IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

PHILIP WORKMAN,	**)**	
	)	
Appellant,	**)**	
	)	**SHELBY COUNTY**
v.	**)**	**No.**
	)	
STATE OF TENNESSEE,	**)**	
	)	
Appellee.	**)**	

ON APPLICATION FOR PERMISSION TO APPEAL
FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

ANSWER IN OPPOSITION TO THE APPLICATION
FOR PERMISSION TO APPEAL

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ARGUMENT

MOTION TO REOPEN POST-CONVICTION PETITION

On March 28, 2001, almost twenty years after the murder of Lt. Ronald Oliver, and just slightly more than twenty-four hours before his execution, appellant filed a motion to reopen his post-conviction proceedings. Relief under his initial post-conviction petition was denied in 1986 and that decision was affirmed by the Court of Criminal Appeals in 1987. A second petition for post-conviction relief was denied by the trial court and the denial affirmed by the Court of Criminal Appeals in 1993. *Workman v. State*, 868 S.W.2d 705 (Tenn.Cr.App. 1993). Since that time appellant has been pursuing various state and federal remedies but has been denied relief on every occasion.

I. APPELLANT'S EVIDENCE FAILS TO SATISFY THE REQUIREMENTS OF TENN. CODE ANN. §40-30-217(a).

As the trial court noted, there is no constitutional right to post-conviction relief, and consequently no such right to reopen a post-conviction petition. (*See Workman v. State,* Shelby County No. P-3908, Order denying relief at 4). Post-conviction relief is entirely a creature of statute. Therefore, in order to reopen a petition for post-conviction relief, appellant must plead facts which bring him within one of three very narrow exceptions contained in Tenn. Code Ann. §40-30-217(a):

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required.
> (2) The claim in the motion is based upon *new scientific* evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction. . ., and the previous conviction has subsequently been held to be invalid.

(emphasis added). Appellant is seeking relief under subsection (2) of this provision. However, as

discussed below, his evidence does not satisfy the requirements of that provision.

A. The evidence must be scientific:

Subsection (2) specifically utilizes the term "scientific" in describing the type of evidence that may trigger a motion to reopen. In *Raymond Hardie Cox v. State*, Marion County, No. M1999-00447-CCA-R3-PC, 2001 WL 208502 (Tenn.Cr.App., filed March 2, 2001, at Nashville)(copy attached), the Court of Criminal Appeals found that affidavits which disputed facts in the indictment — ownership and public access to buildings — did not constitute scientific evidence and therefore did not entitle the defendant to post-conviction relief. Here, the unsworn statement of Harold Davis,[1] the statement of Vivian Porter, and the information from police reports cannot be considered "scientific" evidence. Therefore, as in *Cox*, they cannot serve as a basis to reopen appellant's post-conviction petition.

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[1] The trial court found it "extremely significant that a ***sworn*** statement or affidavit of Harold Davis has not been submitted to this Court, or any other court." (*See Workman v. State*, Shelby County No. P-[illegible], Amended Order denying relief at [illegible])(emphasis added).

B. The evidence must be new:

(1) The x-ray —

Even if the x-ray satisfies the "scientific" prong, it is not "new" evidence either physically, or in the information that it provides. The particular x-ray in question was taken at the time of Lt. Oliver's autopsy and thus has been in existence since prior to appellant's trial. Appellant failed to exercise due diligence, as the record reflects no indication that appellant made any effort to seek out the x-ray prior to June 2, 1995, despite the fact that Dr. Bell, the medical examiner who conducted the autopsy, was present and testified during the trial. Even if this Court, as appellant urges, considers the x-ray to effectively have existed only since it was affirmatively provided to appellant, it has still been "in existence" for over a year. Further, when considering the evidence presented, or potentially available, at trial the x-ray does *not* establish by clear and convincing evidence that appellant is actually innocent. (*See Workman v. State*, Shelby County No. P-3908, Amended Order denying relief at 4-5).

Appellant asserts that the significance of the x-ray is that is shows a single wound track with no fragments remaining in the body. The difficulty for appellant is that this is the position that was presented during his trial and consistently throughout the appellate process in both State and Federal courts. The State's evidence showed that Lt. Oliver was killed by a single bullet that went straight through his body. Dr. Bell, the medical examiner, testified that the bullet exited the body and that there was only one bullet path. The FBI agent, who testified as a ballistics expert, stated that, while ammunition of the type used by appellant will normally "mushroom" and/or fragment, he was not surprised that this did not happen in this case. In fact, the first time that any consideration was given to possible fragmentation was by the Sixth Circuit Court of Appeals in dicta, where the panel essentially did some "thinking out loud" about possible explanations to address appellant's argument

about the size of the exit wound. That portion of the opinion was subsequently withdrawn. Fragmentation has never been a theory advanced by the State in this case.

