IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	No. M1999-01334-SC-DPE-PD
	)	Filed April 26, 2004
PHILIP RAY WORKMAN	)	

RESPONSE TO MOTION TO RESET DATE OF EXECUTION

I. INTRODUCTION

The State agreed to stay proceedings in federal District Court until the Sixth Circuit decides Abdur'Rahman v. Bell. That case remains pending. Now the State seeks to kill Mr. Workman before Abdur'Rahman is decided. That's not right.

A federal investigation related to Mr. Workman's case has generated documents that Mr. Workman could use to challenge the validity of his conviction and death sentence. Because the investigation has not concluded, Mr. Workman cannot have access to those documents. The State seeks to kill Mr. Workman before he can review the documents and determine how they might be used to save his life. That's not right.

The State submits an April 15, 2004, unsworn, unconfronted letter from Dr. Bruce Levy. That letter claims to show that Philip Workman shot Memphis Police Officer Ronald Oliver. As discussed in Sections V and VI, below, Dr. Levy's opinion lacks a scientific basis and, as Dr. Levy himself must recognize, he violated the standard of care for thoroughness and consistency in creating his report. Its conclusion that Workman shot Oliver is therefore unreliable. Relying on it to kill Mr. Workman is wrong. To set an execution date under these circumstances would violate constitutional rights of due process, confrontation, and the right to be free from cruel and unusual punishment.

This Court should deny the State's motion to set an execution date. To the extent it is inclined to grant it, this Court should appoint a Special Master so that Dr. Levy can be put under oath and subjected to cross-examination about his opinion.

II. PRELIMINARY FACTS

On August 5, 1981, Philip Workman robbed a Memphis Wendy's Restaurant. Memphis Police Officers Ronald Oliver, Aubrey Stoddard, and Steven Parker responded to a silent alarm triggered by an employee. As Mr. Workman left the Wendy's Officer Oliver accosted him. Mr. Workman ran, tripped, and fell into the parking lot of an adjoining business, Holiday Auto Parts. Mr. Workman attempted to surrender. He was bludgeoned on the head, and gunfire erupted. Officer Stoddard was shot in the arm. Officer Oliver was killed by a through-and-through shot to his chest.

Mr. Workman asserts that Lieutenant Oliver was killed by "friendly fire", and Mr. Workman is therefore innocent of first-degree murder. See Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001). The State asserts that Workman shot Oliver, and it moves this Court to set an execution date. For the following reasons, this Court should deny the State's motion.

III. LAST SEPTEMBER THE STATE AGREED TO STAY PROCEEDINGS IN FEDERAL DISTRICT COURT PENDING THE SIXTH CIRCUIT DECISION IN ABDUR'RAHMAN v. BELL - NOW THE STATE WANTS TO KILL MR. WORKMAN BEFORE THAT DECISION IS RELEASED

A. The State Agreed To Stay Federal Proceedings Pending Abdur'Rahman v. Bell

On June 6, 2003, the United States Court of Appeals for the Sixth Circuit granted Mr. Abu-Ali Abdur'Rahman's request that the Court rehear his case en banc. (See 6/6/03 Order in Abdur'Rahman v. Bell, 6th Cir. Nos. 02-6547/6548, Apx. 1). The issue Abdur'Rahman presents

the Court is the extent to which Fed.R.Civ.P. 60(b) continues to exist in habeas corpus proceedings after the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The case has been argued, and, as of today, remains pending in the Sixth Circuit.

On September 4, 2003, Mr. Workman filed in the United States District Court for the Western District of Tennessee (1) a Fed.R.Civ.P. 60(b) Motion For Relief From Judgment in Mr. Workman's original habeas proceeding (60(b) Proceedings); and (2) a habeas corpus petition pursuant to 28 U.S.C. § 2254. On September 15, 2003, due to an ongoing federal investigation related to prior proceedings against Mr. Workman, Governor Phil Bredesen granted Mr. Workman a reprieve from his then-scheduled September 24, 2003, execution date. Thereafter, the District Court held a hearing on Mr. Workman's Rule 60(b) Motion and habeas petition. At that hearing, Mr. Workman and the State agreed that the proceedings should be stayed, and the District Court instructed the parties to submit a proposed Order.

Counsel for Mr. Workman forwarded to the Attorney General's Office a draft proposed Order. That draft included language stating that the federal proceedings were stayed pending (1) the en banc proceedings in Abdur'Rahman; and (2) the federal investigation the Governor referenced in granting Mr. Workman a reprieve. Assistant Attorney General Joseph Whalen, whose signature appears on the State's request that this Court set an execution date, wrote back to Mr. Workman's counsel that **he would agree to having the federal proceedings stayed pending Abdur'Rahman**, but he would not agree to staying the proceedings pending the federal investigation. (9/17/03 Facsimile Transmittal, Apx. 2-6).

Having agreed that the federal proceedings should not go forward until the Sixth Circuit decides Abdur'Rahman v. Bell, the State now seeks to kill Mr. Workman before Abdur'Rahman

is decided. This Court should not accede to the State's effort to have the federal proceedings stayed so it can kill Mr. Workman before those proceedings take place. This is especially so given the toll that a fourth trip to Death Watch will have on Mr. Workman's mental well-being.

B. As A Result Of Mr. Workman's Three Prior Trips To Death Watch, Mr. Workman Suffers From Acute Post Traumatic Stress Disorder: A Fourth Trip To Death Watch Will Trigger Further Deterioration Of Mr. Workman's Mental Health

Approximately three days before a scheduled execution, the condemned inmate is instructed to box up his belongings and identify the person to whom he wants his belongings given after his execution. Then, in Mr. Workman's words, "they come in numbers." (9/14/03 Report of George W. Woods, Jr., M.D., Apx. 8). The extraction team, five large men dressed in black, strip search the inmate and walk him to a small holding area adjacent to the execution chamber (Death Watch) (Id.).

