No. 00-7621

IN THE
SUPREME COURT OF THE UNITED STATES

In re PHILIP R. WORKMAN,
Petitioner.

ON PETITION FOR WRIT OF HABEAS CORPUS

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the petitioner's claim that his conviction was obtained by perjured testimony, without any allegation that the State knew of the alleged perjury, and supported only by a witness' recantation lacking any credibility, states a cognizable claim for federal habeas corpus relief?

II.

Whether the petition for an original writ of habeas corpus shows that petitioner's claims satisfy the requirements of 28 U.S.C. § 2244(b) for filing a successive habeas petition and shows exceptional circumstances to warrant the exercise of this Court's discretionary powers?

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On October 30, 1998, the United States Court of Appeals for the Sixth Circuit affirmed the denial of petitioner's first petition for habeas corpus relief. *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), *cert. denied*, 528 U.S. 913 (1999). On March 31, 2000, the Sixth Circuit denied petitioner's application for permission to file a second petition for writ of habeas corpus in an unpublished decision. *In re Workman*, Nos. 00-5367, 96-6652 (6th Cir. March 31, 2000)(order denying motion for leave to file second habeas corpus petition and motions for other relief).

STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain a petition for an original writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254(a).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(b) provides:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2244(b) provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole,

would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Evidence From Petitioner's Criminal Trial

On the evening of August 5, 1981, Philip Ray Workman ("petitioner"), robbed at gunpoint the Wendy's restaurant on Danny Thomas Boulevard in Memphis. A total of three Memphis police officers initially responded to the robbery -- Lieutenant Ronald Oliver and Officers Stoddard and Parker. (J.A., III. 1435-36, 1480) Stoddard and Oliver both responded to the north side of the restaurant, which is the side from which Workman exited. (J.A., III. 1436, 1478) Parker responded to the south side. After being confronted by Oliver at the restaurant exit, Workman fled across the parking lot. (J.A., III. 1478) Stoddard and Oliver caught up to Workman and wrestled with him across the Wendy's parking lot and into an adjacent parking lot. (J.A., III. 1479, 1482) There Workman removed a gun from his pants and shot Stoddard in the right arm, knocking him several feet backwards to the ground. (J.A., III. 1479-80, 1482) While falling to the ground, Stoddard heard several more shots. (J.A., III. 1479) When Stoddard looked up, he saw Oliver down on the ground and Workman running away. (J.A., III. 1480, 1482)

Harold Davis, a computer operator from Tacoma, Washington, witnessed the shooting. While in the restaurant parking lot, Davis heard Oliver tell Workman to "hold it," and then saw the two men struggling. (J.A., III. 1411) He saw Stoddard come to Oliver's assistance and Workman struggling with the two officers. (J.A., III. 1411) Davis observed Workman shoot Stoddard and then, holding the gun at chest or stomach height, shoot Oliver. (J.A., III. 1411, 1412) As Oliver fell, he was firing at Workman. Workman fired back and fled. (J.A., III. 1411, 1412)

Parker, who had been checking the south side of the restaurant building, ran to the north side after hearing shots fired. (J.A., III. 1437-38) When he emerged on the north side, he saw Oliver falling to the ground. (J.A., III. 1438-39) Parker checked on Stoddard, who had been shot in the arm, and Oliver then noticed Workman running through the parking lot. (J.A., III. 1439) When Workman saw Parker, Workman fired a shot at him. (J.A., III. 1440, 1480, 1483) Parker attempted to return fire, but Workman spun away before Parker could shoot. (J.A., III. 1440) Workman then fled across the parking lot and into an adjacent wooded, residential area. (J.A., III. 1442) After radioing the police dispatcher regarding the situation, Parker pursued Workman. (J.A., III. 1443) Neither Stoddard nor Parker ever fired a shot. (J.A., III. 1458; T.R., XIV. 1122-23)[1]

