

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

PHILIP RAY WORKMAN ,)	
)	
Petitioner,)	No.
)	
v.)	EXECUTION DATE 9/24/03 1:00 a.m.
)	
RICKY BELL , Warden, Riverbend)	
Maximum Security Institution,)	
)	
Respondent.)	

PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

1. Petitioner Philip Ray Workman robbed a Memphis Wendy's Restaurant. As he ran from the scene he tripped, fell down, and offered his surrender to police officers. Police responded by striking him the head with a hard object, after which gunfire erupted. Memphis Police Officer Ronald Oliver died from a gunshot wound suffered during the chaos. A Shelby County, Tennessee, jury convicted Mr. Workman of felony-murder and sentenced him to death.

2. To convict Mr. Workman of felony-murder and sentence him to death, the jury had to find that Mr. Workman shot Officer Oliver. In 1994, Mr. Workman filed in this Court a habeas corpus petition asserting, among other things, that the State withheld evidence that Mr. Workman did not shoot Officer Oliver while it presented false testimony precluding such a finding. That habeas corpus proceeding concluded in 1999 when the United States Supreme Court denied Mr. Workman's request that it reconsider its previous denial of certiorari.

3. This habeas corpus petition presents claims which arose during State-court *error coram nobis* proceedings which were held after the completion of Mr. Workman's previous

federal habeas corpus proceeding. Because these claims became ripe only after completion of the State-court *error coram nobis* proceedings, while this petition is second in time to Mr. Workman's previous habeas petition, it is a "first" petition for purposes of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). As such, Mr. Workman does not need to obtain authorization from the United States Court of Appeals for the Sixth Circuit to file this petition, and this Court must review Mr. Workman's claims on their merits.

II. JURISDICTION/VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 2241, and 2254. Section 2244(b)(3)(A), 28 U.S.C., does not require Mr. Workman to seek authorization from the Sixth Circuit to file this petition for the following reasons.

5. While the AEDPA requires Circuit Court approval for the filing of a "second or successive" habeas application, 28 U.S.C. § 2244(b)(3)(A), the AEDPA does not define what constitutes a "second or successive" petition. Federal courts have uniformly rejected the notion that every petition second in time to a first petition constitutes a "second or successive" petition. Rather, federal courts treat the "second or successive" phrase as a term of art and look to the abuse-of-the-writ doctrine to bring meaning to that phrase. See Stewart v. Martinez-Villareal, 523 U.S. 637, 645, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998); James v. Walsh, 308 F.3d 162, 167 (2nd Cir. 2002).

6. An abuse-of-the-writ occurs when a habeas petitioner raises a claim in a second in time petition that could have been raised in the first petition. Conversely, when the claim the petitioner raises in the second in time petition could not have been raised during the prior habeas proceeding, there is no abuse of the writ. Federal courts thus hold that under the AEDPA, when

a second in time habeas petition presents a claim that was not available during the prior habeas proceeding, the second in time petition is not a “second or successive” petition, and as a result the section 2244(b)(3)(A) gatekeeping mechanism does not apply. Rather, the petitioner is free to file his second in time petition in the district court and pursue his newly ripe claims there without Circuit court approval. See, e.g., James v. Walsh, 308 F.3d at 168 (citing cases); Hill v. Alaska, 297 F.3d 895, 898 (9th Cir. 2002); U.S. v. Orozco-Ramirez, 211 F.3d 862, 869 (5th Cir. 2000); Walker v. Roth, 133 F.3d 454, 455 (7th Cir. 1997). Such is the case here.

7. The initial habeas proceeding concluded in 1999. Subsequently, Tennessee’s courts conducted an *error coram nobis* proceeding on Philip Workman’s claims that (1) Harold Davis committed perjury when he claimed at trial that he saw Philip Workman shoot Officer Oliver; (2) the forensic evidence demonstrates that Philip Workman did not shoot Officer Oliver; and (3) had the jury heard Davis recant his testimony and Dr. Cyril Wecht testify that the bullet that killed Officer Oliver did not come from Philip Workman’s gun, the jury would not have convicted Philip Workman of first-degree murder and sentenced him to death.

8. Tennessee’s court recognize that *coram nobis* proceedings such as that conducted in Philip Workman’s case are

almost identical in nature to a motion for new trial predicated upon newly discovered evidence. As a practical matter, the only difference is the time in which the issue must be raised.

State v. Hart, 911 S.W.2d 371, 374 (Tenn.Crim.App. 1995); see also Teague v. State, 772

S.W.2d 915, 920 (Tenn.Crim.App. 1988); Payne v. State, 1998 WL 12670 at *19

(Tenn.Crim.App. 1998). Given that federal habeas review exists for issues arising in the context of new trial motions and appeal therefrom, see Epsom v. Hall, 330 F.3d 49, 52-53 (1st Cir.

