

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

November 30, 2000

**Cecil Crowson, Jr.
Appellate Court Clerk**

PHILIP R. WORKMAN,)
)
Defendant/Appellant/Movant,)
)
v.)
)
)
STATE OF TENNESSEE,)
)
Plaintiff/Appellee/Respondent.)

No. M1999-01334-SC-DPE-PE

**MOTION OF PHILLIP WORKMAN REQUESTING AN
ORDER IMPLEMENTING THE NOVEMBER 13, 2000, DIRECTIONS
OF THE CHIEF DISCIPLINARY COUNSEL OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY**

On October 5, 2000, this Court entered a per curiam order directing that the Warden of Riverbend Maximum Security Institution execute Philip Workman’s sentence of death on January 31, 2001, “unless otherwise ordered by this Court or other appropriate authority.” On October 24, 2000, Philip Workman notified the Chairman of the Board of Probation and Parole (Parole Board) that he sought a commutation of his sentence of death arising out of the death of Memphis Police Officer Ronnie Oliver.

Mr. John Pierotti, the former District Attorney General for Tennessee’s 30th Judicial District, who had no substantial responsibility for Mr. Workman’s case, filed the notice with the Board, informing that he was representing Philip Workman with the blessings and encouragement of Officer Oliver’s daughter, and because of the unusual circumstances and evidence that called into question the jury’s verdict and sentence of death.

On October 30, 2000, Board of Professional Responsibility (Ethics Board) Deputy Chief Disciplinary Counsel Laura Chastain spoke to Mr. Pierotti on the telephone and, given his former

employment with the District Attorney General's Office, instructed him to write a letter to Chief Disciplinary Counsel Lance Bracy, inquiring about the ethical propriety of his representation of Mr. Workman before the Parole Board. Mr. Pierotti wrote the suggested inquiry to Chief Disciplinary Counsel Bracy on October 31, 2000.

On November 13, 2000, in Advisory Ethics Opinion No. 2000-A-731, Chief Disciplinary Counsel Bracy concluded that while Mr. Pierotti did not have a conflict, prior to any hearing before the Parole Board, Mr. Workman, as a present client, must be provided with a thorough disclosure about, and make a knowing consent to, Mr. Pierotti's representation, stating:

It is the opinion of Disciplinary Counsel that this disclosure should be made, and the inmate's informed consent given, on the record in a setting where due process is available, i.e., *in a hearing before a court*. As a part of this disclosure, the inmate should be informed that he has the right to (and be given the opportunity to) seek the advice of independent counsel as to whether he should consent to this representation. [Emphasis added].

Neither the Parole Board, the Assistant District Attorney General representing the State before the Parole Board, nor the representative of the Attorney General's Office in these proceedings has expressed an interest in having input on Mr. Workman's personal decision knowingly and voluntarily waiving any objections he may have to Mr. Pierotti's representation. There is, then, no interested, necessary or adverse party to the judicially supervised waiver proceedings directed by Chief Disciplinary Counsel.

Pursuant to Tenn.R.App.P. 22(a), this Court's inherent, exclusive authority to oversee and implement the decisions of the Ethics Board, this Court's ongoing jurisdiction in this death penalty case, and the fundamental interest of life at stake here, Mr. Workman respectfully requests this Court to enter an order (1) effectuating the direction of Chief Disciplinary Counsel,

(2) providing a judicial forum where he can be informed of his rights, and make a knowing and informed decision about Mr. Pierotti representation; and (3) directing that such proceedings occur as expeditiously as possible.

In support of this motion, Mr. Workman shows:

1. On March 31, 1982, a Shelby County, Tennessee, jury sentenced Mr. Workman to death for the homicide of Memphis Police Lieutenant Ronald Oliver.

2. Pursuant to the 1982 judgement of conviction, Mr. Workman is presently confined under a sentence of death at the Riverbend Maximum Security Institution, 7475 Cockrill Bend Industrial Road, Nashville, Tennessee 37209.

