IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-6652

PHILIP R. WORKMAN,
Petitioner-Appellant,

v.

RICKY BELL, Warden
Respondent-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

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No. 00-5367

IN RE: PHILIP R. WORKMAN,
Movant.

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PETITION FOR REHEARING BY THE EN BANC COURT

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INTRODUCTION

Petitioner Philip Ray Workman respectfully submits that

(1) the opinion authored by Judge Siler misapprehends the significance of measurements respecting the entrance and the exit wounds to Lieutenant Ronald Oliver, and, as a result, that opinion erroneously states that the exit wound is larger than the entrance wound; and

(2) the opinions of Judges Merritt and Siler do not consider Workman's argument that application of 28 U.S.C. § 2244(b) to specified claims has an impermissible retroactive effect and is unconstitutional.

Because members of the en banc Court misapprehended a significant fact and overlooked points of law Workman raises, and because the en banc Court has authority to reconsider its previous action, see Darden v. Wainwright, 477 U.S. 168 (1986), this Court should grant rehearing.

I THE EXIT WOUND IS NOT LARGER THAN THE ENTRANCE WOUND - IT IS MORE THAN THREE TIMES SMALLER

Everyone agrees that the bullets in Workman's gun expand upon striking a body. Based on this uncontested principle, and based on his observation that the exit wound to Lieutenant Oliver's body was smaller than the entrance wound, Dr. Sperry declares that, to a reasonable degree of medical certainty, the bullet that killed Lieutenant Oliver did not come from Workman's gun. The opinion by Judge Siler discredits Dr. Sperry's report because

> 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.[1]

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.[2] It has a diameter of .50".[3] The area of a

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[1] Workman v. Bell, 2000 WL 1253760 at *8 (September 5, 2000)(attached as Appendix A)(emphasis added).

[2] Autopsy Protocol, Joint Appendix filed in original appeal of No. 96-6652 ("Apx.") at 1152.

[3] Id.

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.[4] It has a height of .21" and a width of approximately .64".[5] The area of a triangle = (Height x Length)/2. Thus, the area of the exit wound is (.21 x .64)/2 = .067 square inches.

Visual inspection of diagrams of the entrance and exit wounds, drawn to scale, confirm that, as mathematical calculations make clear, the area of the exit wound is three times smaller than the area of the entrance wound.

exit wound entrance wound

The exit wound is three times smaller than the entrance wound. The recently obtained Oliver x-ray establishes that the bullet that killed Lieutenant Oliver did not fragment - it emerged from his body in tact. The only sworn evidence before this Court is that these facts establish, to a reasonable degree of medical certainty, that the bullet that killed Lieutenant Oliver did not come from

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[4]

[5]

Philip Workman's gun.[6] Workman is entitled to an evidentiary hearing on whether Harold Davis testified falsely when he claimed at trial that he saw an event that the physical evidence says did not happen.[7]

II THIS COURT'S OPINIONS DO NOT ADDRESS WORKMAN'S ARGUMENTS THAT APPLICATION OF 28 U.S.C. § 2244(b) HAS AN IMPERMISSIBLE RETROACTIVE EFFECT AND IS UNCONSTITUTIONAL

Judge Merritt's opinion states

> (a)fter Workman discovered new evidence, in October 1999 and again in February 2000, he made *several requests* of this court. The *one* we undertake to review today is Workman's request to reopen the line of cases concerning his first petition for habeas corpus ....[8]

One of the several requests Workman made was a request that this Court rule that the "gatekeeper" provision of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b), does not apply to specified claims

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[6] 4/1/00 Declaration of Dr. Kris Sperry, attached to 4/3/00 Notice of Filing Second Declaration From Dr. Kris Sperry.

[7] As this Court is aware, (1) Vivian Porter, a woman whose credibility has not been questioned, swears that Davis was with her the night of the Oliver shooting and neither of them were at the scene of the crime; (2) Davis has recanted his trial testimony; (3) no one saw Davis the night of the Oliver shooting; and (4) police reports listing witnesses to events surrounding the Oliver shooting do not mention Davis.

[8] *Workman v. Bell*, Appendix A at *1 (emphasis added).

Workman desires to present in a second or successive habeas corpus petition.[9] Workman argued to the panel and the en banc court that application of the AEDPA gatekeeper provision (1) would have an impermissible retroactive effect under Landgraf v. USI Film Products, 511 U.S. 244 (1994), and this Court's cases interpreting the Landgraf decision, see In re Green, 144 F.3d 384 (6th Cir. 1998); In re Sonshine, 132 F.3d 1133 (6th Cir. 1997); In re Hanserd, 123 F.3d 922 (6th Cir. 1997); and (2) would be otherwise unconstitutional.[10] While the en banc court has ruled that it cannot review a panel's decision respecting whether specified claims meet Section 2244(b) standards, In re King, 190 F.3d 479, 480 (6th Cir. 1999)(en banc), Workman's arguments present a wholly distinct issue - whether this Court should even apply Section 2244(b). The United States Supreme Court

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[9] The relevant claims are (1) the State violated the Eighth and Fourteenth Amendments by withholding an x-ray of the victim's chest demonstrating that the bullet that killed him did not come from Workman's gun; (2) the State violated the Fifth, Sixth, Eighth, and Fourteenth Amendments by coercing Harold Davis prior to Workman's trial to testify that he saw Workman shoot the victim; (3) the knowing use of Harold Davis's perjured testimony violated the Eighth and Fourteenth Amendments; (4) Tennessee's failure to provide Workman a corrective judicial process to consider new evidence establishing that Davis committed perjury at Workman's trial violates the Eighth and Fourteenth Amendments; and (5) executing a man who is innocent of capital murder violates the Eighth and Fourteenth Amendments.

[10] 3/23/00 Petitioner Philip Ray Workman's Motion For Declaration That 28 U.S.C. § 2244 Does Not Apply To Specified Claims; 3/23/00 Petitioner Philip Ray Workman's Motion For Leave To File A Second Habeas Corpus Petition at 12-13; 4/17/00 Supplemental En Banc Brief of Philip R. Workman at 24-43.

and the United States Court of Appeals for the Second Circuit hold this preliminary issue can be reviewed, Stewart v. Martinez-Villareal, 118 S.Ct. 1618, 1620-21 (1998); Mancuso v. Herbert, 166 F.3d 97, 99-100 (2nd Cir. 1999), and this Court should hold likewise.

For the reasons expressed in Workman's papers filed with the panel and his en banc brief, incorporated herein by reference,[11] Workman continues to believe that he should be permitted to pursue a second habeas corpus petition presenting specified claims irrespective of any restrictions imposed by 28 U.S.C. § 2244(b). Before this Court allows Workman's execution to proceed, it should, at the very least, address all arguments Workman presents.

CONCLUSION

This Court's opinions (1) misapprehended a significant question of fact (the exit wound is not larger than the entrance wound - it is more than three times smaller); and (2) overlooked points of law Workman raises (application of the AEDPA "gatekeeper" provision has an impermissible retroactive effect and is

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[11] See footnote 10, supra.

unconstitutional). This Court should therefore grant rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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