2003); Brown v. Easter, 68 F.3d 1209, 1210-11 (9th Cir. 1995); Landano v. Rafferty, 897 F.2d 661 (3rd Cir. 1990); Renzi v. Commonwealth of Virginia, 794 F.2d 155, 158 (4th Cir. 1986); Domaingue v. Butterworth, 641 F.2d 8, 13 (1st Cir. 1981); McKinney v. Walker, 394 F.Supp. 1015, 1016-17 (D. S.C. 1974), issues arising in the course of the *error coram nobis* proceeding conducted in this case are now available for habeas review in this Court. Because those claims were not, and could not have been, available during the course of the prior habeas proceeding which concluded in 1999, those claims do not constitute “second or successive” claims, and the AEDPA gatekeeping provision therefore does not apply. As a result, Philip Workman is entitled to present those claims to this Court without Circuit court authorization.

9. Venue is proper in the Western District of Tennessee where the State held the proceeding resulting in Mr. Workman’s first-degree felony-murder conviction and death sentence. 28 U.S.C. § 2241(d).

III. PARTIES

10. Mr. Workman’s full name is Philip Ray Workman. His address is No. 95920, Unit 2, Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee 37209.

11. Respondent Ricky Bell is the Warden of Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee 37209.

IV. PROCEDURAL HISTORY

12. This petition challenges the conviction and sentence the Criminal Court of Shelby County, Tennessee, rendered under indictment number B-81209.

13. Mr. Workman pled not guilty, and a jury trial ensued. The trial court appointed

Edward Thompson, Esquire, and Robert Jones, Esquire, of the Shelby County Public Defender's Office to represent Mr. Workman.

14. Mr. Workman testified at his trial.

15. Mr. Workman's jury convicted him of first-degree felony-murder and sentenced him to death.

16. Mr. Workman appealed his conviction and sentence to the Tennessee Supreme Court.

The grounds raised in the appeal were:

a. The evidence was insufficient to support 1) the jury's verdict that Mr. Workman was guilty of first-degree murder, 2) the aggravating circumstance that Mr. Workman was in lawful custody at the time of the murder, and 3) the imposition of the death penalty.

b. The imposition of the death penalty in Mr. Workman's case 1) was arbitrary and capricious, 2) was unconstitutional in that the State did not need to prove malice under the felony-murder rule, and 3) amounted to cruel and unusual punishment;

c. The trial court erred in failing to grant Mr. Workman's motion for individual voir dire;

d. The trial court erred in denying Mr. Workman witness fees needed to summon an out-of-state witness who would have testified as to the benefits of individual voir dire;

e. The trial court erred in striking for cause prospective juror Brenda Grimes;

f. The trial court erred in the manner in which it allowed the State to examine prospective jurors;

g. The trial court erred in allowing as an exhibit a photograph which was not properly identified;

- h. The trial court erred in denying Mr. Workman’s motion for exculpatory evidence;
- i. The trial court erred in denying Mr. Workman’s motion to suppress his statement;
- j. The trial court erred in not allowing Mr. Workman access to previous statements made by the State’s witnesses until after the witnesses had testified;
- k. The trial court erred in denying Mr. Workman’s request for the criminal records of the State’s witnesses;
- l. The trial court erred in denying Mr. Workman’s motion to suppress a lineup identification and the resulting in-court identifications;
- m. The trial court erred in denying Mr. Workman’s motion to dismiss the indictment due to sex discrimination in the selection of the grand jury foreperson;
- n. The trial court erred in overruling Mr. Workman’s objection to the State’s use of a portrait of the victim during closing argument;
- o. The trial court erred in instructing the jury on the felony-murder rule and in denying Mr. Workman’s motion to dismiss the felony-murder count in the indictment;
- p. The trial court erred in denying Mr. Workman’s requested instructions at the penalty phase;
- q. The trial court erred in overruling Mr. Workman’s objection to the State’s questioning a police officer at the penalty phase of Mr. Workman’s trial “did anyone knowingly create a great risk of death to two or more persons other than Lieutenant Oliver on that evening?”;

r. The trial court erred in allowing the State to imply that Mr. Workman had a criminal record; and

s. The trial court erred in overruling Mr. Workman's motion for a new trial based on the jury's consideration of improper matters during its sentencing deliberations.

17. After reviewing the above claims and performing its statutorily mandated duty of reviewing the propriety of Mr. Workman's death sentence, on January 30, 1984, the Tennessee Supreme Court affirmed Mr. Workman's conviction and sentence. On March 19, 1984, the Tennessee Supreme Court denied Mr. Workman's rehearing motion.