During the three-day Death Watch, the inmate is under constant surveillance. He no longer can have contact visits. To have a non-contact visit, the inmate must submit to being stripped searched, including an inspection of his anus, prior to the visit and after the visit. All this knowing that the State intends to kill him at a specified day and hour in the room next door.

The State has subjected Mr. Workman to Death Watch three times. Describing his first exposure to Death Watch, Mr. Workman related that "My heart started to explode." (9/14/03 Report of George W. Woods, Jr., M.D., Apx. 8). To cope with the grim reality surrounding him, Mr. Workman entered "almost a dreamlike state." (Id.). In Mr. Workman's words, "You're there, but you're not there .... It's not you." (Id.). A day and a half before he was to be executed, Mr. Workman received a stay of execution.

In the interim between his first exposure to Death Watch and his second, Mr. Workman began experiencing intrusive dreams. He had nightmares of being twenty feet from the electric chair, and it is malfunctioning. (9/14/03 Report of George W. Woods, Jr., M.D., Apx. 9). He dreamt of watching others being executed, and sitting in an electric chair that is being driven through a mall. (Id.).

The second time on Death Watch, Mr. Workman received a stay of execution eleven hours before he was to be executed. Thereafter, Mr. Workman found himself continuously anxious. He began losing his concentration. He could no longer focus on things that had filled his life for the past twenty-two years, his faith, his family. (9/14/03 Report of George W. Woods, Jr., M.D., Apx. 9).

The third time on Death Watch, Mr. Workman came within forty minutes of being executed. He described himself as "not really there." (9/14/03 Report of George W. Woods, Jr., M.D., Apx. 10).

Given the above, Dr. George W. Woods, Jr., diagnoses Mr. Workman as suffering from acute Post Traumatic Stress Disorder. (9/14/03 Report of George W. Woods, Jr., M.D., Apx. 11). Dr. Woods states that a fourth trip to Death Watch will again trigger the symptoms of Mr. Workman's disorder. (9/14/03 Report of George W. Woods, Jr., M.D., Apx. 14).

The State had previously agreed to stay proceedings until the Sixth Circuit decides Abdur'Rahman v. Bell. If this Court allows the State to twist that agreement into an effort to moot the 60(b) proceedings by killing Mr. Workman, he will again be subjected to an environment which will have a deleterious effect on his mental well-being. The State's motion should be denied.

IV. MR. WORKMAN SHOULD NOT BE KILLED UNTIL HE HAS AN OPPORTUNITY TO ACCESS THE RELEVANCE OF A FEDERAL INVESTIGATION RELATED TO HIS CASE

In granting Mr. Workman a reprieve on September 15, 2003, Governor Bredesen stated he was acting because a federal criminal investigation which "may be related" to Mr. Workman's case was underway. (9/15/03 Press Release, Apx. 15). Governor Bredesen made a like statement when he extended the reprieve until April 15, 2004. (1/9/04 Press Release, Apx. 16).

On February 10, 2004, the United States Government indicted the then Shelby County Medical Examiner, Dr. O. C. Smith for, among other things, making a false report to federal agents. (2/10/04 Indictment Apx. 17). The indictment recounts that (1) at a January 2001 clemency hearing, Dr. Smith testified in favor of allowing Mr. Workman's execution to proceed; (2) on a March 2001 radio talk show, an attorney who represented Mr. Workman criticized Dr. Smith's clemency testimony; (3) in the days thereafter, anonymous letters threatened Dr. Smith; (4) approximately eleven months later two Molotov Cocktails were found outside Dr. Smith's office; and (5) on June 2, 2002, Dr. Smith was found wrapped in barbed wire with a bomb tied around his neck. (2/10/04 Indictment Apx. 17-20). The indictment alleges that Dr. Smith staged the barbed wire attack and lied to federal agents about it. (Id., Apx. 20-21).

The day after the Smith Indictment, Governor Bredesen requested that Dr. Bruce Levy review Dr. Smith's clemency hearing testimony and offer his opinion on its veracity. On April 15, 2004, Dr, Levy gave his report to the Governor, and the Governor let the reprieve he had granted Mr. Workman expire.

Based on the above, it is clear that the federal investigation that prompted the reprieve is the Government's investigation of Dr. Smith's involvement in the barbed wire "attack" on him.

The indictment suggests that Dr. Smith staged the attack in an effort to discredit Philip Workman and create an environment conducive to executing him.

As of this date, the criminal proceeding against Dr. Smith remains pending. (See U.S. v. Smith, No. 04-CR-20054, Docket Sheet, Apx. 23-25). As a result, the United States Government refuses to share with Mr. Workman its files on the Smith investigation and prosecution. (See 4/19/04 Letter From Henry to Harris, Apx. 26). As a result, Mr. Workman has not had the opportunity to review that information and assess for himself its relevance in articulating to entities, such as this Court, why he should not be executed. Until Mr. Workman is afforded that opportunity, his execution should not go forward.

