EXECUTION DATE: 1/31/01 1:00 a.m.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

IN RE PHILIP RAY WORKMAN,

Petitioner

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

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CAPITAL CASE
Execution Date: 1/31/01 at 1:00 a.m.

QUESTIONS PRESENTED

Seven (7) Sixth Circuit judges consider Philip Workman's evidence that he is innocent of capital murder "certainly sufficient to make a prima facie showing that 'no reasonable factfinder would have found [Workman] guilty of the underlying offense.'" Workman v. Bell, 227 F.3d 331, 338 (6th Cir. 2000)(en banc opinion of Merritt, J.). They recognize that because Mr. Workman makes this showing, there are serious constitutional problems with closing the courthouse doors to Mr. Workman's claims. Id. at 337 n. 4. Nevertheless, because of a 7-7 tie vote in the Sixth Circuit, Mr. Workman faces execution without any federal consideration of his claims.

He has, in a separate petition for writ of certiorari, requested that this Court grant a writ of certiorari to review the 7-7 decision of the Court of Appeals. In this petition for writ of habeas corpus, he respectfully requests that this Court grant an original writ of habeas corpus, in a case which presents the following issues:

1. When it is clear that the prosecution's key witness at a capital murder trial committed perjury, does it violate the Eighth and Fourteenth Amendments to allow the state to enforce the judgment of conviction and execute the death sentence?

2. Should this Court exercise its original habeas corpus jurisdiction to consider claims establishing that Philip Workman is innocent of capital murder?

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IN THE
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IN RE PHILIP RAY WORKMAN,
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PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

Philip Ray Workman respectfully requests that this Court entertain an original habeas corpus action to review claims that he is innocent of capital murder, claims on which he has been denied review by the lower federal courts.

CITATIONS TO OPINIONS

Philip Workman requested that the United States Court of Appeals for the Sixth Circuit either reopen his previous habeas corpus proceeding or authorize the filing of a second habeas corpus petition. A panel denied these requests in an unpublished order. Workman v. Bell, Nos. 96-6652, 00-5367 (6th Cir. March 31, 2000)(Attached as Appendix A). The Sixth Circuit granted rehearing en banc. The en banc Court divided equally, 7-7, on whether Mr. Workman is entitled to an evidentiary hearing on claims demonstrating that he is innocent of capital murder. Workman v. Bell, 227 F.3d 331 (6th Cir. 2000)(en

banc)(Attached as Appendix B).

JURISDICTION

On September 5, 2000, the en banc Sixth Circuit announced that it was equally divided on whether Mr. Workman is entitled to an evidentiary hearing. This Court has jurisdiction to entertain an original petition for writ of habeas under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a). See Felker v. Turpin, 518 U.S. 651, 658-62 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.Const. Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S.Const. Amend. XIV: "[No] State [shall] deprive any person of life, liberty, or property, without due process of law…."

28 U.S.C. §2241(a): "Writs of habeas corpus may be granted by the Supreme Court …."

28 U.S.C. §2244(b)(2)(B): "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 —* * *

(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."

28 U.S.C. §2244(b)(3)(E): "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

I INTRODUCTION

At Philip Workman's trial, only one witness, Harold Davis, claimed that he saw Mr. Workman shoot Memphis Police Lieutenant Ronald Oliver following a restaurant robbery. Because Tennessee's felony-murder rule limits capital murder to persons (or their accomplices) who actually kill another, Davis's testimony was critical to Mr. Workman's first-degree murder conviction.

We now know that Davis's trial testimony was a lie. He was not, as he claimed at trial, a computer operator. He was, and remains today, a vagabond drug addict who wanders from one cheap motel room to another. He was not, as he claimed at trial, standing ten feet from where Lieutenant Oliver was shot. He was in a car blocks away from the scene. He did not, as he claimed at trial, see Mr. Workman shoot Lieutenant Oliver. He saw nothing.

Though Mr. Workman tried for years to prove Davis's perjury, it was not until after the District Court and the Sixth Circuit denied habeas relief that the truth came out. On September 24, 1999, Vivian Porter swore that Davis was with her the night of the Oliver shooting, and when Lieutenant Oliver was shot, they were in a car blocks away from the crime scene. Six days after Ms. Porter gave her sworn statement, Davis himself admitted that he did not see Mr. Workman, or anyone else, shoot Lieutenant Oliver.