18. Mr. Workman filed in the United States Supreme Court a petition for a writ of certiorari to the Tennessee Supreme Court. On October 1, 1984, the United States Supreme Court denied Mr. Workman's petition for certiorari.

19. Mr. Workman filed March 1, 1985, a Petition for Post Conviction Relief in the Criminal Court for Shelby County, Tennessee. The trial court appointed Howard Wagerman, Esquire, to represent Mr. Workman. The petition raised the following issues:

a. Mr. Workman received at his trial the ineffective assistance of counsel because counsel 1) did not properly advise him; 2) did not adequately investigate and prepare a defense; 3) did not advise him of his right to the compulsory process of witnesses; 4) did not present mitigating evidence at his sentencing hearing; and 5) did not seek a change of venue or a continuance in order to ameliorate prejudicial pre-trial publicity;

b. The aggravating circumstances found during the sentencing phase of Mr. Workman's trial were void for vagueness and over breadth;

c. Mr. Workman received the ineffective assistance of appellate counsel because

counsel failed to present adequate issues in Mr. Workman's United States Supreme Court certiorari petition to the Tennessee Supreme Court;

d. Potential jury members were improperly excluded from Mr. Workman's jury based on their views concerning capital punishment;

e. The Tennessee death penalty statute fails to provide an adequate basis from which a comparative review of death sentences can be made;

f. The prosecutor abused his discretion in seeking a death sentence in Mr. Workman's case based upon the victim's family's request that he do so;

g. Mr. Workman's death sentence was disproportionate to sentences given out for like crimes;

h. Pretrial publicity prejudiced Mr. Workman from receiving a fair trial;

i. The lineup and photographic identification procedures utilized in Mr. Workman's case were unduly suggestive;

j. The State violated Mr. Workman's right to counsel by denying his request for counsel prior to a lineup;

k. Police took a statement from Mr. Workman in violation of Miranda v. Arizona;

l. Mr. Workman's death sentence was unconstitutional because it was imposed absent a finding that he intended to kill the victim;

m. Mr. Workman's jury considered matters outside of the evidence during its sentencing deliberations;

n. The prosecutor committed misconduct in placing a portrait of Officer Oliver

before the jury during closing argument;

o. The Tennessee death penalty statute unconstitutionally discriminates against those persons guilty of killing a white victim; and

p. The jury instructions given in Mr. Workman's case were unconstitutional.

20. After an evidentiary hearing, the trial court denied Mr. Workman relief from his conviction and sentence February 13, 1986.

21. Mr. Workman appealed the denial of post-conviction relief to the Court of Criminal Appeals. The Court of Criminal Appeals of Tennessee affirmed the trial court's denial of relief February 18, 1987.

22. Mr. Workman filed March 16, 1987, an application for permission to appeal the Court of Criminal Appeals decision to the Tennessee Supreme Court. The Tennessee Supreme Court denied Mr. Workman permission to appeal the Court of Criminal Appeals decision May 11, 1987.

23. Mr. Workman filed July 2, 1987, in the United States Supreme Court a petition for certiorari to the Tennessee Court of Criminal Appeals. The United States Supreme Court denied Mr. Workman's certiorari petition.

24. On November 18, 1987, Mr. Workman filed a federal petition for writ of habeas corpus. The District Court for the Middle District of Tennessee appointed Larry Woods, Esquire, and Gloria Dumas, Esquire, to represent him. Mr. Workman's petition raised the following issues:

a. Application of the felony-murder statute in Mr. Workman's case was unconstitutional because it created a presumption of malice and intent to kill;

b. Mr. Workman's death sentence is unconstitutional because he did not possess an intent to kill Officer Oliver;

c. The selection process for the foreperson of Mr. Workman's grand jury was unconstitutional;

d. The trial court violated the constitution in denying Mr. Workman's motion requesting that the State turn over evidence that Mr. Workman was bludgeoned with a flashlight prior to the shooting of Officer Oliver;

e. Introduction of a statement taken from Mr. Workman violated the Constitution;

f. Lineup, photo array, and in-court identifications of Mr. Workman were unconstitutional because the lineup in which Mr. Workman participated and the photo array in which he appeared were suggestive and prejudicial;

g. The voir dire process employed at trial and the selection and constitution of Mr. Workman's jury violated the Constitution;

h. Mr. Workman's death sentence violates the Constitution because the State asked improper questions at the sentencing hearing, the State made improper argument, the trial court refused special sentencing instructions proffered by counsel, and the jury considered improper matters during its sentencing deliberations;