V. THE REPORT ON WHICH THE STATE RELIES TO HAVE MR. WORKMAN EXECUTED LACKS A SCIENTIFIC FOUNDATION

Seeking to have Mr. Workman executed, the State relies on an unsworn letter from Dr. Bruce Levy to the Governor, dated April 15, 2004. In that letter, wrapped in the guise of science, Dr. Levy claims that Workman shot Oliver. Dr. Levy's ultimate conclusion is anything but scientific. It is unreliable, deceptive, and misleading. While Dr. Levy has expertise in evaluating a body and wounds thereto (indeed, he is a medical doctor), he has no expertise in identifying perpetrators of fatal wounds. Yet that is what he is claiming in his letter. In fact, in any search for the truth, no court in this state would ever permit Dr. Levy to testify to his ultimate conclusion about "Who shot John?" Dr. Levy's conclusion is unscientific, unreliable, unobjective, and, in the end, incompetent.[1]

---

[1] Mr. Workman is not disputing Dr. Levy's ability to provide the initial expert opinions he has provided in his letter. He is qualified to opine about Point 1 - the nature and extent of the wounds and his evaluation of the body. But after making those conclusions, Dr. Levy has added to that a second point (Point 2 in Dr. Levy's syllogism) – who shot weapons, which is integral to

Ironically, while Dr. Levy has provided extensive testimony against Dr. Charles Harlan in the Board of Medical Examiners' proceedings to revoke Dr. Harlan's license, In The Matter Of Charles Harlan, Case No. 17.18-022307A, Dr. Levy in his letter does exactly what this Court has judicially condemned Dr. Harlan for doing: Providing an alleged "expert" opinion about how a crime occurred. Such an opinion has nothing to do with one's expertise in medicine or forensic pathology. Like Dr. Harlan, Dr. Levy is not an expert in how crimes occur and he is thus not competent to provide an "expert medical opinion" about who is, or is not, the person who killed a victim. Indeed, Dr. Levy's ultimate conclusion is supposedly based on an asserted "reasonable degree of medical certainty," (4/15/04 Report, Apx. 36), so it is clear that Dr. Levy's conclusion is based solely on his claimed expertise in medicine and forensic pathology, nothing more.

As this Court has recognized, doctors like Levy are not expert crime scene reconstructionists. Thus, when evaluating Dr. Harlan's testimony in the capital case of State v. Wright, 756 S.W.2d 669 (Tenn. 1988), this Court made clear that it is highly prejudicial and misleading for a forensic pathologist to provide an alleged expert opinion about how a crime occurred – precisely because a forensic pathologist is not an expert in that field. As this Court unanimously explained, Dr. Harlan was not "an expert in the reconstruction of crime scenes." Id., 756 S.W.2d at 673. Dr. Levy is not either. Dr. Harlan's claims about how the crime occurred, therefore, were beyond the scope of his expertise, but highly misleading, because they were based on assumptions and cloaked in his alleged "expertise." This Court's condemnation of Dr. Harlan is equally applicable here:

---

his ultimate conclusion (Point 3) about who shot the victim. It is Dr. Levy's assertions about Point 2 which are wholly invalid and unreliable and make his ultimate conclusion unreliable and invalid as well.

> In our opinion, the trial judge erred in admitting Dr. Harlan's opinion as to the sequence of events. His testimony as to the nature and extent of the wounds and the effect of the gunshots upon the victims was obviously within the range of his expertise. His conclusion that Alexander was shot later than Mitchell was based on the assumption that Alexander had fled downhill. This conclusion is nothing more than speculation. Any police officer or other lay person would have ventured an opinion which would have been just as probative, and it would hardly be argued that an opinion from a lay witness on this subject would be admissible. See Blackburn v. Murphy, 737 S.W.2d 529 (Tenn. 1987). *Since the opinion was given by a highly qualified medical expert, the error was made even more egregious*.

Wright, 756 S.W.2d at 673 (emphasis supplied). Dr. Levy's claimed "medical" opinion about who fired the fatal shot here is equally beyond the scope of Dr. Levy's expertise, and it is just as misleading and unreliable as Harlan's assertions in Wright.[2]

Indeed, under the guise of being an "expert" in forensic pathology, Dr. Levy has strayed beyond his field of expertise to make statements for which he has absolutely no expertise. "[C]ourts must be careful to keep experts within their proper scope, lest apparently scientific testimony carry more weight . . . than it deserves." DePaepe v. General Motors Corp., 141 F.3d 715, 720 (7th Cir. 1998). Indeed, like this Court, courts throughout the country have clearly recognized that an expert cannot, by sleight of hand, be qualified as an expert in one field then make "expert" assertions which are in reality beyond the scope of the person's expertise, and therefore unreliable.[3] This is highly improper and misleading in the search for the truth. Yet that

---

[2] The Georgia Supreme Court reached an identical conclusion in Maxwell v. State, 414 S.E.2d 470 (Ga. 1992), in which the Court held that a medical examiner has no right to claim, as an expert, how an offense occurred.

[3] See e.g., United States v. Cruz, 2004 U.S.App.Lexis 6335 (2d Cir. 2004); United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2002)(expert improperly strayed from scope of his expertise); Wheeling Pittsburgh Steel Corp, v. Beelman River Terminals, 254 F.3d 706 (8th Cir. 2001); Olinger v. United States Golf Association, 52 F.Supp.2d 947 (N.D.Ind. 1999); Landmark Builders v. Cottages of Anderson, 2003 U.S.Dist.Lexis 112054 (S.D.Ind. 2003); Prince v. Michelin North America, 248 F.Supp.2d 900 (W.D.Mo. 2003)(expert could not testify about

is precisely what Dr. Levy has done in his letter.

The proof that Dr. Levy is unqualified to give his conclusion about who fired the fatal shot is proven by the fact that Dr. Levy uses absolutely no reliable methodology to determine the number of weapons fired and by whom. This is the critical factual dispute in this case and forms the crux of Dr. Levy's entire conclusion. Reliable methodology is indispensable to any scientific or expert opinion. See Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993); McDaniel v. CSX Transportation, Inc., 955 S.W.2d 257 (Tenn. 1997).

Yet here, Dr. Levy reaches a "medical" conclusion by relying on selected statements of police witnesses and reports. This is not within the field of "medicine." Dr. Levy simply has no training or expertise in evaluating the credibility of witnesses to crime. The reason for that is obvious. That's not taught in medical school. Medicine is.

