

No. 00-_____

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP R. WORKMAN,
Petitioner,

v.

RICKY J. BELL, Warden,
Respondent.

In re PHILIP R. WORKMAN,
Movant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General

JOSEPH F. WHALEN
Assistant Attorney General
Counsel of Record
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 532-7911

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Whether Workman has made a prima facie showing of fraud on the court so as to warrant reopening the prior proceedings in his federal habeas case.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, *Workman v. Bell*, ___F.3d ___, 2001 WL _____, (6th Cir. March 23, 2001)(Nos. 96-6652; 00-5367), was filed on

March 23, 2001, and appears as an appendix hereto.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §§ 1254(1), 1651(a) and U.S.S.Ct.R.

STATEMENT OF THE CASE

Workman was convicted in 1982 of the first degree felony murder of Memphis Police Lieutenant Ronald Oliver and sentenced to death on the basis of five statutory aggravating circumstances. Following the conclusion of two state post-conviction proceedings in 1986 and 1992, respectively, Workman filed a petition for the writ of habeas corpus in federal district court. (R. 1; J.A. I. 14)¹ The district court denied relief, awarding summary judgment to respondent on all claims and denying Workman's motion for summary judgment. (R. 94, J.A. III. 1293) Judgment was entered on November 14, 1996. (R. 96, J.A. I. 69)

The Court of Appeals for the Sixth Circuit affirmed the judgment of the district court on October 30, 1998. *Workman v. Bell*, 160 F.3d 276 (6th Cir. 1998), *republished at* 178 F.3d 759 (6th Cir. 1998). Workman filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 12, 1998. On May 10, 1999, Workman's petition was denied by the panel, with a portion of the Court's original opinion being deleted. Workman's petition for certiorari was denied by this Court on October 4, 1999, *Workman v. Bell*, 528 U.S. 913 (1999), and the Court of Appeals issued its mandate on October 12, 1999. Workman's petition for rehearing of the denial of certiorari was denied on November 29, 1999. *Workman v. Bell*, 528 U.S. 1040 (1999). The Tennessee Supreme

¹ This was actually Workman's second habeas petition. His first petition was filed June 16, 1991, and the final judgment published August 11, 1991.

Court set a new execution date of April 6, 2000.

On January 27, 2000, Workman filed an Application for Commutation to the Governor of the State of Tennessee. A hearing was scheduled on that application for March 9, 2000. On March 5, 2000, Workman filed a Motion to Reopen his habeas corpus case with the Court of Appeals. On March 8, 2000, Workman withdrew his Application for Commutation.² On March 24, 2000, Workman filed a Motion for Leave to File a Second Habeas Corpus Petition, Motion for Declaration That 28 U.S.C. § 2244 Does Not Apply to Specified Claims, and a Motion for Stay of Execution. On March 31, 2000, a panel of the Court of Appeals denied all of Workman's pending motions. On April 3, 2000, Workman filed petitions to rehear and suggestions for rehearing en banc. On April 4, 2000, the Court of Appeals granted Workman's petition to rehear en banc and stayed his execution "until further order of the Court."

An equally divided en banc Court of Appeals rejected petitioner's motion to reopen and dissolved the previously-entered stay of execution. *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1194. On October 5, 2000, the Tennessee Supreme Court set January 31, 2001, as petitioner's new execution date.

Workman filed another application for commutation to the Governor, and, on January 25, 2001, a hearing was conducted by the Tennessee Board of Probation and Parole. At the conclusion of that hearing, the Board voted unanimously to recommend that the Governor deny clemency.

On January 26, 2001, the Court of Appeals, sitting en banc, granted Workman a stay of execution pending a decision by the this Court on his petitions for writ of certiorari and for an original writ of habeas corpus. On February 26, 2001, this Court denied both petitions, and on

² [Supreme Court of Tennessee v. Bell, 227 F.3d 331 (6th Cir. 2000), cert. denied, 121 S.Ct. 1194.]

February 28, 2001, the Tennessee Supreme Court reset Workman's execution date for March 30, 2001.

