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

No. _____

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

PHILIP RAY WORKMAN,
Petitioner,

v.

RICKY BELL, Warden,
Respondent

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

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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. Under these circumstances the following questions are presented:

1. When a condemned man is innocent of capital murder, does it violate the Eighth and Fourteenth Amendments to deny him a federal forum to prove claims establishing his innocence?

2. a. In a capital habeas proceeding, can a Court of Appeals recall its mandate when evidence establishing the petitioner's innocence of capital murder was either fraudulently withheld from him or otherwise unavailable?

   b. Has Mr. Workman made a *prima facie* showing entitling him to recall of the mandate?

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PETITION FOR WRIT OF CERTIORARI
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Philip Ray Workman respectfully requests that this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit. He has in a separate document requested that the Court alternatively grant an original writ of habeas corpus.

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 A panel denied these requests in an unpublished order.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 review this case by writ of certiorari pursuant to 28 U.S.C. §§ 1254(1), 1651(a); and Supreme Court Rule 13.3.

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. §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 certiorari 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 GRANTING A WRIT OF CERTIORARI

I THIS CASE PRESENTS A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE WHICH HAS EVENLY DIVIDED THE EN BANC COURT: WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT APPLYING 28 U.S.C. §2244(b) TO CLAIMS DEMONSTRATING THAT A CONDEMNED INMATE IS INNOCENT OF CAPITAL MURDER

In the en banc opinion stating that Mr. Workman should receive an evidentiary hearing, seven Sixth Circuit judges state that Vivian Porter's sworn statement, Davis's recantations, and the Oliver x-ray are "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 (opinion of Merritt, J.). Those judges express grave reservations about closing the courthouse door under such circumstances:

> To prohibit this court and the Supreme Court from reviewing claims of innocence in death penalty habeas cases would raise serious constitutional issues under the due process clause and under Article I, § 9, which prohibits the suspension of the writ of habeas corpus.

Workman v. Bell, 227 F.3d at 337 n.4 (opinion of Merritt, J.). Several circuit courts agree with the seven judges who voted to grant Workman a hearing on his claims: applying AEDPA procedural provisions to preclude review of claims establishing that a prisoner is innocent of the crime for which he has been convicted raises troubling constitutional questions. See Lucidore v. New York

State Division of Parole, 209 F.3d 107, 112-13 (2d Cir. 2000); Miller v. Marr, 141 F.3d 967, 978 (10th Cir. 1998); Triestman v. United States, 124 F.3d 361, 378-79 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 248 (3d Cir. 1997).

Given the growing recognition that innocent persons have been sentenced to death, whether the AEDPA can deprive a condemned prisoner of a federal forum for claims establishing the he is innocent is an issue that will continue to arise. This case therefore provides this Court an opportunity to resolve a recurring issue, vital to our system of justice, on which the lower courts need guidance. This Court should therefore grant certiorari to resolve the constitutionality of applying 28 U.S.C. §2244(b) to Mr. Workman's claims, and it should thereafter hold that Mr. Workman is constitutionally entitled to a federal forum for the vindication of claims demonstrating that he is innocent of capital murder.

II THIS CASE PRESENTS FOR RESOLUTION THE QUESTION LEFT OPEN IN CALDERON v. THOMPSON: WHETHER A COURT OF APPEALS CAN RECALL ITS MANDATE WHEN THERE HAS BEEN A SHOWING OF FRAUD ON THE COURT

In Calderon v. Thompson, 523 U.S. 538 (1998), this Court considered the circumstances under which a court of appeals can recall its mandate in a habeas case. In establishing standards to guide the exercise of such power, this Court

stated:

> [w]e should be clear about the circumstances we address in this case. This … is not a case of fraud upon the court, calling into question the very legitimacy of the judgment.

Calderon, 523 U.S. at 557. By making this statement, this Court left open the question whether a litigant who can establish fraud is entitled to reopen the habeas proceeding. This case presents an opportunity to resolve this question and establish applicable standards for cases involving fraud in the initial habeas proceedings.

As this Court recognizes: "[T]ampering with the administration of justice … involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944). For this reason, all fourteen judges of the en banc Sixth Circuit agree that a closed proceeding can be reopened upon a showing of fraud. Workman v. Bell, 227 F.3d at 336 (opinion of Merritt, J.), 341 (opinion of Siler, J.).

The en banc court evenly divided, however, on whether Mr. Workman should have an opportunity to establish fraud. Seven judges conclude that the failure to produce the Oliver x-ray, in conjunction with Davis's perjured testimony induced by threats, establishes a sufficient initial showing of fraud to

warrant an evidentiary hearing on the issue. Workman v. Bell, 227 F.3d at 336 (opinion of Merritt, J.). Seven other judges, however, have concluded that fraud on the court should be limited to acts perpetrated only by an attorney involved in the federal proceedings, and because the Medical Examiner's Office, not an attorney, failed to produce the Oliver x-ray, Mr. Workman must lose. Workman v. Bell, 227 at 341 (opinion of Siler, J.).

This Court should grant certiorari, resolve the question Calderon left open, establish standards governing recall of a mandate when fraud is alleged, and thereby resolve an issue that has evenly divided the en banc court below.

CONCLUSION

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

Respectfully submitted,

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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