Thus, one sees quite clearly that Dr. Levy's conclusion is not worth the paper it is written on. Though he initially provides information within the scope of his expertise (nature of wounds, etc.), he ultimately strays from his expertise by then adding to that his speculation about how the crime occurred. Levy has provided an opinion far beyond the bounds of his expertise, a practice resoundingly prohibited by this Court.

In sum, Dr. Levy's use of a clearly unreliable method of determining the truth in a field for which he has no expertise makes Dr. Levy's conclusion worthless. By sleight of hand, Dr. Levy has digressed from his field of expertise to provide an unreliable opinion in a field in which he is no expert at all. Yet, he has proffered his conclusion as an "expert" "medical" opinion. It is

---

related field which was not within his scope of expertise).

anything but that. No court in this state would ever allow such an "expert" opinion.[4] Dr. Levy has merely "dressed up and sanctified" the testimony of the police witnesses who have denied firing weapons. Viterbo v. Dow Chemical Co., 826 F.2d 420, 424 (5th Cir. 1987).[5] As such, Dr. Levy's conclusion provides absolutely no basis for this Court to order Mr. Workman's execution.

VI. EVEN IF DR. LEVY'S REPORT WAS SCIENTIFICALLY GROUNDED, DR. LEVY HAS VIOLATED THE STANDARD OF CARE FOR THOROUGHNESS AND CONSISTENCY, AND, AS DR. LEVY HIMSELF RECOGNIZES, HIS REPORT THEREFORE CANNOT BE RELIED UPON

A. The Standard Of Care For Thoroughness And Consistency According To Dr. Levy

Dr. Levy is the State's chief witness in proceedings before the Board of Medical Examiners against Dr. Charles Harlan. At a July 29, 2003, hearing before the Board, Dr. Levy gave the following testimony:

Q: What is your opinion regarding what the standard of care for forensic pathologists

---

[4] This is not the first time Levy has provided an unreliable expert opinion. In State v. Ward, 2003 Tenn.Crim.App.Lexis 1103, the Court of Criminal Appeals held that Levy's expert assertions were unreliable.

[5] In addition, by using tunnel vision to accept police statements exculpating the police at face value, Levy has done another thing which the courts have condemned in the search for the truth: Levy has vouched for the credibility of the police witnesses, including Parker and Stoddard, who have claimed that they did not fire their weapons. Despite clear evidence to the contrary and evidence that the police are lying about the use and examination of their guns (see Section VI.B., *infra*), the police say they didn't shoot weapons. Ergo, to Levy, "only two weapons were fired." (4/15/04 Report, Apx. 36). Levy has in essence assumed the ultimate issue in dispute, which he simply cannot do under the guise of being an "expert." See Clark v. Takata Corp., 192 F.3d 750 (7th Cir. 1999) (expert claim invalid when based on assumption of issue in dispute). Nevertheless, Levy reaches his conclusion based on his interpretation of the evidence that only two weapons were fired. Having done so, he has accepted the statements of Stoddard and Parker as being true. This, too, is impermissible. See e.g., Snowden v. Singletary, 135 F.3d 732, 739 (11th Cir. 1998)(violation of due process); United States v. Whitted, 11 F.3d 782, 786 (8th Cir. 1993)(where medical doctor essentially vouched for credibility of victim as a medical opinion, the doctor effectively used the guise of a medical opinion to tell the jury that the defendant had committed the crime).

... require(s) regarding thoroughness of autopsies and autopsy reports?

Levy: The standard of care requires that the autopsy report be thorough.

...

Q: Why is thoroughness in an autopsy and autopsy report so important?

Levy: Well, you want an autopsy report to be thorough, so it reflects all of the positive findings and any negative pertinent findings, **so you can rely on the conclusions of that autopsy report.**

Q: And, Dr. Levy, could you explain how, if at all, the standard of care ... regarding consistency would apply in the case of this allegation?

Levy: Well, it would apply equally in all cases. Not only does the autopsy report have to be thorough, but you expect the autopsy report to be ... consistent with external extrinsic ... information.

(In The Matter Of Charles Harlan, Case No. 17.18-022307A, Vol. 9, pp. 1905-07, Apx. 37-40). Thus, Dr. Levy himself recognizes that if an autopsy report has not been thoroughly researched, or if an autopsy report is inconsistent with external information, you cannot rely on its conclusions. Such is the case here.

B. Had Dr. Levy Performed A Thorough Investigation, He Would Have Found External Evidence Inconsistent With His Faulty Premise That Only Workman And Oliver Fired Weapons

Dr. Levy's Report provides that if one looks solely at the mortal wound to Lieutenant Oliver, one can only say that it could have been caused by either police ammunition or ammunition that was in Mr. Workman's gun. (4/15/04 Report, Apx. 36). Dr. Levy's opinion that Mr. Workman shot Lieutenant Oliver thus rests completely on the following logic: only Workman and Oliver fired weapons the night Oliver died, Oliver did not shoot himself: hence, Workman shot Oliver.

Dr. Levy bases his assumption that only Workman and Oliver fired weapons on the trial testimonies of Officers Aubrey Stoddard and Steven Parker. (See 4/15/04 Report Apx. 29 (describing material reviewed)). Those officers testified that while they did not see Workman shoot Oliver, they did not fire their weapons. Dr. Levy's investigation ends there - he takes that testimony at face value. Had Dr. Levy performed a thorough investigation, however, he would have found substantial evidence inconsistent with his premise that only Workman and Oliver fired weapons.