Then, four months later (and just over a month before Mr. Workman's then-scheduled execution), the State finally turned over an x-ray of Lieutenant Oliver's chest – an x-ray which Mr. Workman had subpoenaed years earlier during habeas proceedings, but which the State failed to produce. The Chief Medical Examiner for the State of Georgia swears that the x-ray establishes that Mr. Workman did not shoot Lieutenant Oliver.

Mr. Workman requested that the Sixth Circuit either reopen his habeas proceeding or authorize a second so that a court could consider Ms. Porter's newly discovered testimony, Davis's recantation, and the Oliver x-ray. While a panel denied these requests without any explanation, the Sixth Circuit granted rehearing en banc. On September 5, 2000, however, the en banc Court announced that it was evenly divided, 7-7, on whether a court should hear the

new evidence establishing that Mr. Workman did not shoot Lieutenant Oliver. The tie vote reinstated the panel's unexplained decision.

This Court should grant a writ of habeas corpus to prevent the execution of a man who has been condemned on the basis of perjury, who has newly discovered evidence that he is innocent of capital murder, and whose life would otherwise be taken because of a tie vote.

II STATEMENT OF FACTS AND STATEMENT OF THE CASE

A Lieutenant Oliver Is Mortally Wounded

As Philip Workman was robbing a Memphis Wendy's restaurant after it closed, an employee activated a silent alarm.[1] Police arrived as Mr. Workman walked out of the Wendy's and onto the vacant parking lot.[2] A policeman hit Mr. Workman in the head with a flashlight.[3] According to the Original Police Report, in the ensuing confusion police "officers" and Mr. Workman fired weapons.[4] Lieutenant Oliver was killed in the crossfire by a bullet that went

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[1] R. 4, 589 (Testimony of Steve Burks).

[2] R. 5, 634 (Testimony of Police Officer Stoddard).

[3] Joint Appendix filed in No. 96-6652 (J.A.) at 1069 (Garvin Null Declaration).

[4] J.A. at 960 (Original Offense Report); see also J.A. at 1066 (Steve Craig Declaration).

through his chest.[5]

B The Jury Relied On Harold Davis's Perjured Testimony To Find That Mr. Workman Shot Lieutenant Oliver, And He Was Therefore Guilty Of First-Degree Murder

At Philip Workman's trial, Harold Davis claimed to be a computer operator from Tacoma, Washington. He was, in fact, a vagabond drug addict. Though he was blocks away from the Wendy's parking lot when Lieutenant Oliver was shot, he gave the jury a detailed, though patently false, account of having seen Mr. Workman shoot Lieutenant Oliver:

> A I heard the policeman tell (the white male) to hold it, and they started struggling. Then this other policeman came up and started struggling with them. When he - I saw the other policeman who came in on the other side, he got shot and spun away and I saw a gun and I saw a white male shoot the policeman who fell back and drew his revolver and started shooting. I saw the white male running away shooting back.
>
> ***
>
> Q [C]ould you describe to us in the greatest detail that you can what happened between Lieutenant Oliver and the shooter?
>
> A Well, I saw the police officer trying to grab the arm that had the gun, but he didn't quite get a hold of it ....
>
> Q Where was the pistol at when the shooter shot Lieutenant Oliver?
>
> A It was in his hand.

[5] J.A. at 1144 (Autopsy Protocol); 4/1/00 Declaration of Dr. Kris Sperry.

Q Where was his hand at in relation to Lieutenant Oliver's body?

A I guess it was around chest height or stomach height.

Q How far was the muzzle, the end of the pistol where the bullet comes out, from the body of Lieutenant Oliver?

A No more than two or three feet at the most.

***

Q How far was your car parked from where these people - where the struggle began?

A No more than ten feet at the most .[6]

To emphasize Davis's story, the prosecution had him step down from the witness stand and act out the events he supposedly saw.[7]

In closing argument, the prosecution relied on Davis's false account to convince the jury not simply that Mr. Workman shot Lieutenant Oliver, but that he did so in a cold, calculating, manner:

> Harold Davis had pulled up to get something to eat and was getting out of his car and he virtually saw the whole thing. And what did Mr. Davis say in regards to the tussle that he saw take place? Mr. Stoddard gets shot and spins away, Lieutenant Oliver and the defendant.
>
> Was it a thing where they were wrestling over this pistol? No. Was it a thing where the Lieutenant was trying to get the pistol away and there's an accidental discharge. No.

