IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

MOTION FOR STAY OF EXECUTION

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

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

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

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

I.
FACTS

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

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

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

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

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

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

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

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

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

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

[5] Id.

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

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

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

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

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

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

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

[9] Id.

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

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

C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.
THIS COURT SHOULD GRANT A STAY OF EXECUTION

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

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[25] R. 184, p. 7.

[26] R. 188, p. 4.

grant Philip Workman a stay of execution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

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Paul R Bottei

CERTIFICATE OF SERVICE

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

Paul R Bottei

Exhibit 1

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

Order Granting Stay Of Execution

No. 05-6925

FILED

OCT 19 2006

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNIE E. JOHNSON,

Petitioner - Appellant,

v.

RICKY BELL,

Respondent - Appellee.

ORDER

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

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

It is so ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Exhibit 2

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

En Banc Order Granting Stay Of Execution

Nos. 02-6547/6548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JUN 06 2003

LEONARD GREEN, Clerk

IN RE: ABU-ALI ABDUR'RAHMAN,

Movant (02-6547).

IN RE: ABU-ALI ABDUR'RAHMAN,

Petitioner-Appellant (02-6548),

v.

RICKY BELL, WARDEN,

Respondent-Appellee.

ORDER

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

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

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

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

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

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

Exhibit 3

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

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

No. 04-5596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 28 2004
LEONARD GREEN, Clerk

SEDLEY ALLEY,
Petitioner - Appellee

v.

RICKY BELL, Warden,
Respondent - Appellant

ORDER

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

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

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

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

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

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk