

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

PHILIP RAY WORKMAN	)	
	)	
Petitioner	)	No. 94-2577-BBD
	)	<b>Execution Date:</b>
v.	)	<b>May 9, 2007</b>
	)	
RICKY BELL, Warden	)	
Riverbend Maximum Security	)	
Institution	)	
	)	
Respondent.	)	

MOTION FOR STAY OF EXECUTION

Pursuant to 28 U.S.C. §§1651 & 2251, Petitioner Philip Workman respectfully moves this Court for a stay of execution pending appeal in this matter. In support of this motion, Philip Workman states:

1. This Court has denied Petitioner’s motion for equitable relief. Philip Workman is back before this Court seeking a certificate of appealability, as now required under United States v. Hardin, \_\_\_ F.3d \_\_\_, 2007 U.S.App. Lexis 6400 \*4 (6<sup>th</sup> Cir. Mar. 20, 2007).

2. As Philip Workman has emphasized in his contemporaneously-filed application for certificate of appealability, his appeal presents substantial, debatable issues for which he is entitled to a certificate of appealability. Indeed, this Court has already concluded more than once that Workman may be entitled to relief on appeal. See Application For Certificate Of Appealability, p. 1, citing R. 177, p. 16 (Order) & R. 184, p. 7 (Order). This Court agrees that “Perhaps Petitioner is correct” that he is entitled to relief. Id.

3. The substantial nature of Workman’s appeal is further demonstrated by the facts that:

a. During initial habeas proceedings, Philip Workman alleged that the

prosecution withheld evidence and Terry Willis committed perjury when he claimed he found the “fatal bullet.” See Habeas Petition ¶¶117(f). The Attorney General’s Office denied that Terry Willis committed perjury,<sup>1</sup> but afterwards turned around and presented undisputed proof at a clemency hearing proving that Willis’ testimony was, in fact, false and that Philip Workman should have been granted habeas corpus relief. See R. 161, First Amended Motion For Equitable Relief, pp. 5-7, 13-14, 29-31 & Exs. 3 & 4.

b. During initial habeas proceedings, while denying the perjury of Willis and Harold Davis (who lied when he told the jury that he saw Workman shoot Lieutenant Oliver),<sup>2</sup> the Attorney General and the state misrepresented the facts and committed misconduct and fraud by filing as part of the federal record a previously-filed declaration that the state was fully complying with *Brady v. Maryland*, while violating their ongoing obligation to disclose exculpatory evidence. Such withheld exculpatory evidence proves that at trial the prosecution did, in fact, violate their obligations under *Brady*, and that Willis and Davis did, in fact, commit perjury. See R. 161, First Amended Motion For Equitable Relief, pp. 5-12, 24-32 & Exs. 1, 2, 4, 5. See also *Alley v Bell*, 405 F.3d 371, 372 (6<sup>th</sup> Cir. 2006)(Cole. J., concurring)(state attorneys’ filing of document in federal court alleging compliance with *Brady* can constitute fraud if such representations are not true).

c. During initial habeas proceedings, Harold Davis refused to reveal to Philip

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<sup>1</sup> See e.g., R. 45, Respondent’s Memorandum In Support Of Motion For Summary Judgment, pp. 30, 46 (claiming that Workman’s allegations of misconduct were based on speculation, imagination, and that the facts offered no support to any claims of perjury by state witnesses).

<sup>2</sup> See e.g., R. 45, Respondent’s Memorandum In Support Of Motion For Summary Judgment, p. 6 (stating that Davis saw the shooting); R. 83, Respondent’s Reply To Petitioner’s Response To Respondent’s Motion For Summary Judgment, pp. 26, 28 (averring that Davis testified truthfully at trial and denying that Davis was not a witness to the shooting).

Workman that he had lied during trial, because state agents had threatened him into silence. This constitutes a federal crime. See R. 161, First Amended Motion For Equitable Relief, pp. 8-13, 25, 29-30; 18 U.S.C. §§ 1512(b)(1) & 1512(b)(2)(witness intimidation statute).

d. During initial habeas proceedings, while denying that Officer Oliver was hit by friendly-fire, the state had in its possession additional exculpatory evidence identifying Officer Oliver's death as involving friendly-fire. See R. 170, Supplemental Evidence In Support Of Motion For Equitable Relief, Apx. 1 (Declaration of Charlotte Creasy), Apx. 2-7 (Memphis Police Records); Apx. 8 (Declaration of Howard Hazelwood), Apx. 9 (Declaration of Dale Ballard); R. 175, Supplement To Motion For Relief From Judgment (Affidavit of Matthew Ian John).

4. This Court previously entered a stay of execution pending the final disposition of this matter. R. 162. As this Court has held, when a habeas petitioner obtains a certificate of appealability, a stay of execution pending appeal is appropriate. See Johnson v. Bell, 2001 U.S. Dist. Lexis 25420 \*338-339 (W.D.Tenn. Feb. 28, 2001)("[T]he Court has granted a certificate of appealability . . . Accordingly, petitioner's stay of execution will be continued provided that petitioner files a timely notice of appeal . . .").