1. Dr. Levy Ignored The Original Offense Report Which States That Officers Stoddard And Parker Fired Their Weapons

The Original Offense Report, which Dr. Levy failed to consider, states:

> When the suspect came out of the side door, north side of the building, carrying a .45 caliber automatic pistol and money bag, he ran northbound across the parking lot onto the next parking lot which is located next door to Holiday Auto Parts. There on the Holiday Auto Parts Lot **there was an exchange of gunfire between the officers and the suspect.** Both officers Lt. Oliver and Ptlm. Stoddard were shot on the scene. The suspect then fled further northbound across the parking lot where Officer Parker came running up to assist the other officers in which the suspect did turn and **exchange gunfire between Officer Parker and himself.**

(8/5/81 Memphis Police Department Offense Report, Apx 43).

2. Dr. Levy Ignored The Statement Of A Disinterested Witness Who Swears That He Saw Officer Parker Fire A Shotgun And Police Told Him Not To Talk To Anyone About It

Dr. Levy's Report expresses the view that "There is no physical or historical evidence that a shotgun was discharged that evening." (4/15/04 Report, Apx. 30). Had Dr. Levy performed a thorough investigation, he would have discovered extrinsic evidence that refutes this assertion.

Steve Craig, a local resident and friend of Officer Stoddard, followed Stoddard's police

car as Stoddard responded to the silent alarm. When Officer Stoddard turned into the Wendy's, Mr. Craig parked on the Holiday Auto Parts lot. Mr. Craig swears that:

> Immediately after Memphis Policemen Oliver and Stoddard were shot, Memphis Policeman Parker appeared on the Wendy's north parking lot carrying a shotgun. **Parker fired the shotgun** at a man I have been informed was Philip Workman as that man ran north across the Holiday Auto Parts parking lot.

(5/15/95 Declaration of Steve Craig, Apx. 44).

After the incident, police said to Craig "there was no need to talk further about this ... unless it was someone from the department ...." or words to that effect. (5/15/95 Declaration of Steve Craig, Apx. 44-45). If the incident occurred as the State maintains, there would be no need to give Mr. Craig this instruction. Police told Craig to be mum because he saw Parker fire a shotgun, and police didn't want anyone to know that officers other than Oliver were firing weapons the night Oliver was killed. Like the Original Offense Report, Dr. Levy did not consider this reality in reaching his assumption that only Workman and Oliver fired weapons.

3. Dr. Levy Ignored A Newspaper Article Which Recounts That Officer Parker Fired His Weapon

On August 7, 1981, The Commercial Appeal Newspaper Published An Article Titled "All Looked Well Seconds Before Shots." In that article the reporter recounts "Police said Parker exchanged shots with the robber." (8/7/81 Commercial Appeal Article, Apx. 46). Like the Original Offense Report and Steve Craig's sworn statement, Dr. Levy did not consider this information in reaching his assumption that only Workman and Oliver fired weapons.

4. Dr. Levy Ignored The Reality That Clyde Keenan Testified Falsely During Clemency Proceedings

During clemency proceedings, to foreclose any possibility that Stoddard or Parker fired

their weapons, the State offered the testimony of former Memphis Police Officer Clyde Keenan. As demonstrated below, Mr. Keenan's clemency hearing testimony was demonstrably false. The evidence that Keenan's testimony was false thus becomes affirmative evidence that the opposite of what Keenan lied about is true: police officers other than Oliver fired weapons the night Oliver died. See Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

a. Keenan's Clemency Testimony

At clemency proceedings, Clyde Keenan testified that at the time of the Oliver shooting, he was the Commanding Officer of the Memphis Police Department "Security Squad Shoot Team" (Shoot Team). The Shoot Team responded to any scene where police weapons had been fired in order to access police shooting incidents "from a variety of standpoints: from liability, policy and procedures, safety; all of those things needed to be looked at from an administrative standpoint." (1/25/01 Keenan Testimony, Apx. 50).

Keenan testified that he was one of the first, if not the first, officer to respond to the call that shots had been fired and an officer was down. Keenan claimed that he arrived at the scene less than 90 seconds after the call went out. (3/9/00 Keenan Testimony, Apx. 92). Keenan testified that after Oliver was put into an ambulance he immediately initiated a check of the guns belonging to Parker and Stoddard. As to Parker's handgun, Keenan testified that he personally checked it and found that it did not have any indication of having been fired. (1/25/01 Keenan Testimony, Apx. 58). As to Stoddard's handgun, Keenan testified that because Stoddard and his gun had been taken to the hospital, he sent his Assistant, Gary Ball, to the hospital to check it. Keenan testified that Ball called him on the radio to inform that like Parker's gun, Stoddard's had

not been fired. (1/25/01 Keenan Testimony, Apx. 65). Thus, "once (Stoddard) got to the hospital" all the weapons had been secured - Oliver's had been fired; Parker's and Stoddard's had not. (3/9/00 Keenan Testimony, Apx. 100).

b. Clyde Keenan's Clemency Testimony Is Demonstrably False

Police documents and the testimony of Officer Parker demonstrate, beyond any doubt, that Keenan's testimony about being first on the scene and initiating an immediate check of weapons was false.

1) Radio Dispatch Cards Refute Keenan's Testimony

In order to place himself in a position where he could institute an immediate check of Stoddard's and Parker's weapons, Keenan claimed that: "I was there, based upon what we figured out later, in about a minute, maybe slightly less than a minute ...." (1/25/01 Keenan Testimony, Apx. 53).

We know Keenan's testimony is false because radio dispatch cards show that the "shots fired" call went out at 10:35 p.m. and Keenan (car 1012)[6] arrived on the scene at 10:41 p.m. (Dispatch Cards, Apx. 107).