i. Mr. Workman received the ineffective assistance of trial counsel in that counsel failed to advise Mr. Workman adequately, failed to investigate adequately and prepare a defense, failed to move for a change of venue, failed to call witnesses, and failed to present mitigating evidence at Mr. Workman's sentencing hearing;

j. Mr. Workman received the ineffective assistance of appellate counsel;

k. Tennessee's death penalty statute is unconstitutional because it fails to provide for an effective comparative review of sentences;

l. The prosecutor unconstitutionally exercised his discretion in seeking Mr. Workman's death sentence;

m. Mr. Workman's death sentence is unconstitutionally disproportionate;

n. Excessive pretrial publicity denied Mr. Workman a fair trial;

o. The State violated the Constitution in refusing Mr. Workman's request for counsel prior to a lineup in which he appeared;

p. Application of the death penalty in Tennessee violates the Constitution because the race of the victim determines whether a person will receive the death penalty;

q. The jury instructions given failed to instruct properly the jury regarding the application and weight of aggravating and mitigating factors; and

r. Tennessee Post-Conviction Procedures violate the Constitution.

25. On June 22, 1989, Mr. Workman filed pro se a successor petition for post-conviction relief in the Criminal Court for Shelby County, Tennessee. The trial court appointed Harry U. Scruggs, Esquire, to represent Mr. Workman and Christopher M. Minton, Esquire, subsequently entered an appearance. The petition, as amended, raised the following issues:

a. the State withheld exculpatory evidence that police bludgeoned Mr. Workman with a flashlight prior to the shooting of Officer Oliver, that persons other than Mr. Workman and Officer Oliver fired weapons the night Officer Oliver was killed, that Officer Oliver died as a result of "friendly fire", that police intimidated the only witness who testified that Mr. Workman shot Lieutenant Oliver into so testifying although he did not witness that occurrence, and that

otherwise contradicts the State's theory of Officer Oliver's death presented at trial;

b. the State interfered with defense counsels' investigation into the facts and circumstances surrounding Officer Oliver's death;

c. trial counsel rendered ineffective assistance because counsel failed to investigate adequately the facts and circumstances surrounding Officer Oliver's death and Mr. Workman's background and character;

d. the State committed prosecutorial misconduct by employing opening and closing argument at the guilt and sentencing stages to perpetuate a false version of the facts surrounding Officer Oliver's death which it knew to be false;

e. the trial court's jury instructions were unconstitutional;

f. Tennessee's death penalty statute is unconstitutional; and

g. Appellate counsel rendered Mr. Workman ineffective assistance.

26. On April 1, 1991, Mr. Workman moved the federal court considering his federal habeas corpus petition to amend into it the grounds Mr. Workman asserted in his amended successor State post-conviction petition. On September 3, 1991, the federal court granted Mr. Workman's motion to amend and dismissed the petition without prejudice so that Mr. Workman could exhaust state remedies as to those claims raised in the successor State post-conviction petition.

27. On March 20, 1992, the Criminal Court for Shelby County, Tennessee, dismissed Mr. Workman's successor State petition for post-conviction relief.

28. On April 7, 1993, the Court of Criminal Appeals of Tennessee affirmed the trial court's dismissal.

29. On November 29, 1993, the Tennessee Supreme Court denied Mr. Workman's application for permission to appeal the Court of Criminal Appeals' decision affirming the trial court's dismissal.

30. On February 28, 1994, the United States Supreme Court denied Mr. Workman's certiorari petition.

31. On July 18, 1994, Mr. Workman filed in the United States District Court for the Western District of Tennessee a Petition For Writ Of Habeas corpus. The District Court appointed Christopher M. Minton, Esquire, and Saul Belz, Esquire, to represent Mr. Workman. The petition raised the following issues:

a. The State withheld exculpatory evidence that prior to any shots being fired, Mr. Workman offered his surrender as it knowingly presented false evidence precluding such a finding;

b. The State withheld exculpatory evidence that prior to any shots being fired, Mr. Workman was hit over the head with a flashlight as it knowingly presented false evidence precluding such a finding;

c. The State withheld exculpatory evidence that persons other than Mr. Workman and Officer Oliver fired weapons during the incident as it knowingly presented false evidence precluding such a finding;

d. The State withheld exculpatory evidence that Harold Davis did not see Mr. Workman shoot Officer Oliver as it knowingly presented false evidence precluding such a finding;

e. The State withheld exculpatory evidence that a fellow police officer shot

Officer Oliver as it knowingly presented false evidence precluding such a finding;

f. The State withheld exculpatory evidence that Mr. Workman did not fire the bullet that the State entered into evidence as Exhibit 35 as it knowingly presented false evidence precluding such a finding;