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[6] R. 5, 655-656, 664 (Testimony of Harold Davis).

[7] R. 5, 656-57 (Testimony of Harold Davis).

> [From] approximately two feet away is what I believe Mr. Davis said and a shot was fired. **He coolly and deliberately pulled this trigger and sent the bullet down this barrel and into the body of that man right there**.[8]

The trial court instructed the jury that conviction of first-degree murder required a finding that Mr. Workman actually shot Lieutenant Oliver.[9] Relying on Davis's perjury, the jury believed that was indeed the case. It convicted Mr. Workman of first-degree felony-murder[10] and sentenced him to death.[11]

C In The Initial Habeas Proceedings, Federal Courts Considered The Then-Available Evidence Insufficient To Warrant A Hearing On Mr. Workman's Claim That Davis Committed Perjury

In his habeas petition, Mr. Workman alleged that Davis committed perjury when he told the jury that he saw the Oliver shooting.[12] The District Court granted Mr. Workman leave to conduct discovery,[13] and he served on the Shelby County Medical Examiner's Office a subpoena requesting production of any x-

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[8] R. 8, 1056-57 (Prosecution Closing Argument)(emphasis added).

[9] T.R. 1158 (Guilt Stage Instructions); see State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988)(Tennessee felony-murder rule requires life-taking force to emanate from the felon or one in conspiracy with the felon).

[10] R. 8, 1092 (Jury Verdict).

[11] T.R. 1192 (Jury Verdict Form).

[12] J.A. at 46 (Petition For Writ Of Habeas Corpus).

[13] Appendix to Motion To Reopen No. 96-6652 (Reopen Apx.) at 1 (6/1/95 Agreed Order).

ray taken of Lieutenant Oliver's body.[14] Although such an x-ray exists, the Medical Examiner's Office did not produce it.[15]

Responding to the State's summary judgment motion on Mr. Workman's claim that Davis committed perjury, Mr. Workman submitted all then-available proof, including (1) statements from five witnesses at the scene that they did not see Davis or any person that could have been him;[16] (2) contemporaneous police reports listing witnesses which did not include Davis or any person who could have been him;[17] and (3) Dr. Kris Sperry's declaration that because the exit wound to Lieutenant Oliver's back was smaller than the entrance wound to his chest, Lieutenant Oliver's fatal wound was inconsistent with wounds caused by the .45 caliber hollow-point bullets that were in Mr. Workman's gun.[18] The District Court nevertheless granted summary judgment in favor of the State,

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[14] Reopen Apx. at 4 (Exhibit A to Subpoena In A Civil Case).

[15] Reopen Apx. at 6-32 (Subpoena Response).

[16] J.A. at 1066 (Steve Craig Declaration); 1069 (Garvin Null Declaration); 1074 (Kerry Kill Declaration); 1459 (Police Officer Parker Trial Testimony); 1490 (Police Officer Stoddard Trial Testimony).

[17] J.A. at 961-71 (Police Reports).

[18] J.A. at 1076-77 (Declaration of Dr. Kris Sperry). Dr. Sperry explained that because .45 caliber hollow-point bullets expand upon entering a body, they rarely exit, and in the rare instances when such a bullet exits a body, it leaves an exit wound significantly larger than the entry wound. Id.

opining that (1) Davis was probably at the scene, but everyone overlooked him;[19] and (2) Dr. Sperry's declaration "does not state that Oliver's wound could not have been caused by petitioner's weapon …."[20]

The Sixth Circuit affirmed. In considering the failure of everyone at the scene to see Davis, it found that Davis was there but had been overlooked.[21] While Dr. Sperry's affidavit left the court "no doubt" that the fatal bullet could not have come from Mr. Workman's gun *if* it emerged from Lieutenant Oliver intact, it denied Mr. Workman relief "because the record in no way compels the conclusion that the bullet which killed the officer emerged from his body in one piece."[22]

Mr. Workman sought certiorari from this Court, but on October 4, 1999, this Court denied his petition.[23] Thus, as of that date, the federal courts had ruled that Mr. Workman was not entitled to a hearing on his claim that Davis committed perjury because he could not establish that (1) Davis was at a location

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[19] J.A. at 1323-24 (Order On Cross-Motions For Summary Judgment).