2) A Police Report Refutes Keenan's Testimony

To further show that he was immediately on the scene, Keenan claimed that: (T)here's

[6] For purposes of radio communication, each Memphis Police Officer is assigned a number. At the January 25, 2001, hearing, Keenan stated that as Commander of the Shoot Team, he sent Officer Ball to the hospital to check Stoddard's weapon. (1/25/01 Keenan Testimony, Apx. 64-65). Because a transcript of police radio transmissions (Radio Transcript) documents that Officer 1012 ordered that Ball go to the hospital, we know that 1012 was the number assigned to Keenan. (See Radio Transcript, Apx. 121 (Radio Transcript demonstrating that 1012 radios "Advise Sgt. Ball from my unit on the scene to proceed immediately to John Gaston Hospital ....").

nobody else at the time as we're pulling up except Parker, Stoddard, and Oliver ...." (1/25/01 Keenan Testimony, Apx. 67).

We know Keenan's testimony is false because the 8/6/81 Memo of Patrolman W. D. Dankins establishes that Keenan did not arrive at the scene until after Oliver had been put in an ambulance. (8/6/81 Memo, Apx. 124)

3) Another Police Report Refutes Keenan's Testimony

To further show that he was immediately on the scene, Keenan claimed that "We had been on a previous call - myself and one of the investigators, Sergeant Rick Wilson in White Haven area earlier that day. We were en route from the Frazier area to interview a witness in another case. As we were about a mile and a half from the Wendy's Restaurant on the interstate going out to get off onto Thomas Street, we heard the call for help go out that there was an officer down. We responded to it immediately at that point. We were probably on the scene between a minute and a minute and a half after the time that we heard the officer was down." (3/9/00 Keenan Testimony, Apx. 91-92).

We know that Keenan's testimony is false because the 8/6/81 Supplementary Offense Report of Sgt. R. K. Wilson states "The writer proceeded to the scene and on arriving was met by Lt. C. Keenan, Sgt. G. Ball, Sgt. D.R. Hollie of the Shoot Team and numerous uniformed officers." (8/6/81 Wilson Report, Apx. 127).

4) The Arrest Report Refutes Keenan's Testimony

To add credence to his claim that he was immediately on the scene, Keenan claimed that "There was a uniformed supervisor pulled directly just as I was pulling up, Lieutenant Junior Hayes." (1/25/01 Keenan Testimony, Apx. 54).

We know that Keenan's testimony is false because the 8/20/81 Arrest Report recounts that "Sgt. Holly and Lt. W. C. Keenan roped off the scene area at the start of the investigation the scene had been secured up to that point by Lt. J. R. Hayes, car 106, prior to Lt. Keenan and Holly's arrival." (8/20/81 Arrest Report. pg. 10, Apx. 130).

5) Police Documents Further Refute Keenan's Testimony

To add further credence to his claim that he was immediately on the scene, Keenan claimed that "I knelt down beside (Oliver) .... Thinking ... we had probably a sunken chest wound here; looking, trying to find if that was in front, a sunken chest wound .... I couldn't find the wound. He's just covered with blood and there was nothing I could do. Stayed there with him for just a minute or two. It seemed like an eternity until the fire department ambulance got there to him. As soon as they got there we got out of the way." (1/25/01 Keenan Testimony, Apx. 55).

We know Keenan's testimony is false because:

(1) the 8/20/81 Arrest Report states that Patrolman Cobb stayed with Lieutenant Oliver until an ambulance arrived; and

(2) the 8/6/81 Memo of Ptlm. W. D. Dankins states that Keenan arrived on the scene after Oliver had been put in the ambulance. (8/6/81 Memo, Apx. 124).

6)Officer Parker's Statement And Testimony Refute Keenan's Testimony

To add further credence to his claim that he was immediately on the scene, Keenan claimed that "From looking at him (Oliver), kneeling down beside him, he was conscious. He was aware of the fact that he was badly injured. I tried to talk to him. He was just a little bit responsive, but was slowly drifting off." (3/9/00 Keenan Testimony, Apx. 94).

We know Keenan's testimony is false because:

(1) the 8/6/81 Statement of Steven Parker states "I looked over Lt. Oliver had just hit the ground and was bouncing back up and down. I ran over to Lt. Oliver, his eyes were rolled back in his head" (8/6/81 Parker Statement, Apx. 133); and

(2) at the January 25, 2001, clemency hearing Parker testified that immediately after Oliver was shot "It was obvious he was mortally wounded. He was bleeding out his mouth, his nose, his eyes were already rolled up in his head .... (H)e was dying, convulsing and moving around a little bit, but he was not conscious." (1/25/01 Parker Testimony, Apx. 135).

7) Officer Parker's Testimony Again Refutes Keenan's Testimony

Keenan gave the following testimony during clemency proceedings:

> Q: (W)hen you arrived at the scene, did you see Officer Parker?
>
> A: I did see Officer Parker.
>
> Q: And where was he?
>
> A: Officer Parker was moving back from the north coming to the position where Lt. Oliver was down. He was standing actually between Lt. Oliver and Officer Stoddard. He had just returned from apparently trying to chase the suspect on foot; and he was basically standing closer to Lt. Oliver. At that particular point, he stood there for a few minutes while we were trying to give aid for Lt. Oliver. And after the paramedics arrived, I immediately talked to Officer Parker ...." (3/9/00 Keenan Testimony, Apx. 93).

We know Keenan's testimony is false because:

Officer Parker has testified that after the shooting he spent ten or fifteen minutes looking for the suspect, when he returned to the scene he was ordered to stand on a hat, and it was fifteen minutes later that he and Keenan made contact. (1/25/01 Parker Testimony, Apx. 136-38; 3/26/82 Parker Testimony, Apx. 139).

8) A Police Report Refutes Keenan's Testimony That He Instituted An Immediate Check Of The Weapons

And to show that an immediate check of Officer Stoddard's and Parker's weapons assured Keenan that only Workman and Oliver fired their's, Keenan claimed that "I sent one of my investigators, Gary Ball, after we had checked everything else, to the hospital. He went to the hospital, checked (Stoddard's) weapon at that time .... (1/25/01 Keenan Testimony, Apx. 64-65). So once (Stoddard) got to the hospital, both his weapon and the weapon for Lt. Oliver were secured." (3/9/00 Keenan Testimony, Apx. 100).