(2) The experts —

Appellant also relies upon the affidavits of Dr. Kris Sperry and Dr. Cyril Wecht, who have opined that Lt. Oliver's wound is inconsistent with having been made by the ammunition appellant was using that night. Appellant continues to ignore the fact, however, that these opinions focus on the size of the exit wound as stated in the autopsy report and as shown in photographs. Despite appellant's best efforts to recraft Dr. Sperry's opinion to account for the "significance" of the x-rays,[2] a review of his statements reflects that his opinion today is the same as it was five years ago, namely that "the autopsy report and photographs establish that a projectile created a wound track across the victim's chest" and that it "emerged from his body intact."

(3) Harold Davis, Vivian Porter and police reports —

Appellant has, in effect, been challenging the veracity of Harold Davis' trial testimony since his second post-conviction through his assertion of a "friendly fire" theory. He has had the unsworn recantation and the "corroborating" statements of Ms. Porter since at least October 1999. The police reports have been available through the Public Records Act for many years. Even if this Court overlooks the statutory requirement that the evidence be scientific, this cannot be considered new.

II. APPELLANT'S "STATE LAW" *HERRERA* CLAIM DOES NOT FALL WITHIN THE AMBIT OF THE POST-CONVICTION PROCEDURES ACT.

Appellant is asking this Court to create a new state constitutional basis for relief based upon

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[2] In the original Sperry affidavit submitted to the Ninth Circuit, appellant's counsel had Dr. Sperry refer to rather than rely upon the autopsy report and photos. Judge Fallon found this to be 'of questionable significance.' *See Workman v. State*, Shelby County No. 84-1111, Amended Order denying relief).

a claim of actual innocence. He refers to this as a *Herrera* claim, referring to the case of *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), in which the Supreme Court expressed concern over the theoretical possibility that one who was actually innocent might be executed, but ultimately held that actual innocence claims which are brought too late in the process to obtain judicial review are appropriate subjects for clemency proceedings. Although appellant maintains that actual innocence is a federal constitutional claim, this assertion cannot be supported in light of Supreme Court's decision to refrain from taking action in *Herrera*, and the fact that in federal habeas corpus proceedings actual innocence serves only as an escape hatch by which a petitioner may avoid the bar on review imposed by procedural default rather than an independent claim.

To the extent that this claim is distinct from the statutory claim, appellant's claim under *Herrera* would most nearly fall under Tenn. Code Ann. §40-30-217(a)(1) regarding new opinions which have retroactive effect. As such, appellant's position clearly fails as *Herrera* was decided in 1993, and subsection (a)(1) requires that any motion to reopen based upon a case be brought within one year of the decision. To the extent that appellant wishes this Court to simply create a new right independent of *Herrera* and based entirely upon an interpretation of the Tennessee constitution, the State submits again that he comes too late. As previously noted, appellant has been asserting his innocence of the murder for approximately ten years, yet he has waited until his final twenty-four hours to request a new interpretation of the state constitution. Further, as noted by the Court of Criminal Appeals, a declaratory judgment action may not be utilized to supersede a valid order of the this Court. *Workman v. State,* Shelby County, W2001-00774-CCA-R28-PD, order denying relief at 2, filed March 29, 2001 at Jackson This claim is without merit.

III. APPELLANT'S MOTION DOES NOT SATISFY THE BURDEN OF PROOF.

While the State maintains that based upon the procedural bars as discussed *supra*, this Court need not address the merits of the individual claims asserted, to the extent that this Court deems it appropriate for the disposition of this appeal, the State asserts that the findings of the trial court are amply supported by the record and should be adopted by this Court.

In light of the strong language used by the General Assembly regarding the importance of pursuing relief expeditiously, and in the absence of a reasonable explanation for his delay, appellant's motion to reopen his post-conviction petition was properly denied; additional review by this Court is not warranted, because trial court did not abuse its discretion. *See* Tenn. Code Ann. § 40-30-217(c).

PETITION FOR WRIT OF ERROR *CORAM NOBIS*

Appellant filed a petition for writ of error coram nobis in the Shelby County Criminal Court yesterday alleging that he possesses newly discovered evidence of his actual (factual) innocence of the first degree murder of Memphis Police Lieutenant Ronald Oliver. Lt. Oliver was murdered by appellant during the perpetration of the robbery of the Wendy's Restaurant on Danny Thomas Boulevard in Memphis during the evening of 5 August 1981. The evidence that he offers in support of his petition concerns the questionable recantation of Harold Davis, a witness to the shooting of Lt. Oliver, and alleged new evidence that the fatal bullet was not fired from Workman's gun. Realizing that he is barred from litigating his claims by the one-year statute of limitations, *see* T.C.A. § 27-7-103, he seeks to have this Court create an exception to it based on similar considerations used in *Burford v. State*, 804 S.W.2d 204 (Tenn. 1992). Appellant's position is totally without merit, and the judgment of the trial court, finding his petition barred by the statute of limitations, should be affirmed.