[20] J.A. at 1326 (Order On Cross-Motions For Summary Judgment).

[21] Workman v. Bell, 178 F.3d 759, 768 (6th Cir. 1998).

[22] Workman v. Bell, 178 F.3d at 767.

[23] Workman v. Bell, 120 S.Ct. 264 (1999).

removed from the crime scene; and (2) the fatal bullet emerged from Lieutenant Oliver's body whole. Evidence establishing these facts has now finally come to light.

D It Is Now Beyond Dispute: Harold Davis Lied About Seeing The Oliver Shooting

1 Vivian Porter Swears That Davis Was Blocks Away From The Scene And Did Not See The Oliver Shooting

On September 24, 1999, counsel traveled to Memphis to ascertain whether Davis's sister, Jacqueline Moden, could identify a man in a photograph. Unexpectedly, and contrary to a statement Ms. Moden previously gave to an investigator working on Mr. Workman's behalf, Ms. Moden told counsel that Vivian Porter was with Davis the night of the Oliver shooting, and she arranged a meeting between Ms. Porter and counsel.[24] At that meeting, Ms. Porter informed counsel that Davis was with her the night of the Oliver shooting, and they were in a car blocks from the crime scene when the shooting occurred. She has signed a sworn statement detailing Davis's whereabouts at the time of the shooting.[25]

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[24] Appendix filed in support of No. 00-5367 (App.) at 20 ¶3 (3/22/00 Declaration of Christopher M. Minton).

[25] Id.; App. at 27 (9/24/99 Affidavit of Vivian Porter).

2 Davis Admits That He Lied At Trial

For years, counsel for Mr. Workman looked for the itinerant Davis. Ms. Moden, after telling counsel about Ms. Porter, contacted Davis's mother. Thereafter, Mrs. Davis contacted counsel and gave him the telephone number of a Phoenix, Arizona, motel where Davis might be found.[26] Counsel immediately traveled to that motel, but Davis was gone. An extensive search of the seamier sections of Phoenix, however, miraculously revealed Davis at a Motel 6.[27]

Davis told counsel that he lied when he claimed at trial that he parked his car on the Wendy's parking lot and watched Mr. Workman shoot Lieutenant Oliver. He acknowledged that he was not at the crime scene, and he did not see Mr. Workman, or anyone else, shoot Lieutenant Oliver. He explained that authorities coerced him to tell his false story, threatening his family and him with harm if he did not do so.[28] Seven Sixth Circuit judges recognize that Davis's recantations of his perjured trial testimony are "especially important given Davis's status as **the only witness** to testify that he actually saw Workman shoot

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[26] App. at 20 ¶4. (3/22/00 Declaration of Christopher M. Minton).

[27] App. at 23 ¶2 (3/20/00 Declaration of Jefferson T. Dorsey).

[28] Exhibit 1 to No. 00-5367 (Videotape of Harold Davis Interviews).

Oliver."[29]

3 The Recently Produced Oliver X-Ray Confirms That Davis Lied At Mr. Workman's Trial

On March 2, 2000, the State finally produced an x-ray of Lieutenant Oliver's chest, evidence that had been under subpoena for four and a half years. Mr. Workman immediately had Dr. Kris Sperry, now the Chief Medical Examiner for the State of Georgia, review it. Dr. Sperry swears that the x-ray establishes that the bullet that killed Lieutenant Oliver emerged from his body intact, and this, in turn, establishes that the fatal bullet did not come from Mr. Workman's gun.[30] Indeed, according to the Sixth Circuit's opinion denying relief, because the record now compels a conclusion that the fatal bullet emerged from Lieutenant Oliver's body in one piece, there is "no doubt": it did not come from Mr. Workman's gun.

E A Tie Vote By The En Banc Court Has Denied Mr. Workman The Opportunity To Have Any Court Consider His New Evidence

With dispatch, on March 6, 2000, Mr. Workman moved a Sixth Circuit

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[29] Workman v. Bell, 227 F.3d 331, 337 (6th Cir. 2000)(en banc opinion of Merritt, J.). (emphasis added).