On March 21, 2001, the en banc Court of Appeals denied a motion by Workman to declare the previously-entered stay of execution still in effect. On March 23, 2001, a three-judge panel of the Sixth Circuit denied another motion by Workman to reopen his case and stay his execution; and on March 26, 2001, Workman filed a petition for rehearing of that denial by the full en banc Court. Rehearing was denied on March 28, 2001. On March 27, 2001, the Governor of Tennessee denied Workman's application for clemency.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT WORKMAN HAD NOT SHOWN A FRAUD ON THE COURT; CERTIORARI REVIEW OF THAT DECISION IS NOT WARRANTED.

Petitioner contends that this Court should grant certiorari to review whether the Court of Appeals correctly determined that he had not shown a fraud on the court so as to warrant the reopening of prior proceedings in his federal habeas corpus case. Citing, *inter alia*, a circuit court's inherent authority to protect the integrity of its own judicial proceedings, *see Calderon v. Thompson*, 523 U.S. 538, 590 (1998), Workman had filed a motion to reopen in the Sixth Circuit, asking it to reopen the proceedings on his previously denied federal habeas petition, as well as his previously denied application to file as second habeas petition. Workman grounded his motion on references respondent had made, in previous filings with the Sixth Circuit, to the availability of clemency in Workman's case. On the basis of Workman's several allegations of impropriety in the clemency hearing conducted on his application, he contended that clemency was not "available" to him and that respondent's statements regarding clemency amounted to a fraud on the court. Addressing

Workman’s contention, the Sixth Circuit concluded:

Although the State asserted that a clemency proceeding was available in which Workman could present evidence, it did not make a statement concerning the clemency proceeding that was intentionally false, wilfully blind to the truth, or in reckless disregard for the truth. Taking the allegations in the light most favorable to Workman, if there was any fraud, it would have been upon the governor of Tennessee or upon the [Tennessee Board of Probation and Parole].

Workman v. Bell, supra, slip. op 3-4.

By asking this Court to review the Sixth Circuit’s conclusion that he had not made a showing of fraud on the court, Workman asks this Court to review a factual determination of the lower court. *See* U.S.S.Ct.R. 10 (certiorari petition is rarely granted when the asserted error consists of erroneous factual findings). Moreover, he apparently seeks *de novo* review; nowhere does he allege that the Sixth Circuit’s determination was erroneous. Furthermore, he does not contend that the Sixth Circuit misapplied a properly stated rule of law, or that the legal standard it employed conflicts with decisions in other circuits or with decisions of this Court. *See* U.S.S.Ct.R. 10, 10(a), (c). Indeed, the standard upon which the Sixth Circuit denied Workman’s motion — that established by the circuit court in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) — is fully consistent with prior decisions of this Court.³

Federal courts of appeal “are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion.” *Calderon v. Thompson, supra*, 523 U.S. at 550, *citing Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers). This power, though, is one of last resort, to be exercised only in extraordinary circumstances. It is

³ *Demjanjuk*. *See, e.g., Chambers v. NASCO, Inc.*; *Hazel-Atlas Glass Co. v. Hartford Empire Co.*

otherwise “to be held in reserve against grave, unforeseen contingencies.” *Calderon v. Thompson*, *supra*, 523 U.S. at 550. Here, consistent with the sparing nature of this extraordinary power, the Court of Appeals declined to exercise it, finding that Workman had not shown a sufficient basis for the grant of extraordinary relief. Having eschewed use of such authority, the court below certainly cannot be regarded as having abused it, nor can it be said to have “so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court’s supervisory power.” U.S.Sup.Ct.R. 10(a). There is, quite simply, no compelling reason for this Court to grant certiorari in this case. *See* U.S.Sup.Ct.R. 10.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General

JOSEPH F. WHALEN
Assistant Attorney General
Counsel of Record
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 532-7911

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded to

counsel for the petitioner by mailing same, postage prepaid, to Christopher M. Minton, Office of the Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee 37243 on this the ____ day of March, 2001.

JOSEPH F. WHALEN
Assistant Attorney General