Workman was apprehended in the same wooded area approximately an hour after the shooting. (J.A., III. 1447) He told officers that he had thrown his gun into the woods. (T.R., XII. 759) His gun was soon located beside a truck under which Workman had hidden while police were searching for him.(T.R., XII. 797-798) The gun, a .45 caliber semi-automatic Colt pistol, capable of carrying seven rounds (J.A., III. 1499D, 1499H), was found in a condition indicating that all its rounds had been fired. (T.R. , XII. 798-799) Oliver's service revolver was found by his feet with six spent shell casings in the cylinder. (T.R., XI. 722) An autopsy of Oliver revealed that he had died as the result of a single gunshot wound. (J.A., III. 1404) An entrance wound was found on the front left side of his chest, and an exit wound in the back, near his right shoulder blade. (J.A., III. 1399, 1401) The autopsy showed that Oliver had suffered internal gunshot wound injuries to his diaphragm, stomach, both lungs and heart. (J.A., III. 1400) The medical examiner, Dr. James Bell,

[1] "T.R." references are to the record of petitioner's criminal trial, a copy of which has been made a part of the record in this habeas case. *See* R. 16.

testified that Oliver's wounds were consistent with his having been shot with a high-caliber bullet. (J.A., III. 1401)

During his own testimony, Workman stated that, after running from the officers, he fell on the parking lot. (J.A., III. 1513) He stated that, while trying to give up his gun, he was hit or grabbed and then "I guess I pulled the trigger" and "[t]he gun fired." (J.A., III. 1514-15) He stated that he then heard gunfire coming from his right, turned to it, and "I guess I shot again." (J.A., III. 1515) On cross-examination, Workman admitted, "I pulled the trigger, yes sir ... I had my hand around the gun and I guess it was pointed at the officers." (J.A., III. 1541)

After a trial by jury, petitioner was convicted in 1982 of the first degree felony murder of Oliver. At a separate sentencing hearing, the same jury sentenced Workman to death pursuant to Tenn. Code Ann. § 39-2-203(g)(1982), finding five statutory aggravating circumstances.[2]

Post-Conviction Procedural History

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;

[2] 1) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered; 2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant; 3) the murder was committed while the defendant was engaged in committing or was fleeing after committing or attempting to commit, the offense of robbery; 4) the murder was committed by the defendant while he was in or during the escape from lawful custody or place of lawful confinement; and 5) the murder was committed against any law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer. Tenn. Code Ann. § 39-2-203(i)(3), (6), (7), (8), (9) (1982). The Court of Appeals previously determined that the jury improperly considered the felony murder aggravator, but that this error was harmless. *Workman v. Bell*, *supra*, 178 F.3d at 774.

J.A. I. 14)[3] 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 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.[4] 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

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[3] This was actually Workman's second-in-time petition. His first petition was filed November 18, 1987, and dismissed without prejudice on August 27, 1992.

[4] Response of Respondent-Appellee to Petitioner's Motion to Reopen , App. E.

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). The en banc court did not rehear the panel's denial of petitioner's motion for leave to file a second habeas corpus petition. *Id.* at 333, 341-42. On October 5, 2000, the Tennessee Supreme Court set January 31, 2001, as petitioner's new execution date. ordered that petitioner's execution should be carried out on January 31, 2001.

Petitioner's "New" Evidence

As he did before the Court of Appeals, petitioner bases his petition for an original writ of habeas corpus on two pieces of evidence: the 1999 recantation of Harold Davis' 1982 trial testimony and the 1981 autopsy x-ray of Lt. Oliver's body.

Davis' Recantation

On September 24, 1999, petitioner obtained an affidavit from Vivian Porter, who stated that she was with Harold Davis on the night of August 5, 1981, in Memphis.[5] She stated that she and Davis were driving together when they were stopped by a Memphis police officer. She related that the officer left hurriedly after getting a call, and that she and Davis remained in that spot for a "couple of minutes." After proceeding down the street, they drove by the Wendy's restaurant and

[5] Appendix to Petitioner's Motion for Leave to File a Second Habeas Petition, at 27.

observed a number of police cars parked and a portion of the parking lot roped off.