g. The State withheld exculpatory evidence that otherwise contradicted the State's theory as it knowingly presented false evidence precluding such a finding;

h. The State employed opening and closing argument at both the guilt and the sentencing stages to perpetuate a false version of the events leading to the death of Officer Oliver which the State knew to be false;

i. The State interfered with defense counsels' investigation of the crime for which Mr. Workman was convicted;

j. Trial counsel rendered ineffective assistance by failing to investigate adequately the facts and circumstances surrounding the crime for which Mr. Workman was convicted and sentenced to death;

k. Trial counsel rendered ineffective assistance by failing to move for a change of venue or otherwise limit the effect of pretrial publicity;

l. Trial counsel rendered ineffective assistance by failing to investigate adequately Mr. Workman's background and character;

m. The State based its decision to seek a first-degree murder conviction and the death penalty based on the desires of Officer Oliver's family;

n. Pretrial publicity of Officer Oliver's death poisoned Mr. Workman's trial;

o. Racial discrimination occurred in the selection of the foreperson for the grand

jury that indicted Mr. Workman;

- p. The trial court denied Mr. Workman individual voir dire;
- q. The State engaged in improper questioning during voir dire;
- r. The trial court improperly excused a potential juror;
- s. The trial court failed to excuse a potential juror;
- t. The trial court improperly excluded evidence about Mr. Workman's drug

history and the long term effects of drugs on him;

- u. The State improperly used a picture of Officer Oliver during the trial;
- v. The guilt phase jury instructions were improper;
- w. The State withheld evidence exculpating Mr. Workman from aggravating

circumstances while it presented false testimony in support of those circumstances;

- x. The State presented improper evidence in support of aggravating

circumstances;

- y. The State made improper closing argument at the sentencing stage;
- z. The instructions given at the sentencing phase were improper;
- aa. The sentencing jury considered extraneous matters during its deliberations;
- bb. The evidence is insufficient to support specified aggravating circumstances;
- cc. The jury improperly applied duplicitous aggravating circumstances;
- dd. The jury improperly applied contradictory aggravating circumstances;
- ee. Tennessee's death penalty statute is unconstitutional;
- ff. Appellate counsel rendered ineffective assistance;
- gg. Mr. Workman's death sentence does not carry a heightened degree of

reliability.

32. On October 29, 1996, this Court dismissed Mr. Workman's habeas corpus petition.

33. On October 30, 1998, the United States Court of Appeals affirmed the District Court's dismissal.

34. On October 4, 1999, the United States Supreme Court denied Mr. Workman's Petition For Writ of Certiorari.

35. On November 29, 1999, the United States Supreme Court denied Mr. Workman's request that it reconsider its denial of certiorari.

IV. FACTS

36. On January 3, 2000, the Tennessee Supreme Court set an April 6, 2000, execution date for Mr. Workman.

37. Approximately thirty days prior to April 6, 2000, the State informed Mr. Workman that he was scheduled to be killed by electrocution but he could chose to be killed by lethal injection if he was so inclined. Mr. Workman refused to take any part in his execution and, as a result, he was scheduled to be killed by electrocution.

38. On April 3, 2000, the State instructed Mr. Workman to box up his belongings and identify the person to whom he wanted his belongings given after his execution.

39. On April 3, 2000, the State transferred Mr. Workman from his cell to the death house where Mr. Workman was placed on death watch.

40. The death house is a small room which contains four cells.

41. Mr. Workman was placed in one of the death house cells. Personal items that Mr. Workman was allowed to take with him to the death house were placed in a separate cell. To get

any of his personal belongings, Mr. Workman had to ask a guard to get it from this cell and hand it to Mr. Workman.

42. During death watch, Mr. Workman was under constant surveillance by prison guards.

43. During death watch, Mr. Workman was forbidden from having contact visits with his family and his attorneys.

44. Prior to having a non-contact visit on death watch with his family or attorneys, guards would tell Mr. Workman to strip, perform a strip search of Mr. Workman, and hand him a new set of prison clothes. Guards would then lead Mr. Workman to a closet-sized room where he could converse with his family or his attorneys through a reinforced glass window. When the non-contact visit ended, guards would again instruct Mr. Workman to strip, perform another strip search of him, and hand him a new set of prison clothes.

45. On April 4, 2000, the en banc United States Court of Appeals for the Sixth Circuit stayed Mr. Workman's execution. The State transferred Mr. Workman from the death house back to his cell.

46. On September 5, 2000, the en banc United States Court of Appeals for the Sixth Circuit dissolved its stay of Mr. Workman's execution.

