

IN THE TENNESSEE SUPREME COURT  
AT NASHVILLE

STATE OF TENNESSEE,

Filed: **September 15, 2000**

Petitioner,

v

No. M1999-01334-SC-DPE-PD

PHILIP R. WORKMAN,

Respondent.

**RESPONSE TO MOTION TO RESET EXECUTION DATE**

I UNDER THE CIRCUMSTANCES OF THIS CASE, ARTICLE I, §§ 8 AND 16 OF THE TENNESSEE CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PRECLUDE THIS COURT FROM SETTING AN EXECUTION DATE

The State and Federal Constitutions contemplate that this Court's judgment be brought to bear on the question of the acceptability of executing a person under the circumstances of this case. See Coker v. Georgia, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Given the circumstances surrounding Philip Workman's case, setting an execution date would violate Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Harold Davis was the only witness to claim at Philip Workman's trial that he saw Workman shoot Lieutenant Ronald Oliver.<sup>1</sup> Based on Davis's testimony that he saw Workman shoot Oliver in a calm, cool, and deliberate manner, the jury sentenced Workman to death.<sup>2</sup>

---

<sup>1</sup> TR 655-56, 664 (Davis Testimony)(Appendix attached to 12/9/99 Response To Motion To Set Execution Date And Motion For Certificate Of Commutation ("App.") at 001-002, 005).

<sup>2</sup> See TR 1056-57 (Prosecution Closing Argument)(App. at 009-010).

Harold Davis has recanted his trial testimony.<sup>3</sup> Vivian Porter swears that Davis was with her the night Oliver was shot, and neither were at the scene.<sup>4</sup> Every witness to events immediately before, during, and after the Oliver shooting swear that they did not see Davis or any person that could have been him.<sup>5</sup> Police reports listing witnesses to the Oliver shooting do not mention Davis.<sup>6</sup> Pathologists state that the fatal wound to Lieutenant Oliver was not caused by one of Workman's bullets.<sup>7</sup> Harold Davis did not see Workman shoot Oliver - he was not even at the scene.

It violates the State and Federal Constitutions to send a man to death when the only eye-witness against him has recanted, and that recantation is supported by independent witnesses, official documents, and expert medical opinions. This Court therefore cannot set an execution date for Philip Workman.

---

<sup>3</sup> Exhibit 1 to 12/9/99 Response To Motion To Set Execution Date And Motion For Certificate Of Commutation.

<sup>4</sup> 9/24/99 Affidavit of Vivian Porter, (App. at 037); see Exhibit 1 to 12/9/99 Response To Motion To Set Execution Date And Motion For Certificate Of Commutation.

<sup>5</sup> Joint Appendix filed in the United States Court of Appeals for the Sixth Circuit ("J.A.") at 1066 (Steve Craig Declaration)(App. at 026); 1074 (Kerry Kill Declaration)(App. at 030); 1069 (Garvin Null Declaration)(App. at 028); 1459 (Parker Testimony)(App. at 036); 1490 (Stoddard Testimony)(App. at 035); 1408B (T. L. Cobb Testimony)(App. at 034).

<sup>6</sup> J.A. at 961-71, 973-74, 976-77 (Supplementary Offense Reports)(App. at 011-025).

<sup>7</sup> Wecht Report at 7 (App. at 044); J.A. at 1076-77 (Declaration of Dr. Kris Sperry)(App. at 031-032)

II THIS COURT SHOULD NOT SET AN EXECUTION DATE UNTIL WORKMAN'S REMAINING APPEALS ARE HEARD BY THE EN BANC SIXTH CIRCUIT, THE UNITED STATES SUPREME COURT, AND, IF NECESSARY, THE GOVERNOR

A Workman Has Available Federal Court Proceedings

A case is ripe for the setting of an execution date when

there exists no procedure ... by which the conviction or the sentence can be further tested or scrutinized under the procedural guidelines within which this Court must function.

