

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAR 23 2000

ATTORNEY GENERAL
OFFICE

In re: PHILIP R. WORKMAN,
Movant.

) Death Penalty Habeas Corpus Case
)
) No.
)
) EXECUTION SCHEDULED FOR
) 4/6/2000, 1 a.m.

PETITIONER PHILIP RAY WORKMAN'S
MOTION FOR LEAVE TO FILE A SECOND HABEAS CORPUS PETITION

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TABLE OF CONTENTS

CLAIMS WORKMAN WILL PRESENT IN A SECOND HABEAS PETITION.....	1
I BACKGROUND.....	1
A Prior To Trial The State Withheld The Oliver X Ray.....	2
B Prior To Trial The State Coerced Harold Davis To Testify That He Saw Workman Shoot Oliver	3
C Based On The Evidence Presented, The Jury Convicted Workman Of Capital Felony Murder.....	4
II WORKMAN'S CLAIMS MEET SECTION 2244(b)(2) STANDARDS.....	6
A Due Diligence Prong.....	6
1 X-Ray Claim.....	7
2 Coercion Claim.....	8
3 Herring Claim.....	10
B Latency Prong.....	11
III INTERPRETING SECTION 2244(b) IN A WAY THAT WOULD FORECLOSE WORKMAN FROM FILING A SECOND HABEAS PETITION WOULD RENDER THAT STATUTE UNCONSTITUTIONAL.....	12
IV CONCLUSION.....	13

The State of Tennessee intends to execute Petitioner Philip Ray Workman on April 6, 2000, at 1 a.m.

Pursuant to 28 U.S.C. § 2244(b)(2), Workman respectfully requests that this Court grant him leave to file a second habeas corpus petition.¹

CLAIMS WORKMAN WILL PRESENT IN A SECOND HABEAS PETITION

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 (X Ray Claim).
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 (Coercion Claim).
3. Executing a man who is innocent of capital murder violates the Eighth and Fourteenth Amendments (Hester Claim).

I. BACKGROUND

While Workman was robbing a Memphis Wendy's Restaurant, an employee tripped a silent alarm. Memphis Police Officers Ronald Oliver, Aubrey Studdard, and Stephen Parker responded. When Workman walked out of the Wendy's, Oliver approached him. Workman attempted to run, and Oliver died from a through-and-through gunshot wound to his chest.

To convict Workman of capital felony-murder, the State had to convince Workman's jury that the bullet that killed Oliver came from Workman's gun. State v. Farmer, 296

¹ Workman has filed a contemporaneous motion requesting that this Court declare 28 U.S.C. § 2244(b) inapplicable to the claims presented in this motion. Should this Court hold that Section 2244(b) does not apply to a claim in this motion, whether that claim meets Section 2244(b)'s standards becomes moot.

S.W.2d 879, 883 (Tenn. 1956); Woodruff v. State, 51 S.W.2d 843, 845 (Tenn. 1932); State v. Seyers, 759 S.W.2d 933, 938 (Tenn.Crim.App. 1988). To ensure that the jury would make this finding, the State (1) withheld an x-ray of Oliver's chest demonstrating that the fatal bullet emerged from his body intact; and (2) coerced Harold Davis to testify that he saw Workman shoot Oliver.

A. Prior To Trial The State Withheld The Oliver X-Ray

As Judge Nelson correctly noted at oral argument in Workman's first habeas proceeding, everyone agrees that the type of bullets that were in Workman's gun expand upon entering a body. Because the exit wound to Oliver was slightly smaller than the entry wound, this Court recognized in its Workman opinion that the fatal bullet could not have come from Workman's gun if it emerged from Oliver's body intact.² Prior to Workman's trial, the State withheld evidence that the bullet did just that.

In pre-trial motions, Workman's attorneys moved for production of, among other things, (1) any medical and/or scientific evidence that would support a claim that Workman was innocent of the charges against him;³ and (2) any photographs or other demonstrative material necessary for the preparation of Workman's defense.⁴ Despite the fact that the trial judge granted these motions,⁵ the State withheld from Workman's counsel an x-ray

² Workman v. Bell, 178 F.3d 739, 767 (6th Cir. 1998).

³ 9/29/81 Motion For Production Of Exculpatory Evidence, contemporaneously filed Appendix ("App.") at 2.

⁴ 9/29/81 Motion For Discovery, App. at 4.

⁵ 12/17/81 Orders, App. at 8, 9.

demonstrating that the bullet that killed Lieutenant Oliver emerged from his body intact.⁶

B Prior To Trial The State Coerced Harold Davis To Testify That He Saw Workman Shoot Oliver

The day after the Oliver shooting, Harold Davis approached police to tell them that he had been in the neighborhood of the Wendy's Restaurant the previous night, and he heard shots fired. While Davis told police that he did not see the shooting, police told him that he was going to be an "eye-witness." Police then coerced Davis to sign a statement that he saw Workman shoot Oliver.⁷

At the time of Workman's trial, Davis was living in Washington state. The prosecution called Davis and instructed him to come to Memphis, Tennessee, to testify at Workman's trial. When Davis balked, the prosecution informed Davis that he could either (1) come to Memphis voluntarily and stay in a hotel during the trial; or (2) be brought to Memphis involuntarily and stay in jail during the trial. Davis chose the former.⁸

When Davis met with the prosecution on the eve of Workman's trial, he informed that he did not see Workman shoot Oliver, and he felt uncomfortable about testifying that he saw such an event. Thereafter a man threatened Davis and his family with bodily harm if Davis did not testify that he saw Workman shoot Oliver.⁹

⁶ See Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen (filed in this Court) at 33 (Declaration of Dr. Kris Sperry); Exhibit B to 8/15/95 Fiddler's Response To Respondent's Motion For Partial Summary Judgment (filed in the District Court) (Trial Counsel's File).