47. On October 5, 2000, the Tennessee Supreme Court set a January 31, 2001, execution date for Mr. Workman.

48. Approximately thirty days prior to January 31, 2001, the State informed Mr. Workman that he was scheduled to be killed by lethal injection but he could chose to be killed by electrocution if he was so inclined. Mr. Workman refused to take any part in his execution and, as a result, he was scheduled to be killed by lethal injection.

49. On January 26, 2001, the en banc United States Court of Appeals for the Sixth Circuit stayed Mr. Workman's execution.

50. On January 28, 2001, despite the stay of execution entered by the en banc United States Court of Appeals for the Sixth Circuit, the State instructed Mr. Workman to box up his belongings, instructed Mr. Workman to identify the person to whom he wanted his belongings given after his execution, and transferred Mr. Workman from his cell to the death house where Mr. Workman was placed on death watch.

51. The conditions for Mr. Workman's second confinement on death watch were the same as those described in paragraphs 40-44, above.

52. On January 30, 2001, the State transferred Mr. Workman from the death house back to his cell.

53. On February 28, 2001, the Tennessee Supreme Court set a March 30, 2001, execution date for Mr. Workman.

54. On March 27, 2001, the State instructed Mr. Workman to box up his belongings, instructed Mr. Workman to identify the person to whom he wanted his belongings given after his execution, and transferred Mr. Workman from his cell to the death house where Mr. Workman was placed on death watch.

55. The conditions for Mr. Workman's second confinement on death watch were the same as those described in paragraphs 40-44, above.

56. On March 29, 2001, approximately forty minutes before Mr. Workman's third scheduled execution, the Tennessee Supreme Court stayed the execution and ordered the Shelby County, Tennessee, Criminal Court to hold an evidentiary hearing on Mr. Workman's *error*

coram nobis claims that (1) Harold Davis committed perjury when he claimed at trial that he saw Philip Workman shoot Officer Oliver; (2) the forensic evidence demonstrates that Philip Workman did not shoot Officer Oliver; and (3) had the jury heard Davis recant his testimony and Dr. Cyril Wecht testify that the bullet that killed Officer Oliver did not come from Philip Workman's gun, the jury would not have convicted Philip Workman of first-degree murder and sentenced him to death. The State transferred Mr. Workman from the death house back to his cell.

57. The Shelby County Criminal Court set an August 13, 2001, hearing date for Mr. Workman's *error coram nobis* petition.

58. In the months prior to August 13, 2001, Mr. Workman's trial counsel and an investigator working with counsel searched for Harold Davis but could not find him.

59. The State knew that Mr. Workman's trial counsel and an investigator working with counsel were looking for Davis but were unable to find him.

60. On July 31, 2001, Mr. Workman filed a motion for default judgment in the Shelby County Criminal Court asserting that the State had not properly responded to Mr. Workman's *error coram nobis* petition.

61. On August 1, 2001, the Shelby County Criminal Court issued a letter to the State and to Mr. Workman's *error coram nobis* lawyers that no proof would be taken at the August 13, 2001, hearing, but, rather, argument would be heard on Mr. Workman's motion for a default judgment.

62. On August 3, 2001, at or around 11:17 a.m., Harold Davis was arrested for retail theft in Clay County, Florida.

63. On August 3, 2001, at or around 1:44 p.m., Harold Davis was booked into the Clay County, Florida, Jail.

64. On August 3, 2001, after Davis was booked into the Clay County, Florida, Jail, the Shelby County Criminal Court reversed itself and ordered that proof would be taken at the August 13, 2001, hearing.

65. On August 4, 2001, Davis had his initial appearance on the retail theft charges in Clay County, Florida, Circuit Court. The Florida Circuit Court informed Davis that given his extensive record of prior convictions he may need to speak to an attorney. The Florida Circuit Court set an August 23, 2001, date for further proceedings.

66. The State became aware that Davis was incarcerated in the Clay County, Florida, Jail no later than August 6, 2001.

67. The State and Davis agreed, either explicitly or implicitly, that after Davis testified at the *error coram nobis* hearing the State would, if it felt it was appropriate to do so, assist Davis in obtaining disposition of the charges pending against him in the State of Florida.

68. On August 8, 2001, Mr. Workman's *error coram nobis* counsel filed a motion to continue the August 13, 2001, hearing date because they had not yet located Harold Davis.

69. On August 9, 2001, the Clay County, Florida, Circuit Court ordered the Sheriff of Clay County, Florida, to transport Davis to Memphis, Tennessee, for the *error coram nobis* hearing.

70. On August 9, 2001, the Shelby County Criminal Court held a hearing on Mr. Workman's motion to continue the August 13, 2001, hearing. At that hearing counsel for the State said if Davis was not available it might join in the motion to continue.