On October 1, 1999, petitioner secured an unsworn statement from Harold Davis regarding the events about which he had testified at petitioner's criminal trial in 1982.[6] In that statement, Davis stated that he was driving toward the Wendy's restaurant to get something to eat when a police car pulled ahead of him. Davis stated that he pulled over to the side and observed, through his rearview mirror, a man come out of the restaurant and struggle with two police officers. One officer pulled the man's hand while the other officer fell back and pulled his gun. Davis stated he then started to leave the area and heard sirens and saw lights coming from other officers arriving. As he was pulling off, he "looked through his rear view mirror and [he] heard shots and that's when [he] took off." [7] Davis denied seeing Philip Workman shoot the police officer. Davis acknowledged selecting Workman's photograph from an array the day following Lt. Oliver's death, but stated that he had seen Workman's picture in the paper prior to selecting his photograph.

On November 20, 1999, petitioner secured a second statement from Davis, which was likewise not taken under oath.[8] In this statement, Davis stated that when he saw the police car pull into the Wendy's restaurant, he turned around to return to his friend's home and "that's when I heard all the shots and heard all the sirens and everything." Davis stated that, the following day, after he called the police department, a detective showed him a photo and Davis responded that he had not seen anything. Davis stated that the police had told him what he was to say.

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[6] *Id.* at 23; Exhibit 1.

[7] Exhibit 1 to petitioner's Motion for Leave to File Second Habeas Petition.

[8] *Id.*

In neither statement does Davis make any mention of having been with Vivian Porter or of having been stopped by a police officer. In addition to being the second statement that Davis had given within two months, the November 1999 statement was also the third statement he had given petitioner regarding his trial testimony since petitioner's conviction. In 1992, in response to questioning by petitioner's investigator, Davis stated that authorities had not pressured him to testify at Workman's 1982 trial.[9] *Autopsy X-Ray*

In response to the application for executive clemency filed by petitioner in early 2000, and to refute petitioner's claims that his bullets could not have killed Lt. Oliver, the state submitted, *inter alia*, a report from the current Shelby County, Tennessee, Medical Examiner[10] stating that Lt. Oliver's wounds were consistent with the ammunition used by Workman on the night of the shooting.[11] In that report, the medical examiner stated that he had reviewed the autopsy reports, photographs and chest x-ray.

In 1995, during federal habeas corpus proceedings in the district court, petitioner had issued a subpoena to the medical examiner's office for records, including any autopsy x-rays.[12] While petitioner received the autopsy report in response to his subpoena, in what appears to have been the

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[9] Appendix to Petitioner's Motion for Leave to File Second Habeas Petition, at 23.

[10] The medical examiner who conducted the autopsy and testified at petitioner's criminal trial died in 1987. *See* Response of Respondent-Appellee to Petitioner's Motion to Reopen, App. B, ¶ 13.

[11] Response of Respondent-Appellee to Petitioner's Motion to Reopen, App. D.

[12] Appendix to Petitioner's Motion to Reopen, at 2-4.

result of nothing more than administrative oversight, he did not receive the x-ray.[13] Petitioner made no further requests for, or motions to compel production of, the x-ray.

The x-ray is consistent with the conclusion that the bullet that killed Lt. Oliver entered one side of his body and emerged from the opposite side. The autopsy report itself (J.A. II. 1023), which petitioner had obtained prior to his trial in 1981 (R. 67),[14] likewise reflects a gunshot to the left chest, traversing left to right through internal organs, and exiting from the right back. In addition, the medical examiner's trial testimony (J.A. III. 1399-1400), as to which petitioner conducted cross-examination (J.A. III. 1404-05), also describes a gunshot to the left chest, passing through the body and exiting the right chest in the back.[15]

ARGUMENT

While Workman's petition for an original writ fails to make an affirmative statement of the reasons for not making application to the district court, as required by U.S.Sup.Ct.R. 20.4(a),[16] petitioner does acknowledge that the claims he purports to present in this petition were previously

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[13] Response of Respondent-Appellee to Petitioner's Motion to Reopen, App. B.