Workman v. State, 22 S.W.3d 807, 809 (Tenn. 2000). Because such procedures are currently available to Workman, his case is not ripe for the setting of an execution date.

Workman has submitted to the en banc Sixth Circuit a request that it reconsider its 7-7 vote which resulted in its lifting of a stay of execution it had entered. A copy of that rehearing request is attached as Exhibit 1. As that request recounts, the seven judges that voted to lift Workman's stay misapprehend a crucial fact. Those judges believe that the exit wound to Lieutenant Oliver is larger than the entrance wound, and it therefore could have been caused by one of Workman's bullets. As Workman's rehearing petition demonstrates, however, the exit wound is more than three times *smaller* than the entrance wound.<sup>8</sup> If just one of the seven Sixth Circuit judges who voted to lift Workman's stay considers this error significant, Workman could receive an evidentiary hearing in federal court respecting his claims. This Court should not set an execution date until Sixth Circuit judges have had the opportunity to assess the effect of their mistaken belief that the exit wound to Lieutenant Oliver was larger than the entrance wound.

In addition, in his rehearing petition Workman points out that the en banc court failed to consider Workman's arguments that he should be allowed to file a second or successive habeas

---

<sup>8</sup> See Petition For Rehearing By The En Banc Court, Exhibit 1, at 2-4.

corpus petition irrespective of restrictions imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA).<sup>9</sup> Before the time is ripe for the setting of an execution date, the en banc Sixth Circuit must resolve these issues.

If the Sixth Circuit denies Workman's rehearing request, Workman will have an opportunity to seek a writ of certiorari from the United States Supreme Court. Given that any certiorari petition Workman files will follow a vote by an equally divided en banc circuit court, the United States Supreme Court will give Workman's petition serious consideration. Indeed, the Supreme Court has granted many certiorari petitions that follow a vote that equally divides an en banc circuit court. See Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); Frisby v. Shultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); ETSI Pipeline Project v. Hodel, 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988); Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); Haring v. Prossie, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983); General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982); Fair Assessment In Real Estate Association, Inc. v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978); E. I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 97 S.Ct. 2229, 53 L.Ed.2d 100 (1977); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Papish v. Board of

---

<sup>9</sup> See Petition For Rehearing By The En Banc Court, Exhibit 1, at 4-6.

Curators of the University of Missouri, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973);  
Ramsey v. United Mine Workers of America, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 84 (1971);  
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21  
L.Ed.2d 731 (1968).

B     Governor Sundquist Has Stated That He Will Afford Workman A Clemency  
Hearing

Governor Sundquist has stated, through his Press Secretary, that Workman may have a clemency hearing before the Board of Pardons and Paroles (Board). The Governor and the Board should not be burdened as a court of last resort in a death penalty proceeding until judicial process has been exhausted. Herrera v. Collins, 506 U.S. 390, 411-12 (1993). Because Workman has timely filed a rehearing request with the Sixth Circuit, and because Workman will have the opportunity to seek a writ of certiorari from the United States Supreme Court, the judicial process has not yet been exhausted. Setting an execution date at this point in the litigation would force the Governor and the Board to act as a court of last resort at a time when available judicial remedies exist.

Finally, to make any clemency proceeding a meaningful process, Workman must have sufficient time to prepare. In addition, Board Members, lawyers for Workman, lawyers for the State, and witnesses must coordinate their schedules, a task which requires that dates be left open so that all can be accommodated.

C     Conclusion

There remain significant proceedings, judicial and executive. This Court should not set an execution date until these proceedings have been completed.

Respectfully submitted,

Donald E. Dawson  
POST-CONVICTION DEFENDER  
460 James Robertson Parkway  
Nashville, Tennessee 37243  
(615) 741-9331

CERTIFICATE OF SERVICE

I certify that on September 15, 2000, I hand-delivered a copy of the foregoing to:

Paul Summers  
Attorney General and Reporter  
ATTORNEY GENERAL'S OFFICE  
500 Charlotte Avenue  
Nashville, Tennessee 37243-0493

---

Donald E. Dawson