IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 2 2 2001
LEONARD GREEN, Clerk

PHILIP R. WORKMAN, Petitioner-Appellant,	)	
v.	)	No. 96-6652
RICKY BELL, Warden, Respondent-Appellee.	)	
In re: PHILIP R. WORKMAN, Movant.	)	No. 00-5367

DEATH PENALTY HABEAS CORPUS PROCEEDING
EXECUTION DATE: 3/30/01 1:00 a.m.

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO
SUPPLEMENTAL MEMORANDUM TO
MOTION TO REOPEN AND TO APPOINT A SPECIAL MASTER

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Respondent does not deny that ADA Campbell and AAG Pruden were involved in manufacturing and presenting Clyde Keenan's false testimony. Respondent fails to refute evidence that O.C. Smith's testimony was fabricated as well. These failures give this Court ample reason to reopen the case for a full investigation of fraud perpetrated on this Court by Respondent in all prior proceedings – fraud perpetrated in a continuing effort to secure Workman's execution in spite of his innocence.

This fraud permeates the entire proceeding against Philip Workman. Respondent fails to recognize that the fraud recently uncovered transcends Workman's claim of actual innocence. While certainly relevant to that claim, it demonstrates a pattern of fraud which has tainted *all* of the proceedings against Workman – from the time Memphis Police arrested Workman, to all proceedings in this Court, to the current effort of ADA Campbell, AAG Pruden, and AG Summers to manipulate the clemency process. These new revelations require this Court to look at Respondent's repeated denials of wrong doing during prior proceedings with a jaundiced eye. See Kyles v. Whitley, 514 U.S. 419, 445, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

In Workman's initial habeas proceeding, Workman alleged that the prosecution knowingly presented Harold Davis's false testimony that he saw

Workman shoot Oliver. We now know, *beyond any doubt*, that Davis's testimony was false. Respondent's counsel, however, repeatedly told this Court that Workman was not entitled to relief based on Davis's false testimony because Workman could not establish that the prosecution knew Davis's testimony was false:

> [The evidence] does [not] present a genuine issue of fact that any state witness testified falsely at the trial or that the prosecution knew that any testimony was false.[1]
>
> [The evidence] does [not] present a genuine issue of fact that Davis testified falsely or that the prosecution deliberately deceived the court and jurors with respect to Harold Davis.[2]
>
> [N]one of the evidence Workman offered creates a genuine issue of fact that the prosecution withheld evidence or knowingly allowed false evidence to be presented.[3]
>
> Nor does it present a genuine issue of fact that any state witness testified falsely or that the prosecution knowingly produced false testimony.[4]

In reliance upon Respondent's assertions of lack of knowledge, this Court ultimately denied relief. Workman v. Bell, 178 F.3d 759, 768 (6th Cir. 1998).

Then, after the prior appeal concluded, Workman learned that during the prior habeas proceeding, D.C. Smith withheld an x-ray showing that the fatal

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[1] Final Brief Of Respondent-Appellee, *Workman v. Bell*, No., 96-6652, p. 13.

[2] Id., pp. 15-16.

[3] Id., p. 16.

[4] Id., p. 18.

bullet did not come from Workman's gun. Workman thus moved to reopen the proceedings, and once again, Respondent denied any knowledge of the deliberate withholding of the evidence. Yet again, *based upon Respondent's claims of ignorance*, this Court denied relief as seven judges stated that "nothing in this record demonstrates that the Attorney General knew of the X-ray at the district court proceeding." Workman v. Bell, 227 F.3d 331, 341 (6th Cir. 2000)(en banc)(Opinion of Siler, J.).

And now we have Respondent's counsel in their capacity of Counsel to the Governor, Legal Advisor to the Parole Board, and co-counsel with ADA Campbell, involved in presenting the fabricated testimonies of Clyde Keenan and O.C. Smith – the very person who withheld the Oliver x-ray in earlier proceedings.

Even in the document just filed in this Court, Respondent continues to mislead this Court. Respondent represents to this Court that prior to the clemency hearing, the parties exchanged "written detailed presentations to the Board, laying out their respective positions."[5] However, Respondent fails to inform the Court that the state did not disclose the fabricated "aluminum evidence" from O.C. Smith prior to the hearing – when fully aware of the need to do so. In addition,

[5] 3/21/01 Response in Opposition at p.9 n.12.

Respondent never disclosed to this Court that the initial tests performed on the Oliver wound were negative for aluminum, that the lab technician who looked at the tissue samples under an electron microscope did not see aluminum residue, and that the lab technician's test on the "pig's foot control" was also negative for aluminum. Not surprisingly, now that Workman has discovered Smith's material omissions, Respondent ignores Smith's testimony altogether in his Response.

The recent revelations cast grave doubt on the veracity of Respondent's prior denials that it did not know that Davis or other witnesses testified falsely (raised in the first habeas) and that the failure to produce the Oliver x-ray was inadvertent (raised in the motion to reopen). This Court should reopen all of the prior proceedings (the first habeas, the request for a second habeas application, and the motion to reopen the first habeas petition) to ensure that Philip Workman is not killed on the basis of a pattern of lies which began at trial and has continued through the clemency process.[5]

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[5] Respondent also misrepresents to this Court that the documents recently filed by Philip Workman only request leave to file a successive habeas petition, and only go to a claim of actual innocence. This is not true. Because of Respondent's fraud, Workman is requesting in his motion the reopening of: (1) his initial habeas petition (which was denied because of Respondent's misleading assertions of "no knowledge" of Davis's perjury); (2) the initial application for a second petition (which also apparently was denied for similar reasons); and (3) the motion to reopen (which also was denied based on Respondent's claim of no knowledge).

While the denial of an application for a second application normally is not available for further review, fraud by a party overcomes that limitation. See Calderon v. Thompson, 523 U.S. 538, 557, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). Otherwise, a party acting fraudulently to get

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2001, I transmitted by facsimile a copy of the foregoing to Gordon W. Smith at 615-532-7791.

relief denied would be able to insulate its fraudulent actions from further review by simply deceiving the court to get relief denied, and preventing the discovery of its fraud until after getting relief denied. Congress never intended such a perverse result.