IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

PHILIP R. WORKMAN

Petitioner,

v. No. B 81209

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF ERROR CORAM NOBIS,
SUPPLEMENT TO ORIGINAL PETITION FOR POST CONVICTION RELIEF,
PETITION FOR DECLARATORY JUDGMENT,
MOTION FOR STAY OF EXECUTION

COMES NOW your Petitioner, Philip R. Workman, through his undersigned counsel of record, and files this Petition for Writ of Error Coram Nobis, Supplement to Original Petition for Post Conviction Relief, Petition for Declaratory Judgment, and Motion for Stay of Execution. In support of this petition, your Petitioner would show unto the court as follows:

1. Mr. Workman was convicted of first degree felony murder on March 31, 1982, in the Criminal Court of Shelby County, Tennessee, Dk# B 81209. The jury sentenced Mr. Workman to death.

2. On August 5, 1981, Workman robbed a Wendy's restaurant on Thomas Street in North Memphis, as it closed around 10:00 p.m. As Workman gathered the restaurant's money, an employee tripped a silent alarm. Memphis police officers, Ronald Oliver, Aubrey Stoddard and Stephen Parker responded. When Workman attempted to run, Oliver died from a gunshot wound to the chest.

3. In order to convict Workman of capital murder, the jury had to find that the bullet that killed Oliver came from Workman's gun. To establish this critical fact, the prosecution presented the testimony of Harold Davis, Stoddard and Parker. Officers Stoddard and Parker denied that they ever fired their weapons or saw Workman shoot Oliver.

4. Mr. Harold Davis testified at the trial that he saw Workman aim at Oliver and shoot him. Davis was the only witness that testified that he actually saw Workman shoot Oliver.

5. We now know, 18 years later, that Harold Davis committed perjury before the jury which led to Workman's sentence of death. In a video taped interview taken September 24, 1999, Ms. Vivian Porter states that on the night of the shooting, Davis and she rode in a car. As they drove past the Wendy's, they saw numerous police cars parked on the Wendy's lot, but they did not stop. Porter affirms that Davis and she did not drive onto the Wendy's lot, nor did they park their car on the side of the road and walk onto the lot. Rather, they drove past the Wendy's and later learned the news that it was the site of the robbery and police shooting. (See Affidavit of Porter, App. at 7)

6. On November 20, 1999, Mr. Harold Davis in an emotional videotaped interview, recanted his trial testimony. Davis now admits that his trial testimony that he saw Workman shoot Oliver is a lie and that he committed perjury at Workman's trial because he was coerced by authorities.

7. Davis' recantation makes sense in light of other facts surrounding the robbery. Davis claimed at trial that he parked his car on the Wendy's lot, saw the Oliver shooting, and remained at the scene as a bunch of additional police officers arrived. (Tr. 653-654). Police officers and police documents establish that, as Davis now admits, neither he nor his car were on the Wendy's lot. As a matter of fact photographs taken immediately after the shooting by the media demonstrate Davis' car was not there. At roll call for the shift during which Oliver died, police were instructed to be alert for a black male who was robbing fast food restaurants in the area at closing time (Tr. 673). Davis is a black male and would have necessarily attracted the attention of police officers who were looking for a black male suspect. Davis claimed at trial that he parked his car on the vacant Wendy's parking lot, saw Workman shoot Oliver, and remained there as a "bunch" of additional police officers arrived. (TR. 653-654). The initial responding officer, however, first surveyed the scene for any potential suspects, determined that none were in the vicinity and he then ran to assist Oliver and Stoddard. (TR. 720). After the additional officers arrived, they took statements from every person who witnessed either the robbery or the shootout on the parking lot and recorded those statements in police reports. The police reports nowhere mention Davis or any person who could have been him.

8. To credit any assertion that Davis was present to witness the Oliver shooting,

one must believe that police, alert for a black male who was robbing Wendy's restaurants at closing time, failed to see a black male in the middle of a vacant Wendy's parking lot after the Wendy's had been robbed at closing time.

9. Thus, not only is Davis' recantation material, it is also credible since it is corroborated by Vivian Porter and other facts surrounding the crime scene.