71. Despite knowing that Mr. Workman's *coram nobis* counsel were searching for Mr. Davis, the State did not inform counsel that it had located Davis and had made arrangements for Davis's appearance at the *error coram nobis* hearing scheduled to begin on August 13, 2001.

72. On August 12, 2001, at or around 9:25 a.m., the State booked Davis into the Germantown Jail.

73. On August 12, 2001, at or around 2:00 p.m., Mr. Workman's *error coram nobis* counsel were contacted by Davis's relatives who told counsel that Davis's former pastor had seen Davis earlier in the day in the Memphis Airport under police escort.

74. On August 12, 2001, at or around 2:00 p.m., Mr. Workman's *error coram nobis* counsel contacted counsel for the State and asked if the State was bringing Davis to Memphis to appear at the *error coram nobis* hearing. Counsel for the State said he hoped to have Davis in Memphis sometime in the future.

75. On August 12, 2001, at or around 6:30 p.m., counsel for Mr. Workman attempted to interview Davis at the Germantown Jail. Davis refused to talk to Mr. Workman's counsel.

76. On August 12, 2001, at or around 7:00 p.m., Davis's sister visited Davis in the Germantown Jail. Davis's sister implored Davis to tell the truth at the *error coram nobis* proceeding.

77. On August 13, 2001, at the *error coram nobis* hearing, counsel for the State acknowledged that the State had brought Davis to Memphis. Counsel informed the Shelby County Criminal Court that it procured Davis's attendance, not through formal process, but through an agreement with the Circuit Court of Clay County, Florida.

78. On August 13, 2001, at the *error coram nobis* hearing, counsel for Mr. Workman

moved the Shelby County Criminal Court to enter an order commanding the State to provide Mr. Workman's counsel with any evidence that the State and Davis had any kind of a deal for his testimony. The State responded that there was no such information.

79. On August 13, 2001, at the *error coram nobis* hearing, Davis testified on direct examination conducted by Mr. Workman's counsel that he did not see Philip Workman shoot Officer Oliver.

80. After Davis gave his direct examination, the State cross-examined Davis for three days. During his cross-examination Davis testified that (1) after his trial testimony, persons threatened him that if he ever recanted his trial testimony, either his family or he would be harmed; and (2) due to his history of drug use his mind had become clouded.

81. During cross-examination, Davis's brain swelled and he had to be taken to the emergency room of the hospital.

82. On re-direct examination, Davis recanted his trial testimony line by line.

83. On re-cross examination, Davis again said that due to his history of drug use his mind had become clouded.

84. On August 16, 2001, Vivian Porter testified at the *error coram nobis* hearing that Davis was with her the night Officer Oliver was shot and they were not at the scene of the shooting.

85. On August 16, 2001, the Shelby County, Tennessee Criminal Court continued the *error coram nobis* hearing.

86. On August 23, 2001, Davis appeared before the Clay County, Florida, Circuit Court. The Florida Circuit Court asked the prosecuting attorney if Davis needed an attorney. The

prosecuting attorney stated he was offering Davis twenty-one days time served. The Florida Circuit Court responded:

You know I could give you up to 60 days in jail, a 500-dollar fine, but I'm not going to do that. I'm going to give you credit for 21 days served and adjudicate you guilty, give you a cost judgment of 143 dollars. **Anybody promise you anything other than that?** I am going to sign a certificate of no incarceration. Worse case scenario I will not put you in jail. That's why you didn't get a lawyer.

87. On October 16, 2001, Dr. Cyril Wecht testified that after reviewing Officer Oliver's autopsy, photographs of Officer Oliver's wounds, and the type of ammunition that was in Mr. Workman's gun the night of the incident, he held an opinion, to a reasonable degree of certainty, that Philip Workman did not shoot Officer Oliver. There nowhere appears in any court proceeding a contrary expert opinion. After Dr. Wecht's testimony, the Shelby County Criminal Court continued the *error coram nobis* hearing.

88. On November 5, 2001, Wardie Parks testified that he was a juror at Mr. Workman's trial, he watched evidence presented during the previous *error coram nobis* proceedings, and he reviewed the trial transcript. Mr. Parks testified that he heard the evidence presented at the *error coram nobis* proceeding, he would not have voted to convict Mr. Workman of first-degree murder and sentence him to death.

89. The issue before the Shelby County Criminal Court was whether the evidence presented at the *error coram nobis* hearing may have resulted in a different judgment had it been presented at Mr. Workman's trial.

90. The Shelby County Criminal Court denied Mr. Workman *error coram nobis* relief.

91. As to Harold Davis's testimony, the Shelby County Criminal Court ruled that because Davis testified on cross-examination that his mind had become clouded over the years,

Davis's testimony should not be credited.