[30] 4/1/00 Declaration of Dr. Kris Sperry.

panel to reopen his prior habeas proceeding because the failure to produce the Oliver x-ray corrupted that proceeding.

In addition, on March 23, 2000, pursuant to 28 U.S.C. § 2244(b), Mr. Workman moved the panel to authorize a second habeas application containing claims that (1) the State violated the Eighth and Fourteenth Amendments by withholding prior to trial the Oliver x-ray (X-Ray Claim); (2) the State violated the Sixth, Eighth, and Fourteenth Amendments by obtaining and presenting Davis's perjured testimony (Davis Claim); and (3) executing Mr. Workman would violate the Eighth and Fourteenth Amendments because he is actually innocent of capital murder (Herrera Claim). In his motion, Mr. Workman argued (1) that his claims met AEDPA "gatekeeper" standards;[31] and, alternatively, (2) that the Constitution precluded the court from applying the AEDPA "gatekeeper" to claims demonstrating that he is innocent of capital murder.[32] On March 31, 2000, the panel denied Mr. Workman's requests without providing any reasoning.[33]

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[31] Petitioner Philip Ray Workman's Motion For Leave To File A Second Habeas Corpus Petition at 6-11.

[32] Id. at 12-13.

[33] Appendix A (3/31/00 Orders in Nos. 96-6652 and 00-5367).

The en banc Sixth Circuit granted rehearing. In his en banc brief Mr. Workman reiterated his argument that application of 28 U.S.C. § 2244(b) to claims demonstrating that he is innocent of capital murder violates the Constitution.[34]

On September 5, 2000, the en banc court announced that it was evenly divided on whether Mr. Workman should be given an opportunity to have the newly discovered evidence heard.[35] Seven judges agreed that denying Mr. Workman a forum for claims establishing that he is innocent of capital murder raises serious constitutional questions.[36] They therefore voted to order a hearing on those claims and to ascertain whether the failure to produce the Oliver x-ray amounted to fraud justifying recall of the mandate.[37] An equal number of judges, however, opined that Mr. Workman's evidence did not show that he was innocent of capital murder. This conclusion, however, is based on the *mistaken* belief that the exit wound to Lieutenant Oliver was larger than the entry wound.[38]

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[34] Supplemental En Banc Brief of Philip R. Workman at 40-43.

[35] Workman v. Bell, 227 F.3d 331 (6th Cir. 2000).

[36] Workman v. Bell, 227 F.3d at 337 n.4 (opinion of Merritt, J.).

[37] Workman v. Bell, 227 F.3d at 338 (opinion of Merritt, J.).

[38] Workman v. Bell, 227 F.3d at 340 (opinion of Siler, J.).

That simply is not true.[39]

The result: While seven (7) federal judges declare that Philip Workman has sufficient proof to establish that he is innocent of capital murder, the stalemated Sixth Circuit has left him no federal forum for his claims. This Court must intervene.

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[39] Judge Siler's opinion opines that " the autopsy report ... clearly shows that the exit wound is in a jagged form measuring .64" x .21", which is somewhat *larger* and much more distorted than the entry wound which is .50" in diameter." Workman v. Bell, 227 F.3d at 340 (opinion of Siler, J.). This opinion, however, contains a fatal flaw - it fails to factor in the shapes of the entrance and exit wounds and how those shapes, in relation to their measurements, establish the surface areas of the entrance and exit wounds. When one performs this investigation one learns that the exit wound is over three times smaller than the entrance wound.

The entrance wound is circular. (J.A. at 1152 (Autopsy Protocol)). It has a diameter of .50". (Id.). The area of a circle = II r^2. Thus, the area of the entrance wound is 3.14159 x $.25^2$ = 0.196 square inches.

The exit wound is in the approximate shape of a right triangle. (Id.). It has a height of .21" and a width of approximately .64". (Id.). The area of a triangle = (Height x Length)/2. Thus, the area of the exit wound is (.21 x .64)/2 = .067 square inches, an area over three times smaller than the entry wound.