10. Additionally, state authorities failed to produce exculpatory evidence which established that Workman did not shoot Oliver. Workman's gun was loaded with .45 caliber aluminum jacketed hollow point, silver tip bullets. Because such bullets expand upon impact, they rarely exit a body they strike. In the rare instance when a silver tip bullet exits a body it strikes, it creates an exit wound significantly larger than the entry wound.

11. The bullet that killed Lieutenant Oliver created an entry wound to Oliver's left chest and a smaller exit wound to the right of his back. Recognizing that these wounds were inconsistent with wounds caused by silver tip bullets, the United States court of Appeals for the Sixth circuit stated:

> If a .45 caliber hollow point bullet had gone all the way through Lt. Oliver's chest and emerged in one piece, we have no doubt that the exit wound would have been larger than the entry wound. It hardly follows, however, that Lt. Oliver could not have been shot with the type of ammunition Workman was firing, because the record in no way compels the conclusion that the bullet which killed the officer emerged from his body in one piece.

Workman v. Bell, 178 F. 3d 759, 767 (6th Cir. 1998).

12. At the time of the Sixth Circuit opinion, the record did not establish that the fatal bullet emerged from Lt. Oliver whole because the state had previously failed to produce a post-mortem x-ray taken of Lt. Oliver's chest.

13. On June 2, 1995, Workman served a federal subpoena upon the medical examiner for any x-ray taken of Lieutenant Oliver. (App. at 2). Although such x-ray existed, the state did not produce it. (App. at 2). Workman only learned of the existence of the x-ray on February 28, 2000, when the District Attorney's office for the 30th Judicial District mentioned it in papers filed with the Tennessee Board of Probation and Parole. Counsel immediately contacted the state and, on March 2, 2000, counsel obtained a copy of the x-ray. On March 4, 2000, counsel took the x-ray to Dr. Kris Sperry, the Chief Medical examiner for the State of Georgia. Dr. Sperry reviewed the x-ray and informed counsel that it compels the conclusion the Sixth Circuit considered critical – the bullet that killed

Oliver emerged from his body in one piece. (Affidavit of Sperry, App. at 4).

CLAIM I - AVAILABILITY OF WRIT OF ERROR CORAM NOBIS

14. All averments contained in paragraphs 1 through 13 are incorporated herein by reference. Petitioner also incorporates herein by reference all averments contained in the Affidavit of Philip Workman attached as Exhibit 1 hereto and all documents contained in the Appendix filed contemporaneously herewith.

15. The writ of error coram nobis was developed by the judiciary in England during the Sixteenth century. 18 Am. Jur. 2d, Coram Nobis and Allied Statutory Remedies, § 1 (1985). Since neither the right to move for a new trial nor the right to appeal were recognized in common law, the writ of error coram nobis was developed as a procedural mechanism to allow courts to provide relief under limited circumstances. State v. Mixon, 983 S. W. 2d 661, 666 (Tenn. 1999). Essentially, the common law writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial factual error not appearing in the record, which, if known at the time of judgment, would have prevented the judgment from being pronounced. Id.

16. Generally, at common law, the only time limitation upon filing of the writ of error coram nobis was the requirement that a petitioner show that he or she had exercised due diligence in advancing the claim and seeking the remedy. Id. at 668.

17. Though the writ of error coram nobis in civil cases was superseded when Rule 60 of the Tennessee Rules of Civil Procedure became effective in 1971, the adoption of Rule 60 did not diminish or supersede the statute which extended the writ as an available remedy in criminal proceedings. See T.C.A. § 40-26-105. See also, State v. Mixon, 983 S. W. 2d 661, 668 (Tenn. 1999). Furthermore, a writ of error coram nobis is available to claim relief for newly recanted testimony. State v. Mixon, 983 S. W. 2d at 672-673.

18. The purpose of the writ of error coram nobis is to bring to the attention of the court some fact unknown to the court which, if known, would have resulted in a different judgment. State, ex rel. Carlson v. State, 219 Tenn. 80, 407 S. W. 2d 165 (1966).

19. A petition for writ of error coram nobis in a criminal case which seeks relief

or the ground of subsequently or newly discovered evidence should recite (1) the grounds and nature of the newly discovered evidence; (2) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial; and (3) the petitioner was without fault in failing to present the newly discovered evidence at the appropriate time. Teague v. State, 772 S. W. 2d 915 (Tenn. Cr. App. 1988).