[14] Ex. B to Petitioner's Motion for Summary Judgment at 366-78.

[15] At the guilt phase of petitioner's 1982 criminal trial, the medical examiner testified:

> There was a gunshot wound that entered as I mentioned earlier in the left chest. It passed through the left lung, through the diaphragm, through the stomach, through the diaphragm again, through the heart, through the right lung, exited the right chest in the back as I've already mentioned. J.A. III. 1399-1400.

[16] Petitioner similarly fails to make an affirmative statement under this rule setting out specifically how and where he exhausted available state remedies or otherwise comes within the provisions of 28 U.S.C. § 2254(b).

presented to the Court of Appeals in an application for permission to file a second habeas petition under 28 U.S.C. § 2244(b).[17] This petition then, in effect, represents a third attempt to obtain federal habeas corpus relief.

The provisions of 28 U.S.C. § 2244(b) govern successive petitions for habeas relief in the lower federal courts. Whether or not this Court is bound by such restrictions, they "certainly inform" this Court's consideration of original habeas petitions like this one. *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996). Respondent submits that the petition should be denied because the claims that petitioner purports to present[18] therein do not meet the requirements of the statute. Moreover, the petition presents no exceptional circumstances to warrant the exercise of this Court's discretionary powers. U.S.Sup.Ct.R. 20.4(a).

I. PETITIONER'S ALLEGATION THAT HE WAS CONVICTED ON THE BASIS OF PERJURED TESTIMONY FAILS TO STATE A COGNIZABLE CLAIM FOR FEDERAL HABEAS CORPUS RELIEF.

On the basis of a 1988 decision of the United States Court of Appeals for the Second Circuit, *see Sanders v. Sullivan*, 863 F.2d 218, 222 (2d Cir. 1988), petitioner contends that an allegation that he was convicted on the basis of perjured testimony, absent evidence that such alleged perjury was knowingly presented, solicited or acquiesced in by the State, presents a cognizable claim of

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[17] The one exception is petitioner's first claim, which he presented to the Court of Appeals as part of a Motion for Declaration That 28 U.S.C. § 2244(b) Does Not Apply to Specified Claims.

[18] Workman's petition for an original writ inadequately sets forth his claims for relief. While he alludes to and references the claims he presented to the Court of Appeals as his "X-ray claim," "Davis claim" and his "*Herrera* claim," and presents argument on his perjured testimony claim, his petition fails to set forth those claims with any particularity. Respondent submits that this should be reason alone to deny the petition.

constitutional error.[19] But this contention is at odds with long-standing precedents of this Court. It is only the *knowing* use of perjured, material testimony by the prosecution that violates a criminal defendant's right to due process under the Fourteenth Amendment. *See United States v. Agurs,* 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois,* 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)(per curiam). *See also Hysler v. Florida*, 315 U.S. 411, 413 (1942) (prisoner cannot contend that mere recantation of testimony is a ground for invoking the Due Process Clause).[20]

The rule contended for by petitioner would represent a substantial and unanticipated departure from this Court's existing precedents. Therefore, the application of such a rule to grant relief in petitioner's case would be barred by this Court's holding in *Teague v. Lane*, 489 U.S. 288, 307 (1989). Under *Teague*, a new rule of criminal law or procedure may not be applied retroactively to cases on collateral review. Accordingly, petitioner's claim would also fail to satisfy the requirements of 28 U.S.C. § 2244(b)(2)(A) for claims based on a new rule of constitutional law.

