*:** The Attorney General's Office presented testimony at the 2001 clemency hearing which proves false their denials, in habeas, of Willis' false testimony. The Warden doesn't deny this. He can't. It is undisputed. In fact, when this Court considered this case in 2004, everyone was well aware of Workman's claims:

> [T]he Attorney General . . . was involved in presenting to the clemency board the testimony of Clyde Keenan which now establishes that Terry Willis committed perjury at trial. In habeas proceedings, though, Respondent-Appellant told the District Court that there was 'no support' for Workman's 'claims of perjury by state witnesses," including Willis. R. 45 Respondent's Memorandum In Support Of Motion For Summary Judgment, p. 46. *This presents a classic case for relief from judgment based on misconduct and misrepresentation, as well as fraud upon the United States District Court – exactly as in* ***Demjanjuk.***

Workman v. Bell, 6th Cir. No. 04-6038 (Workman's Response In Opposition To Motion To Vacate Stay, p. 2 (emphasis supplied). See also Id., pp. 18-20 (discussing misconduct and/or fraud related to witness Harold Davis).

Ultimately, despite this undisputed fact, the Warden nevertheless hopes to reap the benefits of such fraud and misconduct by claiming that the issues in this case were not clear. That is not true. In his motion, Workman clearly alleged fraud,[1] he informed the Court of Clyde Keenan's state-sponsored testimony in 2001 which proves Willis' lies;[2] he included as an exhibit Keenan's testimony sponsored by the Attorney General;[3] he made clear that during the initial habeas proceedings those obligated to disclose such evidence during the proceedings (i.e., the Attorney General's Office) withheld it from Workman and the Court;[4] he maintained the he was the victim of fraud and misconduct because the federal record (filed by counsel for the Respondent) contained a false representation that the state had complied with *Brady*;[5]

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[1] R. 161: First Amended Motion For Equitable Relief, p. 25.

[2] Id., pp. 13-14.

[3] Id., Ex. 3.

[4] See e.g., Id., p. 25.

[5] See e.g., Id., p. 28. This assertion is identical to the assertion made in the *Alley* case. In an opinion written by Judge Cole, five judges agreed that an evidentiary hearing on the question of fraud was necessary under such circumstances. See Alley v. Bell, 405 F.3d 371 (6th Cir. 2005)(Cole, J., concurring)

he specifically cited *Workman* (involving fraud upon the Court), and he argued that he was entitled to relief just like a movant in the Ninth Circuit where, in a federal proceeding, "adverse attorneys" failed to disclose the truth.[6]

Despite these assertions, however, Workman was never allowed to conduct discovery,[7] nor was he given a requested evidentiary hearing at which he could finally get to the bottom of the misconduct and/or fraud in this case – as happened in Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993). In fact, Workman did not (and still does not) know all the details of the misconduct and fraud which have occurred. But he certainly properly alleged fraud related to Willis so that his motion on this ground couldn't be dismissed for, essentially, not proving itself.[8]

Where the Warden cannot and does not dispute the facts, Workman does have a likelihood of success on this claim: The Court did indeed abuse its discretion in denying his motion without granting an evidentiary hearing, because "An abuse of

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[6] Id., p. 28, citing Dixon v. Commissioner, 316 F.3d 1041 (9th Cir. 2003).

[7] Workman moved for a status conference at which he could discuss his need for discovery and an evidentiary hearing (R. 171, citing Alley v. Bell, 405 F.3d 371, 372-373 (6th Cir. 2005)(Cole, J., concurring)(discussing fraud upon the court and the need for a hearing on such matter). The District Court granted that motion (R. 172), but later rescinded its order. R. 183.

[8] Indeed, in *Demjanjuk* – as here – when information came to light indicating that exculpatory evidence may have been improperly withheld during initial federal proceedings, the Court ordered an investigation and a hearing into the matters, where, as here, the issues of fraud were raised, but needed to be probed.

discretion occurs when the district court . . . improperly applies the law . . . or . . . employs an erroneous legal standard." Surles v. Greyhound Lines, Inc., 474 F.3d 288, 296 (6th Cir. 2007); Geier v. Sundquist, 372 F.3d 784, 789-790 (6th Cir. 2004). That has happened here where, despite the issues presented, the District Court thought there was no possible basis on which Workman could possibly prevail. That simply is not true. This Court should issue a stay to consider these issues.

Criminal Intimidation Of Harold Davis: In the District Court, Workman presented uncontroverted allegations (with supporting evidence in the form of sworn testimony from the *coram nobis* proceeding) that, during the course of federal habeas proceedings, Harold Davis was under threat of death or serious bodily injury from state actors not to reveal his trial perjury.[9] The District Court thus had before it uncontroverted facts establishing that Workman did not receive a fair hearing on his claims related to Davis. This was a clear violation of federal law which prohibits witness intimidation – a law designed to protect the integrity of the court process. 18 U.S.C. §1512(b)(1) & (b)(2).