20. Here, it is apparent that the common law writ of error coram nobis should be available to Mr. Workman. After all, Mr. Workman did not know at the time of his trial that Harold Davis was committing perjury. Furthermore, at the time of his trial Mr. Workman was not told about the post-mortem x-ray taken of Lt. Oliver's body. Without the x-ray, the evidence could not have been produced that the bullet wounds to Lt. Oliver were inconsistent with a .45 caliber weapon using silver tip aluminum jacket bullets. Furthermore, it is apparent that this evidence was not available to Mr. Workman until recently. Thus, it is not Mr. Workman's fault that the evidence was not developed at an earlier time. In fact, the x-ray evidence was hidden by state officials to the extent that it was failed to be produced pursuant to a subpoena issued in 1995 in federal court requesting specifically any x-rays if they existed.

21. We also know that the evidence of the perjured testimony and hidden x-ray would have made a difference since five jurors from Workman's original trial have provided affidavits stating under oath that had they know this information at trial, they would not have convicted Workman. (See App. at 15).

22. Counsel acknowledges that T. C. A. § 27-7-103 provides a statute of limitation requiring a petition for writ of error coram nobis to be filed within one year of the date the judgment becomes final in the trial court. (See also State v. Mixon, 983 S. W. 2d 661, 668 (Tenn. 1999)). However, pursuant to Burford v. State, 845 S. W. 2d 204 (Tenn. 1992) and it progeny, to apply the statute of limitation in this context would be unconstitutional in this case.

23. As stated in Burford, governmental interests in a statute of limitation are the prevention of stale and groundless claims. Burford, 845 S.W. 2d at 207. It is also clear that a state may erect reasonable procedural requirements for triggering the right

to an adjudication, such as statutes of limitation, and a state may terminate a claim for failure to comply with a reasonable procedural rule without violating due process. Logan v. Zimmerman Brush Co., 455 U. S. 422, 437 (1982), Burford, 845 S. W. 2d at 208. However, before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitation, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner. Logan, 455 U. S. at 437; Burford, 845 S. W. 2d at 208. The question, then, is "whether the state's policy reflected in the statute affords a fair and reasonable opportunity for bringing suit." Burford, 845 S. W. 2d at 208. In other words, the test is whether the time period provides an applicant a reasonable opportunity to have the claim issue heard and determined. Burford, 845 S. W. 2d at 208.

24. Additionally in Burford, the Tennessee Supreme Court held that although a statute of limitation may be generally constitutional, it may be unconstitutional as applied:

> Although we have determined that the statute is constitutional, it is possible that under the circumstances of a particular case, application of the statute may not afford a reasonable opportunity to have the claimed issue heard and decided.

Michel v. Louisiana, 350 U. S. 95 (1955), Burford, 845 S. W. 2d at 208.

25. In Burford, the Tennessee Supreme Court found the three year post conviction procedure statute of limitation unconstitutional as applied because "petitioner found himself caught in a procedural trap and unable to initiate litigation in Trousdale County despite the approach of the three year limitation." Burford, 845 S.W.2d at 208.

26. In her concurring opinion in Burford, Justice Daughtery specifically pointed to a hypothetical instance of injustice when the state hides exculpatory evidence as warranting relief from otherwise applicable statutes of limitation:

> Hypothetically, of course, legitimate grounds for relief might come to light long after the three year period has run, as in the case of suppression of material evidence by the prosecution that is concealed for many years after trial. Through no fault of his or her own, an inmate in such situation would be foreclosed from any type of post conviction relief other than perhaps executive clemency. . . .

Burford, 845 S. W. 2d at 211.

27. Following Burford, application of the one year statute of limitation to the

writ of error coram nobis would be unconstitutional as applied here. After all, we now know that the state hid the x-ray, despite a subpoena commanding production of the x-ray in 1995 in federal court. The x-ray was only discovered on March 2, 2000, over 19 years after the original trial. Furthermore, Harold Davis' recantation did not occur until 19 years after the original trial. It is not petitioner's fault that these facts were not developed earlier in order to save him from the death penalty.