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[19] In the Court of Appeals, petitioner also based this claim on the Sixth Circuit's decision in *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938). In this petition, petitioner correctly notes that *Jones* was subsequently superseded by the Sixth Circuit's decision in *Burks v. Egeler*, 512 F.2d 221, 226, 229 (6th Cir. 1975), *cert. denied*, 423 U.S. 937 (1975), wherein the court reiterated that, as a general matter, such claims are not cognizable on federal habeas review.

[20] As the Second Circuit acknowledged in *Sanders, supra*, 863 F.2d at 222, most other circuit courts have ruled on this issue in accordance with these decisions of the Court. *See Smith v. Wainwright*, 741 F.2d 1248, 1257 (11th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); *Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir. 1980), *cert. denied*, 449 U.S. 880 (1980); *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980), *cert. denied*, 446 U.S. 945 (1980); *Burks v. Egeler*, 512 F.2d 221, 224-226 (6th Cir. 1975), *cert. denied*, 423 U.S. 937 (1975); *Smith v. United States*, 358 F.2d 683, 684 (3d Cir. 1966); *Marcella v. United States*, 344 F.2d 876, 880 (9th Cir. 1965), *cert. denied*, 382 U.S. 1016 (1966); *Wild v. Oklahoma*, 187 F.2d 409, 410 (10th Cir. 1951).

Furthermore, and notwithstanding the *Teague* bar to the application of such a new rule, petitioner's claim based on such a new rule would necessarily fail. Even under *Sanders* such a claim would require a *credible* recantation of trial testimony of an extraordinary nature. 863 F.2d at 226. *Cf. Durley v. Mayo*, 351 U.S. 277, 290-91 (1956)(Douglas, J., dissenting) (State's failure to provide hearing when it *knows* that the testimony of the *only* witness against petitioner was false denies due process). Petitioner's perjured testimony claim is based entirely on the recent recantations of Harold Davis' trial testimony.[21] Contrary to petitioner's hyperbolic assertions to the contrary, though, "[this] new evidence is bereft of credibility." *Herrera v. Collins*, 506 U.S. 390, 421 (1993)(O'Connor, J., with whom Kennedy, J., joins, concurring).

In addition to the skepticism engendered by the fact that more than seventeen years have passed since Davis' trial testimony and statements to police, and more than seven years have passed since Davis specifically told petitioner that he had *not* been pressured to provide his testimony, it must be emphasized that neither of Davis' 1999 statements were made under oath.[22] Such evidence is inherently unreliable and unworthy of this Court's consideration.

Moreover, each of the two statements is factually inconsistent with the other. For example, and in addition to the patent inconsistencies in Davis' two accounts of his actions on the night of the murder, in his November 20, 1999, statement Davis says that he was later shown "a photo" by police

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[21] While Davis was the only trial witness who testified to seeing petitioner shoot Lt. Oliver, he was not the only percipient witness. *See* Statement of the Case — Evidence From Petitioner's Criminal Trial, *supra*. Davis' trial testimony merely corroborated the inference to be drawn from other evidence in the case, including "Workman's own trial testimony that he shot Lt. Oliver." *See Workman v. Bell*, *supra*, 178 F.3d at 768.

[22] *See* Exhibit 1 to Petitioner's Motion for Leave to File a Second Habeas Petition.

and told them, "Well, I didn't see it or anything."[23] In his October 1, 1999, statement, however, Davis clearly recalled having been presented with an "array of pictures," and that he selected one of the photographs.[24] Furthermore, both of Davis' statements openly contradict the September 24, 1999, Vivian Porter affidavit offered by petitioner as "corroboration."[25] Indeed, Davis himself never makes any mention of having been with Vivian Porter.