We know Keenan's testimony is false because the 8/6/81 Supplementary Offense Report of Gary Ball states that Keenan sent him to the hospital to interview Mr. Workman, not to check Stoddard's weapon. (8/6/01 Ball Report, Apx. 141). That report further relates that Officer Ball came upon Officer Stoddard's gun hours after he arrived at the hospital, not through a search for it, but only by happenstance. (Id., Apx. 142).

Clyde Keenan testified falsely to preclude any possibility that Stoddard or Parker fired a weapon the night Lieutenant Oliver was killed. That false testimony becomes affirmative evidence that the opposite is, in fact, true. Like the Original Offense Report, Steve Craig's sworn statement, and the Commercial Appeal newspaper article, Dr. Levy did not consider Clyde Keenan's false testimony in reaching his assumption that only Workman and Oliver fired weapons.

5. Dr. Levy Ignored A Disinterested Witness Who Swears That, Contrary To Officer Stoddard's Clemency Testimony, Stoddard's Pistol Was Out Of Its Holster

To foreclose the possibility that he fired his pistol the night Lieutenant Oliver was killed,

Officer Stoddard testified that he never took his pistol out of its holster. (1/25/01 Stoddard Testimony, Apx. 143). Garvin Null, a disinterested witness, however, contradicts Stoddard's testimony. Mr. Null swears that immediately after Officer Stoddard was shot, he ran to Stoddard and, at that time, Stoddard's pistol was out of its holster. (5/13/95 Declaration of Garvin Null, Apx. 144). Mr. Null's sworn statement is affirmative evidence suggesting that Stoddard testified falsely at the clemency hearing, and just the opposite of Stoddard's testimony is what actually happened: Stoddard had his gun out of its holster and was shooting. Like the Original Offense Report, Steve Craig's sworn statement, the Commercial Appeal newspaper article, and Clyde Keenan's demonstrably false testimony, Dr. Levy did not consider this possibility in reaching his assumption that only Workman and Oliver fired weapons.

C. Dr. Levy Violated The Standard Of Care For Thoroughness And Consistency

Dr. Levy blindly accepted the trial testimonies of Officers Stoddard and Parker to reach his conclusion that only Workman and Oliver fired weapons, and therefore Workman shot Oliver. The officers' testimony, however, simply cannot be squared with the Original Offense Report, Steve Craig's sworn statement, the Commercial Appeal newspaper article, Clyde Keenan's demonstrably false testimony, and Garvin Null's sworn statement. Because Dr. Levy considered none of this extrinsic evidence, he violated the standard of care for thoroughness and consistency. As Dr. Levy himself recognizes, his Report is therefore worthless.

VII. SETTING AN EXECUTION DATE WITHOUT ALLOWING MR. WORKMAN AN OPPORTUNITY TO CHALLENGE DR. LEVY'S REPORT WOULD VIOLATE THE UNITED STATES AND TENNESSEE CONSTITUTIONS

To set an execution date based on the dubious claims in Dr. Levy's unsworn letter and without giving Philip Workman the opportunity to cross-examine Dr. Levy would violate

fundamental principles of substantive and procedural due process, while constituting cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, §16 of the Tennessee Constitution..

The federal courts recognize that "shopping for a dubious expert opinion is fabricating evidence" and actionable. Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001), citing Buckley v. Fitzsimmons, 509 U.S. 259, 276 (1993). *A fortiori*, a state expert who provides a "dubious expert opinion" against an individual is no less culpable; his or her actions likewise constitute a violation of due process of law. Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004); see also Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000)(people have due process right not to be deprived of life or liberty through use of false evidence).

Thus, due process is violated when a forensic expert provides expert conclusions but recklessly, knowingly or maliciously provides false information or otherwise disregards exculpatory evidence which undercuts or contradicts the expert's claims. Pierce v. Gilchrist, 359 F.3d 1279, 1293 (10th Cir. 2004). Indeed, in the *Gilchrist* case, the Tenth Circuit made clear that Joyce Gilchrist (who worked for the Oklahoma City Police Department) acted unconstitutionally when she "disregarded and disputed the significance of" exculpatory evidence which showed that Mr. Pierce was not guilty. Id. at 1291-1292. Similarly, in Davis v. Zain & DiMaio, 79 F.3d 18 (5th Cir. 1996)(per curiam), the Fifth Circuit indicated that when a person faces loss of life or liberty because a state-employed forensic expert's investigation, testing, or testimony is inaccurate, there is a violation of due process. Id. at 19.[7] See also Herrera v. Safir, 17 Fed.Appx.

[7] In this case, one cannot overlook the fact that in Zain & DiMaio, the medical examiner sued for having allowed such inaccuracies to result in Davis' unjust conviction was none other than Vincent J.M. DiMaio – the very same medical examiner whom Dr. Levy relies on as support

41 (2d Cir. 2001)(crime laboratory's use of procedures resulting in unreliable results actionable). Especially where Dr. Levy has clearly violated the standard of care for his profession (see Section VI, *supra*), there is a violation of due process here.

Moreover, the fact that Dr. Levy has been able to make claims against Philip Workman without being cross-examined is equally untenable under the Sixth and Fourteenth Amendments and the Tennessee Constitution. Thorough cross-examination has been described as the "greatest legal engine ever invented for the discovery of truth." Perry v. Leeke, 488 U.S. 272, 283 n. 7 (1988). Philip Workman, however, has not had the opportunity to cross-examine Dr. Levy.