3. Mr. Workman unsuccessfully sought post-conviction relief in State and federal courts.

4. During post-conviction proceedings, neither the State nor federal courts provided Mr. Workman an evidentiary hearing to consider:

a. Vivian Porter's testimony that Harold Davis, the only witness who testified that he saw Mr. Workman shoot Lieutenant Oliver, was with her the night of the Oliver shooting, and they were not at the scene of that shooting;

b. Mr. Davis's recantation of his trial testimony; and

c. the opinions of two pathologists that the bullet that killed Lieutenant Oliver did not come from Mr. Workman's gun.

5. After reviewing the above evidence and the record of Mr. Workman's trial, Mr. Pierotti expressed an interest in representing Mr. Workman in a proceeding before the Parole Board seeking to commute Mr. Workman's death sentence.

6 On September 28, 2000, attorney Jefferson Dorsey informed Mr. Workman that

- a. Mr. Pierotti was interested in representing Mr. Workman in a proceeding before the Parole Board;
- b. from 1968 to 1990, Mr. Pierotti was an Assistant District Attorney General for Tennessee's 30th Judicial District (formerly Tennessee's 15th Judicial District), which consists of Shelby County;
- c. from 1990 to 1996, Mr. Pierotti was the District Attorney General for Tennessee's 30th Judicial District; and
- d. during Mr. Workman's first and second post-conviction proceedings which took place from January 7, 1985, to February 28, 1994, the District Attorney General's Office for the 30th Judicial District appeared on behalf of the State of Tennessee.

7. After being informed of the above facts, Mr. Workman expressed his desire that Mr. Pierotti represent him before the Parole Board.

8. On October 24, 2000, Mr. Pierotti filed with the Parole Board a request that it hold a hearing and thereafter recommend to Governor Don Sundquist that he commute Mr. Workman's death sentence. *See* Exhibit 1 (10/24/00 Letter of John Pierotti to Charles Traugher, Chairman Parole Board).

9. On October 31, 2000, Mr. Pierotti wrote Chief Disciplinary Counsel Bracy seeking an ethical opinion, as suggested by Deputy Chief Disciplinary Counsel Laura Chastain.

10. On November 13, 2000, the Ethics Board issued Advisory Ethics Opinion No. 2000-A-731, concluding that Mr. Pierotti is not ethically prohibited from representing Mr. Workman before the Parole Board, *see* Exhibit 2, and directing that Mr. Workman, as Mr. Pierotti's present client, should be fully informed of the issues relating to Mr. Pierotti's representation, on the

record, “*in a hearing before a court,*” which includes being informed of his right to independent counsel and knowingly and understandingly waiving any objections that exist or that he may have. *Id.* at 8.

11. To comply with the above-quoted portion of Advisory Ethics Opinion No. 2000-A-731, counsel for Mr. Workman recruited the undersigned independent counsel who met with Mr. Workman to discuss the above-described issues relating to Mr. Pierotti’s representation. *See* Exhibit 3 (Passino Affidavit at 1, ¶¶3 and 4).

12. In an attempt to pretermite needless, senseless litigation, independent counsel also contacted each of the following about the State’s views on Mr. Workman’s knowingly and understandingly waiving any objections that he might have to Mr. Pierotti’s representation before the Parole Board:

a. Joseph Whalen, the Assistant Attorney General representing the State in the death penalty judicial proceedings, stated that the hearing directed by the Advisory Ethics Opinion involved a personal representational issue as to which the Attorney General had no interest, *see* Exhibit 3 (Passino Affidavit at 2, ¶7);

b. John Campbell, the Assistant District Attorney General who represents the State before the Parole Board, stated, that the hearing directed by the Advisory Ethics Opinion involved a personal representational issue as to which the District Attorney General’s Office had no interest, *see* Exhibit 3 (Passino Affidavit at 2, ¶8);

c. Teresa Thomas, General Counsel for the Parole Board stated that it was the Parole Board’s policy that it had no authority or interest in addressing inmate representational issues and, consequently, the hearing directed by the Advisory Ethics Opinion involved a

personal representational issue as to which the Parole Board had no interest whatsoever, *see* Exhibit 3 (Passino Affidavit at 2-3, ¶9); and

d. Chief Disciplinary Counsel Lance Bracy, who informed that pursuant to the provisions of Rule 9, Section 7.2 (h), once his office had rendered an advisory opinion, its duties and responsibilities were at an end. *See* Exhibit 3 (Passino Affidavit at 3, ¶10).