92. As to Vivian Porter's testimony, the Shelby County Criminal Court ruled that because her testimony was inconsistent with Davis's testimony, her testimony should not be credited.

93. As to Dr. Cyril Wecht, the Shelby County Criminal Court ruled that because Dr. Wecht could not state that he was 100% sure that Mr. Workman did not shoot Officer Oliver, his testimony did not foreclose the possibility that Mr. Workman shot Officer Oliver.

94. As to Wardie Parks's testimony, the Shelby County Criminal Court refused to consider it, citing Tenn.R.Evid. 606(b).

95. On appeal to the Tennessee Court of Criminal Appeals, Mr. Workman argued, among other things, that the Tennessee statute mandating proportionality review required the appellate court to conduct proportionality review taking into account the evidence Mr. Workman presented at the *error coram nobis* proceeding.

96. On December 30, 2002, the Tennessee Court of Criminal Appeals affirmed the Shelby County Criminal Court's denial of *error coram nobis* relief. In doing so it did not conduct proportionality review taking into account the evidence Mr. Workman presented at the *error coram nobis* proceeding.

97. In seeking a discretionary appeal to the Tennessee Supreme pursuant to Tenn.R.App.P. 11, Mr. Workman argued, among other things, that the Tennessee statute mandating proportionality review required the Tennessee Supreme Court to conduct proportionality review taking into account the evidence Mr. Workman presented at the *error coram nobis* proceeding.

98. On May 19, 2003, the Tennessee Supreme Court denied Mr. Workman's request that it grant a discretionary appeal pursuant to Tenn.R.App.P. 11. In doing so it did not conduct proportionality review taking into account the evidence Mr. Workman presented at the *error coram nobis* proceeding.

99. On June 2, 2003, the Tennessee Supreme Court denied Mr. Workman's request that it reconsider its denial of his request for a discretionary appeal.

100. On June 2, 2003, the Tennessee Supreme Court set a September 24, 2003, date for Mr. Workman's execution.

V. CLAIMS FOR RELIEF

101. As to each claim for relief, Mr. Workman incorporates all paragraphs preceding that claim.

102. CLAIM 1: The State violated the Sixth, Eighth, and Fourteenth Amendments by interfering with counsels' ability to interview Harold Davis and by intimidating Davis to testify in a manner beneficial to the State.

103. CLAIM 2: The State violated the Sixth, Eighth, and Fourteenth Amendments by withholding evidence that in exchange for Harold Davis's testimony at the *error coram nobis* hearing favorable to the State, the State would try to assist Davis resolve criminal charges pending against him.

104. CLAIM 3: Tennessee's Courts violated the Sixth, Eighth and Fourteenth Amendments by refusing to consider the testimony of former juror Wardie Parks that had he heard the evidence presented at the *error coram nobis* proceeding he would not have convicted Philip Workman of first-degree murder and sentenced him to death.

105. CLAIM 4: Because Dr. Cyril Wecht's opinion that Philip Workman did not shoot Officer Oliver is the only expert opinion in the trial and *error coram nobis* record, the evidence is insufficient to support Mr. Workman's conviction of felony-murder and resulting death sentence, in violation of the Sixth, Eighth, and Fourteenth Amendments.

106. CLAIM 5: Tennessee's appellate courts violated the Eighth and Fourteenth Amendments by failing to conduct the statutorily required proportionality review taking into account the evidence presented at the *error coram nobis* proceeding.

107. CLAIM 6: By scheduling Mr. Workman's execution four times, and by repeatedly subjecting him to pre-execution procedures such as those described in paragraphs 40-44, above, the State has violated the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹

WHEREFORE, Mr. Workman respectfully requests that this Court:

1. Order the State to answer;
2. Upon the State's answer allow an appropriate period of investigation and discovery under the Rules Governing Section 2254 Cases;
3. Hold an evidentiary hearing;
4. Declare Mr. Workman's conviction and/or sentence unconstitutional;
5. Issue an unconditional writ of habeas corpus ordering the State to release Mr. Workman from custody and precluding the State from retrying him;

¹ Mr. Workman acknowledges that Castellano-Chacon v. I.N.S., ___ F.3d ___ (6th Cir. August 18, 2003) holds that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not self-executing and therefore judicially unenforceable. Mr. Workman raises this claim to preserve it for review on appeal.

6. Issue a conditional writ of habeas corpus ordering the State to release Mr. Workman from custody should the State not retry him within a specified period; and

7. Order such other relief as this Court deems just.

Respectfully Submitted,

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By: _____

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been hand-delivered to Paul Summers, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this ____ day of _____.