Indeed, the grave unfairness of the situation here is virtually identical to the 400-year-old case of Sir Walter Raleigh, who was unjustly condemned to death based on a letter written by Cobham, who claimed in his letter that Raleigh was guilty. See Crawford v. Washington, 541 U.S. ___, ___, 124 S.Ct. 1354, 1360 (2004). As the United States Supreme Court has just recently observed, Raleigh's claim that he was improperly being subjected to an inquisition and entitled to confront his accusers was, and is, indisputably correct – especially where the letter writer sought to curry favor with the King. Id. The sorry spectacle of using Cobham's unconfronted letter to execute Raleigh was justly called the single most degrading incident in the history of England. Id. Just as Cobham wrote a letter claiming Raleigh's guilt, Levy has done the same here – free from the crucible of cross-examination which would clearly show his lack of science, his lack of expertise, and his flawed methodology.

---

for the assertions made in Levy's letter. (See 4/15/04 Report, Apx. 33-35). In Zain & DiMaio, Davis was convicted of capital murder based on forensic testimony originating from the Bexar County (Texas) Medical Examiner's Office. It clearly appeared to the state courts that that testimony was perjurious. In light of that testimony, Davis sued DiMaio and Zain, DiMaio's employee.

Similarly, in yet another nearly identical situation, the South Carolina Supreme Court held over 150 years ago that, absent cross-examination, a deposition of a coroner (just like Dr. Levy) was "utterly incompetent" as evidence against an accused. State v. Campbell, 1 S.C. 124 (1844), quoted in Crawford, *supra*. As the Justices of our sister state, North Carolina, emphasized over 200 years ago, this is not some fly-by-night principle – it is a fundamental precept of "natural justice":

> [I]t is a rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.

State v. Webb, 2 N.C. 103 (1794)(per curiam), quoted in Crawford, *supra*. There is little question that Mr. Workman has been prejudiced by claims made by Dr. Levy, whom he has been unable to cross-examine.

The use of the Levy letter to take Philip Workman's life does not withstand the "natural justice" which demands that Levy be cross-examined. This is especially true where Levy has never sworn, under the penalty of perjury, that the contents of his letter are true – whereas experts presented by Mr. Workman have.

There is only one expert opinion that has been made under oath and subjected to cross-examination: Dr. Cyril Wecht's coram nobis testimony that to a reasonable degree of medical certainty, Lieutenant Oliver was not killed by a .45 aluminum jacketed hollow point bullet. Dr. Smith, while placed under oath at the January 2001 clemency hearing, was not subjected to cross-examination on his assertion that he was 100% positive Workman shot Oliver, a claim Dr. Levy labels as speculative. Dr. Levy has neither been placed under oath nor subjected to cross-examination. Killing Mr. Workman on the basis of such an unverified, unchallenged document -

a document which contains the multiple shortcomings discussed in Section VI, above - is wrong.

More fundamentally, let us also not forget why we are in this mess with Dr. Levy to begin with. At a clemency proceeding, and to support the state's effort to have Philip Workman executed, O.C. Smith made various claims *and Philip Workman was categorically prohibited from subjecting those claims to cross-examination*. Workman has shown various of Smith's claims to be false,[8] and now even Dr. Levy admits that conclusions made by Smith are unscientific and/or speculative. The falseness of Smith's contentions could have been shown years ago, had Workman been able to cross-examine Smith. Insulated from cross-examination, however, Smith was able to get away with his false and/or misleading claims. According to the United States Attorney and the Federal Grand Jury, after questions about Smith's credibility surfaced, Smith falsified a bomb attack on himself and lied about it to federal officials, apparently because of his connection to this case. The Governor thus asked Dr. Levy to review Smith's testimony. (See 9/15/03 Press Release, Apx. 15).

Yet Levy's letter does little to clarify the confusion about who fired the fatal bullet, for he too – just like Smith – has made statements and reached conclusions which have been without any testing in the crucible of cross-examination. Thus, though statements and conclusions drawn by Levy are questionable, speculative, non-scientific, and/or patently wrong, Levy has (like O.C. Smith) avoided the scrutiny of cross-examination or confrontation. Like Smith's assertions, Levy's assertions have never had their truthfulness tested by the searching light of cross-examination, which would show that they are wholly unreliable and misleading.

The past is prologue. Smith's assertions were false or misleading, but the truth was

[8] See Workman v. Summers, 6th Cir. No. 01-6421 (pending)

obscured because Smith was insulated from cross-examination at the clemency proceeding. The same is true about Levy's alleged "medical" conclusion, presented only in an unsworn letter. Again, the search for the truth has been obscured.

As John F. Kennedy aptly noted, "Those who do not learn from history are doomed to repeat it." For Philip Workman to be denied the right to cross-examine Dr. Levy, we would repeat the sorry spectacle to which Sir Walter Raleigh was subjected four centuries ago – execution based on statements in a letter. Workman would be subjected to the identical unfairness which plagued the clemency proceedings, where accused criminal O.C. Smith made unreliable claims free from the inspection of cross-examination. This Court has the power and the duty to prevent the repetition of these unfortunate chapters in history and the history of this exceptional case.

If this Court is inclined to set an execution date, it should appoint a Special Master so that Dr. Levy can be placed under oath and he can be cross-examined about his opinions. See Petition of Burson, 909 S.W.2d 768, 770 (Tenn. 1995). The facts developed in that proceeding should then be transmitted to this Court, after which this Court can assess the validity or invalidity (as shown *supra*) of Dr. Levy's opinions and then consider the motion to set an execution date in light of this Court's review of such proceedings.

VIII. CONCLUSION

The State's motion to set an execution date should be denied. Absent denying the State's motion, this Court should appoint a Special Master so that Dr. Levy can be placed under oath and he can be cross-examined about his report.

Respectfully Submitted,

_____

Christopher M. Minton
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing and its accompanying Appendix have been hand-delivered to Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this ___ day of _____.

_____