There is nothing reliable or trustworthy about Davis' recantations. *Cf. Schlup v. Delo,* 513 U.S. 298, 323 (1995)(to be credible, a claim of actual innocence must be supported by "new reliable evidence" not presented at trial, such as "trustworthy eyewitness accounts"). Consequently, petitioner's perjured testimony claim cannot be sustained on the basis of such evidence. Furthermore, petitioner's claim would likewise fail to satisfy the requirement of 28 U.S.C. § 2244(b)(2)(B)(ii) that the facts underlying the claim be sufficient to establish, by clear and convincing evidence, that he is actually innocent. *See Schlup v. Delo*, *supra*, 513 U.S. at 331 (court may consider how the likely credibility of the affiant bears on the reliability of the new evidence).[26]

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[23] This assertion, of course, also begs the question of why Davis would have felt compelled to call the police department the day after the murder to report that he "didn't see anything."

[24] Davis suggested that he was able to identify Workman's photograph because he had already seen his picture in the newspaper. Davis gave his statement to the police on August 6, 1981, the day following the murder. J.A. II. 972. Workman's photograph, however, did not appear in any Memphis area newspaper that day. His photograph first appeared on August 7, 1981—the day after Davis identified Workman's photograph as that of the man he saw shoot Lt. Oliver. Response in Opposition to Petitioner's Motion for Leave to File Second Habeas Petition, App. at 15-27.

[25] *See* Appendix to Petitioner's Motion for Leave to File a Second Habeas Petition, 27.

[26] By presenting this claim, petitioner impliedly concedes that he lacks sufficient evidence to prove that perjured testimony was knowingly used at his trial. In any event, to the extent petitioner purports to present any claim alleging that Davis' testimony was coerced, as he did before the Sixth Circuit, such a claim would likewise fail to satisfy the requirements of 28 U.S.C. § 2244(b)(2) on

II. PETITIONER'S CLAIM THAT THE STATE UNCONSTITUTIONALLY WITHHELD EVIDENCE OF THE AUTOPSY X-RAY DOES NOT SATISFY THE REQUIREMENTS OF 28 U.S.C. § 2244(b)(2)(B).

Petitioner contends that the State unconstitutionally withheld the autopsy x-ray of Lt. Oliver.[27] He raised no claim regarding the autopsy x-ray in his first habeas petition. 28 U.S.C. § 2244(b)(2) provides, in pertinent part, that a claim presented in a successive petition that was not presented in a prior application shall be dismissed unless:

> - the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; *and*
>
> - the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B)(i), (ii)(emphasis added). Respondent submits that the autopsy x-ray could have been discovered previously by petitioner had he only inquired. Moreover, respondent further submits that, because the autopsy x-ray itself is immaterial, it cannot support a claim of constitutional error. For the same reasons, it cannot provide clear and convincing evidence of actual innocence.

Petitioner contends that he exercised due diligence to obtain the x-ray by requesting it in 1990 and in 1995. The x-ray, though, has existed since August of 1981. While petitioner 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

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this basis.

[27] Petitioner's Motion for Leave to File Second Habeas Petition, p. 1.

request for it — despite the fact that the medical examiner himself testified at petitioner's trial. (J.A. III. 1394-1405) Instead, petitioner waited nine years, until 1990, to make any such request; even then, he made only a public records request with no specific mention of the x-ray.[28] This cannot be construed as a request for the x-ray because autopsy x-rays are not considered public records under Tennessee law.[29] While petitioner did finally cause process to issue for the medical examiner's records, including the x-ray, in 1995 — some fourteen years after the murder — due diligence would have called for petitioner to make some further inquiry regarding the autopsy x-ray when he did not receive one in response to his request. He made none.[30] The x-ray is simply not "new" evidence, previously unavailable to petitioner within the meaning of § 2244(b)(2)(B)(i).[31]

Nor, in any event, would the autopsy x-ray have been material to petitioner's guilt or innocence. The duty to disclose under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) extends only to evidence that is both favorable and material. Evidence is material only if a reasonable probability exists that, had it been available, the result of the trial would have been different. *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995). As the expert affidavit petitioner submitted to the Court of

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[28] *See* Appendix to petitioner's Motion for Leave to File a Second Habeas Petition, at 18-19.