REASONS FOR ENTERTAINING AN ORIGINAL APPLICATION

Reasons For Not Making Application In The District Court

Through an original application to this Court, Mr. Workman seeks to present claims establishing that he did not shoot Lieutenant Oliver, and he is therefore innocent of capital murder. On March 31, 2000, a Sixth Circuit panel denied Mr. Workman's request that it authorize a second habeas corpus proceeding. While the Sixth Circuit granted rehearing en banc, the en banc Court's 7-7 tie vote has reinstated the panel's denial of relief. If this Court does not grant certiorari on the above issues (as presented in a separate petition for writ of certiorari), then this Court's original habeas jurisdiction is the only vehicle through which Mr. Workman can present claims demonstrating his innocence. Absent granting certiorari, this Court must exercise its original habeas jurisdiction to ensure that Mr. Workman receives the federal habeas relief to which he is entitled.

I MR. WORKMAN WAS CONDEMNED ON THE BASIS OF PERJURED TESTIMONY -- EXECUTING HIM ON THE BASIS OF LIES IS SIMPLY INTOLERABLE

While this Court holds that a due process violation occurs when a prosecutor *knowingly* uses perjured testimony, see Giglio v. United States, 405 U.S. 150, 153 (1972), it has not decided whether a due process violation can

occur in the absence of a prosecutor's knowledge that testimony is false. The United States Courts of Appeals have reached different answers to this question.

The Second Circuit holds that a due process violation occurs when the prosecution's chief witness credibly recants his testimony, and the state nonetheless continues to punish the prisoner. Sanders v. Sullivan, 863 F.2d 218, 222 (2d Cir. 1988). The Second Circuit reasons that

> [t]here is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony or even false testimony by witnesses with some affiliation with a government agency. Such a rule elevates form over substance. It has long been axiomatic that due process requires us "to observe that fundamental fairness essential to the very concept of justice." **It is simply intolerable in our view that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies.**

Sanders, 863 F.2d at 224 (emphasis added; citations omitted). The Second Circuit therefore holds that a due process violation occurs when a state leaves a conviction in place after the recantation of material testimony that most likely affected the verdict. Sanders, 863 F.2d at 225. In Jones v. Kentucky, 97 F.2d 335, 338 (6th Cir. 1938), the Sixth Circuit reached a similar conclusion. But see Burks v. Egeler, 512 F.2d 221, 229 (6th Cir. 1975).

Other circuit courts reject the notion that a due process violation can occur if the prosecution does not know that testimony is false. See, e.g., Blackmon v.

Scott, 22 F.3d 560, 565 (5th Cir. 1994); Smith v. Wainwright, 741 F.2d 1248, 1257 (11th Cir. 1984); United States ex rel. Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir. 1980). These courts base their decisions on (1) the doctrine that only prosecutorial involvement constitutes the necessary state action to support a due process violation; and (2) a concern for maintaining the finality of criminal convictions. See Sanders, 863 F.2d at 222. The Second Circuit persuasively explains why these concerns do not preclude a court from finding a due process violation absent prosecutorial knowledge that testimony is false.

As to state action, the Second Circuit explains that a state's failure to cure a conviction founded on testimony that has been credibly recanted exhibits sufficient state action to constitute a due process violation. Sanders, 863 F.2d at 224. As to finality, the Second Circuit holds that a due process violation will occur only when (1) there is a credible recantation of testimony that most likely affected the verdict; and (2) the state, alerted to the recantation, leaves the conviction in place. Sanders, 863 F.2d at 225. Given this standard, only those convictions that are fundamentally unfair, and that a state refuses to correct, will be subject to attack. Finality has never commanded blind deference under these circumstances. See Mackey v. United States, 401 U.S. 667, 693 (1971)(Harlan, J., concurring) ("There is little societal interest in permitting the criminal process

to rest at a point where it ought properly never to repose").

The only witness who told Mr. Workman's jury that he saw the Oliver shooting has recanted his testimony. That recantation is supported by a disinterested witness and expert testimony. Seven Sixth Circuit judges state that "a jury could have had a reasonable doubt about whether Philip Workman actually fired the weapon which killed Lt. Oliver ...." Workman v. Bell, 227 F.3d at 338 (opinion of Merritt, J.). Executing Mr. Workman under these circumstances is simply intolerable. This Court should therefore grant Mr. Workman's application for an original writ of habeas corpus.