28. It would be unconscionable to allow the prosecution to hide evidence and violate the dictates of Brady v. Maryland, and then force petitioner into a procedural trap by asserting that it is too late to raise a writ of error coram nobis because of a statute of limitation. Such a policy would violate Burford, and raise the concerns expressed by Justice Daughtery, because as long as the prosecution hid the evidence for long enough, there would be no remedy available to petitioner.

29. Since this court should vacate the final judgment and sentence of death originally entered it follows that a stay of execution must be granted. Once the writ of error coram nobis is granted, there is no judgment of death to be imposed on Philip Workman.

CLAIM II - SUPPLEMENT TO ORIGINAL PETITION FOR POST CONVICTION RELIEF

30. All averments contained in paragraphs 1 through 28 are incorporated herein by reference. Petitioner also incorporates herein by reference all averments contained in the Affidavit of Philip Workman, attached as Exhibit 1 hereto; all averments raised in previously filed petitions for post-conviction relief; and all documents contained in the Appendix filed contemporaneously herewith.

31. Petitioner may typically raise constitutional error in a criminal proceeding, in a petition for post conviction relief. *See* T.C.A. § 40-30-203:

> Relief under this part shall be granted when the conviction or sentence is voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.

32. If Mr. Workman would have known about the concealed x-ray evidence before July 1, 1989, he could have raised a Brady claim concerning the x-ray in his original petition for post conviction relief. However the three year statute of limitation in effect at the time, required Mr. Workman to file his post conviction claims by July 1,

1989. See T.C.A. § 40-30-102 (1988) (repealed). At the time Workman was required to file all of his claims for post conviction relief, he was not aware that the state had been concealing the post mortem x-ray of Oliver. This concealment by the state frustrated Workman's ability to file a post conviction Brady v. Maryland claim and obtain relief.

33. Now, years after the conclusion of all state post conviction petition proceedings, Workman discovers that the state in fact has been hiding material evidence. Ordinarily, a successor petition for post conviction relief may be only brought pursuant to a motion to reopen pursuant to T.C.A. § 40-30-217. This provision limits successive post conviction claims to three very narrow grounds.

34. Again, following the analysis in Burford v. State, applying T.C.A. § 40-30-217 to limit Mr. Workman's ability to raise constitutional claims which were not raised earlier through no fault of his own would be unconstitutional. This is especially true since the bad faith actions of the state in hiding credible evidence would be asserted by the state to foreclose relief on legitimate constitutional claims raising a question of actual innocence and to put Mr. Workman to death.

35. Thus, the only remedy that would comport with fundamental fairness and not reward the state for reprehensible behavior would be to allow Mr. Workman to raise the Brady claim as if it were raised in his original post conviction petition and grant him an evidentiary hearing on the claim.

36. Once this court allows supplementation of the original petition for post conviction relief, this court should grant a stay of execution pursuant to T.C.A. § 40-30-220, which requires the court to issue a stay of execution, pending completion of post conviction proceedings.

CLAIM III - DECLARATORY JUDGMENT

37. All averments contained in paragraphs 1 through 33 are incorporated herein by reference. Petitioner also incorporates herein by reference all averments contained in the Affidavit of Philip Workman, attached as Exhibit 1 hereto; all averments raised in previously filed petitions for post-conviction relief; and all documents contained in the Appendix filed contemporaneously herewith.

38. T.C.A. § 29-14-102 grants all courts of record inherent authority within their respective jurisdictions to declare rights, status and other legal relations whether or not further relief is or could be claimed. (*See* T.C.A. § 29-14-102; *see also* Rule 57 of the Tennessee Rules of Civil Procedure).

39. Finally, this court should construe by declaratory judgment the law of the land provision of the Tennessee Constitution, Article I, §§ 8, 16 and 32 and prohibit the execution of a man who presents substantial evidence that he is factually innocent of capital murder.

40. Further, this court should declare that it would violate Article I, §§ 8, 16, and 32 of the Tennessee Constitution to fail to afford an evidentiary hearing to a person on claims of actual innocence in light of proof of fraudulent concealment of exculpatory evidence by state officials.