[29] *See* Tenn. Code Ann. § 38-7-110(c)(public documents limited to county medical examiner *reports*, toxicological *reports* and autopsy *reports*).

[30] *See* Appendix to petitioner's Motion for Leave to File a Second Habeas Petition, at 20.

[31] The same reasoning vitiates any claim of constitutional error under *Brady v. Maryland*, 373 U.S. 83 (1963). *See In re Smith*, 142 F.3d 832, 835 (5th Cir. 1998)("if a defendant, using reasonable diligence, could have obtained the information, a *Brady* claim does not arise").

Appeals clearly demonstrates,[32] the x-ray, at best, is merely consistent both with the autopsy report (J.A. II. 1023) — with which petitioner had been provided prior to trial — and with the medical examiner's trial testimony (J.A. III. 1399-1400), both of which show the bullet entering and exiting Lt. Oliver's body. Petitioner himself has emphasized this point in previous filings in the Court of Appeals.[33]

Petitioner's defense at trial was that he had robbed the restaurant and shot the officer while attempting to surrender; he maintained that he was a drug addict and under the influence of drugs. *See State v. Workman*, 667 S.W.2d 44, 47 (Tenn. 1984). An x-ray showing that the bullet both entered and exited the victim's body was neither favorable nor exculpatory. In any event, petitioner did not contest the autopsy findings or the cause of death in any respect.[34] Indeed, petitioner himself admitted during his trial testimony that he shot Lt. Oliver. (J.A. III. 1515, 1541) There is simply no basis on which to conclude that the outcome of petitioner's trial would have been any different had he obtained the autopsy x-ray. Consequently, a *Brady* claim cannot be established. Nor does the

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[32] *See* Appendix to Petitioner's Motion to Reopen, at 33 (having reviewed the autopsy x-ray, petitioner's expert stated that "*the autopsy report and photographs* establish that a projectile created a wound track across the victim's chest. The projectile that caused this wound track did not fragment inside the victim's body. It traversed the victim's chest and emerged from his body intact." (emphasis added) During habeas proceedings in the district court in 1995, the same expert made the same statement without even having seen the x-ray. *See* J.A. II. 1077 ("[autopsy report] and [photographs] indicate that the bullet that created the illustrated bullet wounds exited the decedent's body").

[33] *See* November 12, 1998, Petition for Rehearing, at 5-6, where petitioner stated that "Dr. James Spencer Bell, M.D. [the medical examiner] testified for the prosecution that the bullet exited the body;" that "[i]t is undisputed . . . that there is only one exit wound, and Dr. Bell testified to only one bullet path;" and that "it is undisputed that Dr. Bell testified [that] the bullet left the body."

[34] Petitioner's cross-examination of the medical examiner at trial consisted of three questions. (J.A. III. 1404-05)

x-ray provide any evidence, much less evidence of a clear and convincing variety, to support the proposition that no reasonable trier of fact would have found petitioner guilty had the evidence been admitted. *See* 28 U.S.C. § 2244(b)(2)(B)(ii).[35] In point of fact, the jury that convicted petitioner had this evidence in the form of the medical examiner's own testimony.[36]

III. PETITIONER'S CLAIM UNDER *HERRERA V. COLLINS*[37] FAILS TO STATE A COGNIZABLE CLAIM FOR FEDERAL HABEAS CORPUS RELIEF.

Relying on this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), petitioner contends that his freestanding claim of actual innocence entitles him to federal habeas corpus relief. This Court's holding in *Herrera*, however, stands for exactly the opposite proposition. There, this Court stated:

> Petitioner urges us to hold that [his] showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not . . .
>
> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.