II THE LOWER COURT HAS DENIED MR. WORKMAN A REMEDY FOR CLAIMS DEMONSTRATING THAT HE IS INNOCENT OF CAPITAL MURDER

While the AEDPA did not eliminate this Court's original habeas jurisdiction, its provisions inform this Court's consideration of original petitions. Felker v. Turpin, 518 U.S. 651, 662 (1996). In particular, when, as here, a petitioner presents a second habeas corpus application, this Court considers whether the claims it presents meet 28 U.S.C. § 2244(b) standards. Id., 518 U.S. at 662-63. If so, this Court then considers whether exceptional circumstances exist. See id., 518 U.S. at 665. Because claims Mr. Workman presented to the Sixth Circuit in his request that it authorize a second habeas

proceeding meet Section 2244(b) standards, and because exceptional circumstances exist, this Court should exercise its original habeas jurisdiction over claims the Sixth Circuit rejected.

A Claims Mr. Workman Presented To The Sixth Circuit Meet Section 2244(b) Standards

Section 2244, 28 U.S.C., provides that a habeas petitioner may pursue new claims[40] in a second habeas proceeding if he makes a prima facie showing that (1) the factual predicate for the claims could not have been discovered previously through the exercise of due diligence; and (2) the factual allegations supporting the claims, if true, establish by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner guilty of the underlying offense. Mr. Workman makes a prima facie showing on these

[40] Mr. Workman did not present any claim resembling his X-Ray and Herrera Claims in the prior habeas proceeding. Mr. Workman acknowledges that he previously presented a claim that the State's knowing use of Davis's perjured testimony violated the Fourteenth Amendment, and that claim is similar to the Davis Claim he presents in this petition. Courts recognize, however, that because Mr. Workman's present claim includes allegations that authorities coerced Davis into testifying falsely, it implicates the Sixth Amendment and is therefore distinct from a Fourteenth Amendment perjured testimony claim. See U.S. v. Heller, 830 F.2d 150, 152-54 (11th Cir. 1987); U.S. v. Vavages, 151 F.3d 1185, 1190 (9th Cir. 1998); U.S. v. Jackson, 935 F.2d 832, 847 (7th Cir. 1991). If this Court nonetheless has doubt about whether Mr. Workman's present Davis Claim is different from the previously presented perjured testimony claim, that doubt should be resolved in Mr. Workman's favor. Sanders v. U. S., 373 U.S. 1, 16 (1963). In any event, given that Mr. Workman's claims demonstrate that he is innocent of capital murder, he is entitled to habeas relief notwithstanding any provision of the AEDPA, as application of the AEDPA would be unconstitutional. See pp. 17-18, of contemporaneously filed Petition for Writ of Certiorari in Workman v. Bell, No. ___.

elements.

1 Mr. Workman Exercised Due Diligence In Investigating Yet Unheard Claims Establishing That He Is Innocent Of Capital Murder

Undersigned counsel began representing Mr. Workman in 1990. Counsel timely began efforts to discover the factual bases of Mr. Workman's X-Ray Claim, Davis Claim, and Herrera Claim. Reasons beyond counsel's control, however, precluded him from discovering the evidence that supports those claims.

a X-Ray Claim

On November 5, 1990, pursuant to Tennessee's Public Records Act, counsel requested from the Shelby County Medical Examiner's Office any document[41] relating to, or reflecting upon, the Oliver shooting.[42] The Medical Examiner's Office did not produce the Oliver x-ray.[43]

On June 1, 1995, Mr. Workman served a subpoena on the Medical

[41] Counsel defined "document" broadly as encompassing "any medium upon which information can be recorded (including) any ... graphic matter, ... print, laboratory, record, (or) photograph." App. at 18 (11/5/90 Letter From Christopher M. Minton to Medical Examiner).

[42] App. at 18-19 (11/5/90 Letter from Christopher M. Minton to Medical Examiner).

[43] App. at 20 ¶ 2. (Declaration of Christopher M. Minton).

Examiner's Office commanding production of the Oliver x-ray.[44] Again, it was not produced.[45]

b Davis Claim

On February 22, 1991, counsel hired Ron Lax, a private investigator, to locate, interview, and otherwise investigate Davis.[46] When Mr. Lax spoke to Davis's sister, Jacqueline Moden, he specifically asked if she was aware of any person who might have information about Davis's claim that he saw the Oliver shooting. Ms. Moden did not give Mr. Lax Vivian Porter's name.[47]

On February 26, 1992, Davis called Mr. Lax from an undisclosed location. Mr. Lax specifically asked Davis if authorities had pressured him to obtain false testimony at Mr. Workman's trial. Davis said they had not.[48]

On September 24, 1999, Ms. Moden told counsel for the first time that, contrary to her statement to Mr. Lax, Vivian Porter was with Davis the night

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[44] Id. at 04 (Exhibit A to Subpoena).