A petition for writ of error coram nobis is an extraordinary remedy which should be used only

if no other remedy is available. *State v. Mixon*, 983 S.W.2d 661, 663 (Tenn. 1999). In Tennessee, the error coram nobis remedy is statutory in nature, having been so since 1858 when the common law writ was replaced by statute. *Id.* at 667. Included in the error coram nobis statute is a one-year statute of limitations. That statute of limitations begins to run 30 days after the entry of judgment by the trial court if no post-trial motion is filed, or upon entry of the trial court's order disposing of a timely filed post-trial motion. *Id.* at 670 (overruling *Teague v. State*, 772 S.W.2d 915 (Tenn.Crim.App. 1988)).

Appellant argues that strict application of the error coram nobis statute of limitations in his case is unconstitutional. As authority for this proposition he cites to this Court's opinion *Burford v. State*, 804 S.W.2d 204 (Tenn. 1992). His reliance is clearly misplaced.

In *Burford*, this Court held that the application of the post-conviction statute of limitations in certain limited situations might violate due process. In so ruling, the Court was balancing the government's interest in administrative efficiency and economy and the appellant's interest against an excessive sentence ***in violation of his constitutional rights.*** *Id.* at 208 (emphasis supplied). No such concerns are present in the error coram nobis context. A petition for error coram nobis deals with factual matters, not constitutional rights/claims, as the basis for the writ is newly discovered evidence as it relates to guilt or innocence. Newly discovered evidence of this type does not implicate constitutional rights. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993). Furthermore, as this Court has stated in relation to the error coram nobis statute of limitations, claims of newly discovered evidence years after a conviction are inherently suspect. *Mixon*, 983 S.W.2d at 670, *citing Herrera*, 506 U.S. at 417-18.

In its discussion of the error coram nobis statute of limitations in *Mixon, supra*, this Court expressed concerns for finality of criminal judgments. The Court noted that today, unlike at the time

when the writ of error coram nobis sprang into existence, there is a highly developed appellate and collateral review process. *Id.* In addition to this extensive judicial review process, criminal defendants also have the ability to seek clemency from the Governor. Consequently, this Court saw no need to reinterpret or extend the error coram nobis statute of limitations when balanced against the need for finality in criminal convictions. *Id.* at 671. As the Court of Criminal Appeals has recognized, "The traditional method for addressing actual innocence based upon newly discovered evidence which is procedurally barred from the courts is through executive clemency." *Newsome v. State*, 995 S.W.2d 129, 134 (Tenn.Crim.App. 1999); *accord Hicks v. State*, 1998 WL 88422 at *3 (copy attached); *Turner v. State*, 1999 WL 1209496 at *1 (copy attached).[3]

As a panel of the Court of Criminal Appeals has noted, the United States Supreme Court "upheld the application of a Texas rule that barred [a] defendant from presenting newly discovered evidence of actual innocence because he failed to raise the issue within thirty days from when his sentence was imposed." *Turks v. State*, 1997 WL 1883 at *4 (copy attached). Therefore, the Court went on to conclude "that the petitioner's constitutional rights have not been violated by application of Tennessee's one-year [error coram nobis] limitation period." *Id.*; *see also Herron v. State*, 1996 WL 134957 at *3 n. 5. (copy attached).

Finally, it is worth noting that when confronted with the issue of Harold Davis's recantation and expert opinions contending that Appellant did not fire the fatal shot in the context of his request for a certificate of commutation, our Supreme Court stated, "There exists no procedure, no method, and no means by which the conviction or the sentence can be further tested or scrutinized under

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[3]It should be noted that the Post-Conviction Relief Act does provide that a post-conviction proceeding may be re-opened based upon "new scientific evidence establishing that such petitioner is actually innocent" of the offense(s) of which convicted. Tenn. Code Ann. § 40-30-217(a) (2).

procedural guidelines within which this Court must function." *Workman v. State,* 22 S.W.3d 807, 809 (Tenn. 2000).[4]

Based upon the foregoing, the trial court properly denied appellant's petition for writ of coram nobis as being barred by the statute of limitations.

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[4]While the post-mortem x-ray was not a basis for the expert opinion rendered, the subsequent discovery of that x-ray did not alter the expert's conclusion. That conclusion does not conclusively aver that the bullet did not come from Workman's gun. Furthermore, Workman cannot honestly say he exercised due diligence in obtaining it. The x-ray has existed since 1981. While he received a copy of the autopsy report prior to his 1982 trial, there is no indication in the record that he ever contacted the county medical examiner's office regarding the autopsy x-ray or ever made any direct request for it — despite the fact that the medical examiner himself testified at Workman's trial.

CONCLUSION

Based upon the foregoing reasons, appellant's application for permission to appeal should be denied. Appellant's request for a stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via facsimile transmission upon Robert L. Hutton, Jr., GLANKLER BROWN, PLLC, 1700 One Commerce Square, Memphis, Tennessee 38103 on this the 29th day of March, 2001.

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