13. This Court is the recognized and widely accepted repository of the inherent power of the judiciary in Tennessee. Tenn. Const. Art. VI, §1; *In re Burson*, 909 S.W.2d 768, 772 (Tenn. 1995).

14. Included within this Court's inherent power is the essential, fundamental duty to prescribe and administer rules pertaining to the practice of law. *In re Burson, supra*, 909 S.W.2d at 773.

15. The Ethics Board derives its power, and authority solely from this Court, and its inherent power to regulate the practice of law. *Brown v. Board of Professional Responsibility*, 2000 WL 527828, p. 3 (Tenn., May 25, 2000)(citing *Fletcher v. Board of Professional Responsibility*, 915 S.W.2d 448, 450 (Tenn. Ct. App. 1995))(Attachment 1).

16. Consistent with the foregoing, it is the sole and exclusive power of this Court, and no other, to oversee and review the actions of the Ethics Board, *see Brown v. Board of Professional Responsibility, supra*, 2000 WL 527828, at p. 3 (“*the remainder of the judiciary are powerless to review action or inaction of the Board or its employees except as expressly authorized by the Supreme Court*”) (emphasis added), including, presumably, effectuating remedies directed or suggested by the Ethics Board where necessary to protect the public, as well as individual client's rights and interests. *Id.*

17. This Court's exclusive, inherent power to regulate the practice of law, including the individual rights of Mr. Workman as a potential client of Mr Pierotti is underscored by the disclaimer of interest in the proceedings directed by Chief Disciplinary Counsel by each of the four State agencies described above.

18. This Court's duty to ensure the protection of Mr. Workman's rights as a client is significantly heightened by its duty to ensure fairness in all death penalty proceedings, including all clemency proceedings. *See, e.g., State v. Terry*, 813 S.W.2d 420, 425 (1991)(citing *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)).

WHEREFORE, Mr. Workman respectfully requests that this Court:

1. Enter an order directing each and all of the persons/agencies served below to respond to this motion expeditiously, including informing the Court whether they have any interest in the representational issue;

2. If necessary, to set a hearing on this motion promptly;

3. If this motion is unopposed, to enter an order

a. Directing the Davidson County Chancery Court to set an immediate hearing to address the issues raised in the Advisory Ethics Opinion, providing notice to each of the persons/agencies served below, giving them an opportunity to participate if they so desire;

b. Directing the Davidson County Chancery Court to enter an order addressed to the Warden of Riverbend Maximum Security Institution to transport Mr. Workman to the hearing;

c. Providing any other procedural standards or substantive inquiries for the hearing that the Court deems necessary or proper; and

4. Order such other further relief as this Court deems just.

This motion is accompanied by the referenced exhibits and affidavits. Because the legal authority in support of this motion is that of this Court, including its rules and decisions, and because the legal propositions are plain and self-explanatory, this motion is not accompanied by a memorandum of law as would otherwise be required by this Court's rules.

Respectfully submitted,

Michael J. Passino
Tenn.B.P.R No. 5725
LASSITER, TIDWELL & HILDEBRAND PLLC
213 5th Avenue North
Nashville, Tennessee 37219
Phone: (615) 259-9344
Facsimile: (615) 242-4214

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing by facsimile transmission, and United States mail to the **Hon. Lance Bracy**, Chief Disciplinary Counsel, Tennessee Board of Professional Responsibility, 1101, Kermit Drive, Suite 730, Nashville, Tennessee 37217 [Fax: 367-2480]; **Hon. Teresa Thomas**, General Counsel, Tennessee Board of Probation and Parole, Parkway Towers, Suite 1300, Nashville, Tennessee 37217 [Fax: 532-8581]; **Hon. Joseph Whalen**, Assistant Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 [Fax: (615) 532-7791]; the **Hon. John Campbell**, Assistant District Attorney General, 201 Poplar Avenue - Suite 301, Memphis, Tennessee 38103 [Fax: 545-3937], which are the last addresses and facsimile numbers of such persons known to me.

Dated: _____

Michael J. Passino