[45] Reopen Apx. At 6-32 (Subpoena Response).

[46] App. at 21 ¶2 (Declaration of Ron Lax).

[47] App. at 22 ¶7 (Declaration of Ron Lax).

[48] App. at 22 ¶8 (Declaration of Ron Lax).

Oliver was shot.[49] Later that day, Ms. Porter signed her sworn statement that Davis was with her the night Lieutenant Oliver was shot and neither she nor Davis saw the shooting.[50]

On September 30, 1999, days after Davis's mother gave counsel information indicating that Davis was living in a Phoenix motel room,[51] counsel tracked down Davis. Davis recanted his trial testimony and explained that authorities coerced him to lie at Mr. Workman's trial.[52]

c Herrera Claim

In Herrera v. Collins, 506 U.S. 390 (1993), this Court assumed that in a capital case a "truly persuasive demonstration" of actual innocence made after trial would render the execution of a defendant unconstitutional. Herrera, 506 U.S. at 417. This Court went on to opine that the threshold showing for such a claim would be "extraordinarily high." Id. Mr. Workman did not have sufficient evidence to meet this burden until he obtained the Oliver x-ray, Ms. Porter's sworn statement, and Davis's recantations. For the reasons discussed

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[49] App. at 20 ¶3 (Declaration of Christopher M. Minton).

[50] Id.; App. at 27 (9/24/99 Affidavit of Vivian Porter).

[51] See App. at 20 ¶ (Declaration of Christopher M. Minton).

[52] Exhibit 1 to No. 00-5367 (Videotape of Harold Davis Interviews).

above, occurrences beyond counsel's control prevented Mr. Workman from having these critical pieces of evidence until now.

2 The Evidence Establishes That Mr. Workman Is Innocent Of Capital Murder

The new evidence establishes that Mr. Workman did not shoot Lieutenant Oliver. Given Tennessee's felony-murder rule, seven Sixth Circuit judges recognize that the new evidence is "certainly sufficient to make a prima facie showing that 'no reasonable factfinder would have found [Workman] guilty of the underlying offense.'" Workman v. Bell, 227 F.3d at 338. This is the exact standard 28 U.S.C. § 2244(b)(2)(B)(ii) establishes.

B This Case Presents Exceptional Circumstances

Seven (7) federal judges recognize that Mr. Workman presents evidence that he did not shoot Lieutenant Oliver, and he is therefore innocent of capital murder. Because an equal number of judges disagree, the controlling decision allowing Mr. Workman's execution to proceed is an unexplained, two-page, panel order. These circumstances are not only exceptional, they are virtually unprecedented.

Given these exceptional circumstances, if this Court does not grant certiorari, it must exercise its original habeas jurisdiction to prevent a miscarriage

of justice. See Schlup v. Delo, 513 U.S. 298, 324-325 (1995) (executing an innocent person is "the quintessential miscarriage of justice").

CONCLUSION

For the foregoing reasons this Court should stay Mr. Workman's January 31, 2001, 1 a.m. execution, entertain an original habeas petition, and grant Mr. Workman relief from his unconstitutional conviction and death sentence.

Respectfully submitted,

Christopher M. Minton
460 James Robertson Parkway
Nashville, Tennessee 37243
(615) 253-1986

VERIFICATION

I declare under penalty of perjury under the laws of the United States of America that the statements of fact made in Mr. Workman's Application For An Original Writ of Habeas Corpus are true and correct to the best of my information and belief.

Executed on December 14, 2000.

_____
Christopher M. Minton

CERTIFICATE OF SERVICE

I certify that on December 14, 2000, I placed in the United States Mail, first class postage prepaid, a copy of the foregoing addressed to:

Gordon W. Smith
Deputy State Attorney General
ATTORNEY GENERAL'S OFFICE
500 Charlotte Avenue
Nashville, Tennessee 37243-0493

_____

Christopher M. Minton