41. No Tennessee court has decided whether Article I, §§ 8, 16, and 32 of the Tennessee Constitution prohibit the execution of a man who presents substantial evidence that he is factually innocent of capital murder. Because executing a man who is probably innocent is a repulsive, constitutionally intolerable event, this Court should rule that such an execution violates the Tennessee Constitution.

42. Workman does not concede that Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), precludes this Court from finding that his execution would violate the Federal Constitution. Whatever limitations Herrera establishes, however, this Court, in its capacity as an arbiter of the Tennessee Constitution, is free to expand the minimum level of protection mandated by the Federal Constitution. State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999); Burford v. State, 845 S.W.2d 204, 207 (Tenn. 1992); Doe v. Norris, 751 S.W.2d 834, 838 (Tenn. 1988). Herrera itself indicates that this Court should do so.

43. The Herrera Court believed that it was limited by concerns animating Our Federalism and the traditional deference paid to the states in criminal matters. To afford these policies proper deference, the Herrera Court ruled that federal courts are not forums in which to relitigate state trials, and a claim of actual innocence does not warrant federal relief unless evidence of innocence is so overwhelming that it would be

unconstitutional to refuse granting the petitioner a new trial. Because this Court is not limited by the federalism concerns that provided the basis for the Herrera decision, it is not bound to follow that decision and should not do so. Rather, this Court should follow the Connecticut Supreme Court, the Illinois Supreme Court, the Florida Supreme Court, the Supreme Court of South Dakota, and the en banc Texas Court of Criminal Appeals, all of which recognize that executing a man probably innocent of a capital offense is, in their state, a constitutionally intolerable event. Clarke v. Commissioner of Correction, 732 A.2d 754, 757 (Conn. 1999); People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996); Roberts v. State, 678 So.2d 1232, 1235 (Fla. 1996); Jenner v. Dooley, 590 N.W.2d 463, 471 (S.D. 1999); Ex parte Elizondo, 947 S.W.2d 202, 205 (Tex.Crim.App. 1996)(en banc).

44. Courts employ varying standards in assessing whether a petitioner establishes the requisite probability of innocence sufficient to make his execution unconstitutional. For example, Connecticut courts require a petitioner to show that all the evidence, that is the evidence presented at trial and at the post-conviction proceeding, (1) clearly and convincingly establishes that the petitioner is actually innocent of the crime for which he was convicted; and (2) no reasonable fact finder considering the evidence would find the petitioner guilty. Miller v. Commissioner of Correction, 700 A.2d 1108, 1130-31 (Conn. 1997). Illinois courts conclude that relief on an actual innocence claim is appropriate if the evidence in support of that claim is new, material, noncumulative, and of such conclusive character as would probably change the result on retrial. People v. Washington, 665 N.E.2d at 489. Texas courts afford a petitioner relief if he proves by clear and convincing evidence that a jury would acquit him based on the newly discovered evidence. Ex parte Elizondo, 947 S.W.2d at 209. And the Herrera Court itself opined that a truly persuasive demonstration of actual innocence in a capital case would render the condemned's execution unconstitutional. Herrera v. Collins, 506 U.S. at 417. Under any of these standards, Workman establishes his innocence of capital murder.

45. The scientific evidence establishes that Workman did not shoot Lieutenant Oliver. Every bit of trial testimony on which the jury relied to find that

Workman shot Oliver has been discredited. Because the fatal bullet did not come from Workman's gun, under any standard, Workman establishes his innocence. This Court should therefore grant the Motion To Reopen, hold an evidentiary hearing, and rule that the Tennessee Constitution forbids executing a man who is probably innocent of any capital offense.

46. Workman relies on his affidavit attached hereto as Exhibit 1 and further relies on the appendix with material documents filed contemporaneously herewith.

47. After this court declares it is violative of the Tennessee Constitution to execute a person who has a cognizable claim of actual innocence, this court should use its inherent authority to stay Mr. Workman's execution pending a hearing on his innocence claims.

WHEREFORE, PREMISES CONSIDERED, your petitioner prays that this court grant a writ of error coram nobis and consequently grant Mr. Workman a new trial. Alternatively, petitioner prays that this court grant a hearing on Mr. Workman's supplemental petition for post conviction relief and further declare that it would be unconstitutional to execute a person who has made a substantial showing of factual innocence without a hearing.

Respectfully Submitted,

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