5. Thus, where, under the applicable COA standards, this Court must grant Philip Workman a COA because his claims are substantial and debatable (See Application For COA), this Court should likewise grant a stay of execution, as it did in *Johnson*. See also Ford v. Haley, 179 F.3d 1342 (11<sup>th</sup> Cir. 1999)(stay of execution granted after district court granted certificate of probable cause to appeal); Martinez-Villareal v. Stewart, 118 F.3d 625 (9<sup>th</sup> Cir. 1997)(granting stay of execution and ordering further briefing where death-sentenced appellant's arguments "merit[ed] further consideration"); Ford v. Strickland, 734 F.2d 538, 543 (11<sup>th</sup> Cir. 1984)(granting certificate

of probable cause and stay of execution where appellant presented “substantial” grounds for relief on appeal on second habeas petition).

6. In addition, where a petitioner presents substantial issues establishing misconduct, misrepresentation, and/or fraud during initial habeas proceedings, a stay of execution is warranted under existing precedent:

a. Indeed, just recently, in the 60(b) appeal in Johnson v. Bell, 6<sup>th</sup> Cir. No. 05-6925 (6<sup>th</sup> Cir. Oct. 19, 2006), the Sixth Circuit granted a stay of execution pending appeal where, like Workman, a Tennessee death-sentenced appellant presented substantial issues showing misconduct, misrepresentation and/or fraud during initial habeas corpus proceedings. See Appendix 1 (6<sup>th</sup> Circuit Order).<sup>3</sup>

b. Likewise, the Sixth Circuit previously granted Workman a stay of execution to consider similar allegations of misconduct, which ultimately divided the court equally. See Workman v. Bell, 227 F.3d 331 (6<sup>th</sup> Cir. 2000)(en banc); Workman, 6<sup>th</sup> Cir. No. 96-6652 (6<sup>th</sup> Cir. Apr. 4, 2000)(en banc)(granting stay of execution).

c. Similarly, in Mobley v. Head, 306 F.3d 1096 (11<sup>th</sup> Cir. 2002), the court granted a stay of execution to allow proper appellate consideration of the petitioner’s allegations of fraud in a 60(b) proceeding. See also Zeigler v. Wainwright, 791 F.2d 828 (11<sup>th</sup> Cir. 1986)(granting stay pending 60(b) appeal).

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<sup>3</sup> As in *Johnson*, the stay equities warrant issuance of a stay: Workman faces the loss of his life, he establishes a reasonable probability of success on the merits where even this Court notes that Workman may be correct that he is entitled to relief, and neither the state nor the public have any interest in executing a faulty federal judgment tainted by fraud, misconduct, and/or misrepresentation, which has led to Workman having been denied habeas corpus relief, though unconstitutionally convicted because of, *inter alia*, the perjury of Terry Willis and Harold Davis.

d. As the Sixth Circuit did in *Johnson* and *Workman*, and as the Eleventh Circuit did in *Mobley* and *Zeigler*, this Court should grant a stay of execution pending appeal.

7. Finally, it is worth noting that the Sixth Circuit has yet to finally decide *Abdur'Rahman v. Bell*, 6<sup>th</sup> Cir. Nos. 02-6547, 02-6548, which provided a basis for this Court's initial order granting a stay of execution. See R. 162. Having been given a stay of execution, *Abdur'Rahman* remains pending in the Sixth Circuit on remand, following the Supreme Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). In *Abdur'Rahman*, the Sixth Circuit will be addressing the applicability of the "extraordinary circumstances" standard governing relief from judgment under Fed.R.Civ.P. 60(b)(6). See In Re Abdur'Rahman, 392 F.3d 174, 185-187 (6<sup>th</sup> Cir. 2004)(en banc)(discussing extraordinary circumstances standard) *vacated* 545 U.S. 1151 (2005).

8. Where this Court has denied Philip Workman equitable relief applying the "extraordinary circumstances" standard of Rule 60(b)(6), but where this Court's application of that standard is debatable (See COA Application, pp. 8-9), and where the Sixth Circuit has yet to decide *Abdur'Rahman* to explicate the proper application of that standard, a stay of execution is also warranted under *Abdur'Rahman*.

#### CONCLUSION

Because Philip Workman has made a substantial showing of his entitlement to relief on appeal, and because this Court must issue a certificate of appealability, this Court should grant a stay of execution under *Johnson*. Because Workman presents substantial issues relating to misconduct, misrepresentation, and fraud, a stay is also warranted under *Johnson*, *Workman*, and *Mobley*. In addition, a stay of execution is warranted, given the pendency of *Abdur'Rahman* on remand. This Court should grant a stay of execution pending appeal.

Respectfully Submitted,

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*/s/ Kelley J. Henry*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served via the electronic filing process upon counsel for Respondent, Joseph Whalen, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 3<sup>rd</sup> day of April, 2007.

*/s/ Kelley J. Henry*