Id. at 393, 400-401. Consistent with this principle, Congress specifically provided, when it codified

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[35] In his petition, petitioner suggests that the x-ray proves his innocence because it tends to refute statements made, in dicta, in the 1998 opinion of the Sixth Circuit affirming the denial of habeas relief. *See* Petition for Original Writ of Habeas Corpus, p. 10. The panel that authored this decision has since clarified that such statements were dicta and speculation that was not based on the evidence in the habeas corpus record. *See Workman v. Bell, supra*, 227 F.3d at 340.

[36] Insofar as the medical examiner's report and testimony are consistent with the x-ray, it must be presumed that the medical examiner considered his own x-ray when reaching his conclusions.

[37] 506 U.S. 390 (1993)

the restrictions on filing successive habeas petitions in 1996, that such petitions were limited to claims in which a petitioner could make a sufficient showing that, *but for constitutional error*, a jury would not have convicted him. 28 U.S.C. § 2244(b)(2)(B)(ii). Thus, petitioner's allegations of innocence, standing alone, fail to state a cognizable claim for federal habeas corpus relief.

Petitioner misplaces his reliance on dicta in this Court's decision in *Herrera*, wherein it assumed, *arguendo*, that such a right might exist for "truly persuasive" and "extraordinarily high" demonstrations of innocence. First, for the reasons previously discussed,[38] petitioner's assertions of innocence fail miserably to reach this threshold. Indeed, by bringing these claims in a petition for an original writ, he has "forced [this Court] to sort through the insubstantial and the incredible as well," *Herrera v. Collins, supra*, 506 U.S. at 427 (O'Connor, J., with whom Kennedy, J., joins, concurring) — a fair characterization of the autopsy x-ray and Harold Davis recantations, respectively. Furthermore, in addition to requiring an "extraordinarily high" degree of persuasiveness to support a freestanding claim of actual innocence, this Court observed that consideration of such a claim would be warranted only "if there were no state avenue open to process such a claim," *e.g.*, executive clemency. *Id.* at 417. While petitioner fails to inform this Court of it, that avenue remains available to him.[39] *See* Tenn.Code Ann. § 40-27-101, *et seq*.

IV. NO EXCEPTIONAL CIRCUMSTANCES EXIST TO WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY POWER.

To justify the granting of an original writ of habeas corpus, the petition must show that

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[38] *See* Argument, Secs. I and II.

[39] While not a matter of record, respondent represents that a hearing on petitioner's renewed application for executive clemency has been scheduled for January 25, 2001.

exceptional circumstances warrant the exercise of this Court's discretionary powers. U.S.Sup.Ct.R. 20.4(a). Petitioner suggests that this Court should find such circumstances in the fact that seven members of the Sixth Circuit have offered their opinion, in dicta and without briefing on the issue,[40] as to whether petitioner's evidence satisfies the requirements of 28 U.S.C. § 2244(b). For the reasons discussed herein, respondent respectfully submits that such opinion was in error.

Furthermore, the principle that exceptional circumstances must exist to justify granting an original writ suggests that something beyond mere satisfaction of the statutory requirements for filing a successive petition is necessary. Here, petitioner seeks eleventh-hour relief from this Court on the basis of a patently incredible, unsworn recantation of eighteen-year old trial testimony; and a nineteen-year old autopsy x-ray in which petitioner has previously shown little interest and which is entirely consistent with other evidence available to petitioner at the time of trial. These circumstances are unexceptional. The claims petitioner presents on the basis of this evidence "do not materially differ from numerous other claims made by successive habeas petitioners." *Felker v. Turpin, supra*, 518 U.S. at 665.

[40] As discussed in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, No. 00-7620, this issue was not before the en banc court; consequently, it was not part of the supplemental briefing before that court.

CONCLUSION

The petition for writ of habeas corpus should be denied.

Respectfully submitted,

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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 January, 2001.

_____
JOSEPH F. WHALEN
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