Without question, intimidation of federal witnesses calls into question the integrity of the federal proceedings. The District Court, however, completely

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[9] R. 161, First Amended Motion For Equitable Relief, p. 25, citing *Coram Nobis* Transcript 172 (describing individuals who threatened Davis with harm if he ever revealed that his trial testimony was not true).

overlooked these allegations, and the Warden has no meaningful response to them. Having completely failed to address this contention, the District Court abused its discretion in denying Workman relief. For indeed, violations of the criminal law which taint a federal proceeding most certainly call into question the integrity of the federal habeas proceedings. Gonzalez v. Crosby, 545 U.S. 524 (2005). They provide a basis for equitable relief under either Fed.R.Civ.P. 60(b)(6) or as an independent action in equity.

Were that not true, persons could commit crimes and undermine the truthfinding process (as happened here), leaving a litigant – *and* the federal courts – without any recourse to review a judgment so tainted. That is not and can't be the law. Workman's uncontroverted allegations entitle him to a hearing, and he has a reasonable likelihood of success on appeal on this claim. This Court, therefore, should issue a stay.

***Failure To Comply With The Ongoing Obligation To Disclose Exculpatory Evidence While Filing A Document Asserting Compliance With Brady*:** As held in *Demjanjuk* and declared by Judge Merritt's seven-judge opinion in Workman v. Bell, 227 F.3d 331, 335 (6th Cir. 2000)(en banc), the obligations of *Brady* extended to the federal proceedings in this case. The Supreme Court has also made this clear in Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987)(duty of disclosure is ongoing), as

have the Ninth and Tenth Circuits. Smith v. Roberts, 115 F.3d 818, 820(10th Cir. 1997); Thomas v. Goldsmith, 979 F.2d 746, 749-750 (9th Cir. 1992).

The District Court, however, failed to acknowledge this principle (specifically argued by Workman) – while it simultaneously failed to address the significance of the Respondent's filing as part of the federal record a document claiming full compliance with *Brady* – now known to be untrue. That document clearly provides a basis for further inquiry. See Alley v. Bell, 405 F.3d at 371-372 (Cole, J., concurring)(such a document requires inquiry on remand).

Because the District Court did not apply *Pennsylvania v. Ritchie*, nor did it address the significance of the *Brady* compliance document included in the federal record, it again abused its discretion: It improperly applied the law. Surles v. Greyhound Lines, Inc., 474 F.3d at 296.

And while the District Court did not properly apply *Pennsylvania v. Ritchie* to the issues of fraud or misconduct arising from the ongoing withholding of exculpatory evidence during federal proceedings, the question whether the District Court abused its discretion under *Sixth Circuit precedent* remains undecided. This, the District Court recognized.

Indeed, any resolution of this issue ultimately will depend upon whether this Court would now adopt the seven-judge published opinion of Judge Merritt in

Workman, or the seven-judge published opinion of Judge Siler in that case – both of which are of equal precedential value. Where this issue remains undecided, but is certainly deserving of close appellate scrutiny (and undoubtedly would be of great significance to the disposition of this appeal), a stay of execution is warranted to allow proper consideration of that issue as well. This is especially true where this Court has granted a stay and is currently considering such matters in the pending case of Johnson v. Bell, 6th Cir. No. 05-6925. Workman is entitled to a stay because his appeal involves "substantial grounds upon which relief *might* be granted." Barefoot v. Estelle, 463 U.S. 880, 895 (1983).

CONCLUSION

Ultimately, resolution of this appeal requires determination whether Workman's federal habeas was fairly decided, when we now know that the two key witnesses at his trial committed perjury, where we also know that Respondent and other state actors failed in their duty to disclose the truth about that perjury, and where the record below contains *undisputed proof of a federal crime* which tainted the initial habeas proceedings – the unlawful intimidation of witness Harold Davis. This is precisely the type of situation in which the federal courts must act to preserve the integrity of the judicial process, lest a man be executed unjustly. This Court should not allow that to happen, and certainly not before this appeal can be fully and

properly considered by the Court.

While the Warden believes that the solution to the compelling problems posed here is to look the other way, federal law dictates otherwise. The depth of misconduct here is regrettable. But the nature of this misconduct – first acknowledged by the original panel and later by half the *en banc* court – has continued unabated. In what other case has a state witness been prosecuted for concocting and lying about an alleged bomb attack on himself in order to discredit a habeas petitioner? And in how many cases has there been undisputed proof presented by a party in a later proceeding which proves the truth of the petitioner's original habeas claim? This case is indeed unique. The solution is not to ignore what has happened, but to evaluate it carefully and dispassionately.

The Court should grant a stay of execution.

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 3rd day of May, 2007.

Paul K Bottei