⁷ See Exhibit 1 at 11/20/99 Videotape of Davis Interview.

⁸ See *id.*

⁹ See *id.*

C Based On The Evidence Presented, The Jury Convicted Workman Of Capital Felony-Murder

At Workman's trial, the jury was unaware that an x-ray establishes that the bullet that killed Oliver emerged from his body intact, and it therefore could not have come from Workman's gun. Instead, the jury heard false testimony from the only person who claimed to see who shot Oliver and how he was shot.

Davis testified that after he parked his car in the vacant Wendy's parking lot, he saw a white male leave the Wendy's building. Davis then testified in detail to events he supposedly witnessed thereafter:

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.

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.¹⁰

To emphasize Davis's testimony, the prosecution had him step down from the witness stand and act out the events he supposedly saw.¹¹

At closing argument, the prosecution relied on Davis's testimony to have the jury find not only that Workman shot Oliver, but that Workman 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 trouble that he saw take place? Mr. Soddard 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.

[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.¹²

The jury credited Davis's testimony and sentenced Workman to death.

¹⁰ TR 654-56, 664 (Davis Testimony), App. at 10-11, 15.

¹¹ TR 656-57 (Davis Testimony), App. at 11-12.

¹² TR 1056-57 (Prosecution Closing Argument-emphasis added), App. at 16-17.

5

II WORKMAN'S CLAIMS MEET SECTION 2244(b)(2) STANDARDS

Section 2244, 28 U.S.C., provides that a habeas petitioner may pursue new claims¹³ 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 ("Due Diligence Prong"); 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 ("Innocence Prong"). Workman makes a prima facie showing on each of these elements.

A Due Diligence Prong

Undersigned counsel began representing Workman in 1990. Counsel timely began efforts to discover the factual bases of the claims Workman now seeks leave to present. Reasons outside of counsel's control, however, precluded him from discovering the evidence that supports those claims.

¹³ Workman did not present any claim resembling his X-Ray and Herrera Claims in the prior habeas proceeding. Workman acknowledges that he previously presented a claim that the State's knowingly use of Harold Davis's perjured testimony violated the Fourteenth Amendment, and that claim is similar to the Coercion Claim. Courts recognize, however, that Workman's Coercion Claim implicates the Fifth and Sixth Amendments, and it is therefore distinct from a Fourteenth Amendment perjured testimony claim. See *U.S. v. Miller*, 830 F.2d 150, 152-54 (11th Cir. 1987); *U.S. v. Vazquez*, 151 F.3d 1185, 1190 (9th Cir. 1998); *U.S. v. Jackson*, 935 F.2d 830, 847 (7th Cir. 1991). If this Court nonetheless has doubt about whether Workman's Coercion Claim is different from the previously presented perjured testimony claim, that doubt should be resolved in Workman's favor. *Sanders v. U.S.*, 373 U.S. 1, 16, 83 S.Ct. 1008, 10 L. Ed. 2d 148 (1963).

1 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 document¹⁴ relating to, or reflecting upon, the Oliver shooting.¹⁵ While the Medical Examiner's Office produced documents responsive to counsel's request, it did not produce the Oliver x-ray.¹⁶

On June 1, 1995, in the prior habeas proceeding, Workman obtained leave from the District Court to serve Fed.R.Civ.P. 45 subpoenas for documents and things.¹⁷ Pursuant to this Order, on June 2, 1995, Workman served a subpoena on the Medical Examiner's Office requesting production of, among other things, any x-ray taken of Lieutenant Oliver's corpse.¹⁸ After serving the subpoena, Workman filed proof of service in the District Court.¹⁹ While the Medical Examiner's Office produced documents responsive to Workman's Rule 45 subpoena, it did not produce the Oliver x-ray.²⁰

¹⁴ Counsel defined "document" broadly as encompassing "any medium upon which information can be recorded (including) any ... graphic matter, ... print, laboratory, record, (or) photograph." 11/5/90 Letter From Christopher M. Minton to Medical Examiner, App. at 12.

¹⁵ 11/5/90 Letter from Christopher M. Minton to Medical Examiner, App. at 12-13.

¹⁶ Declaration of Christopher M. Minton at ¶ 2, App. at 20.

¹⁷ Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen (filed in this Court) at 1 (6/1/95 Agreed Order).

¹⁸ *Id.* at 4 (Exhibit A to Subpoena In A Civil Case).

¹⁹ *Id.* at 3 (Subpoena In A Civil Case).

²⁰ *Id.* at 6-32 (Subpoena Response).

7

Having issued two requests covering any x-ray taken of Oliver's corpse, and having received no x-ray, counsel believed that no x-ray existed. It was only recently that the Medical Examiner's Office acknowledged that an x-ray of Oliver's chest exists.

On January 29, 2000, Workman filed with the Tennessee Board of Probation and Parole (Board) an Application For Commutation of his death sentence. On February 28, 2000, the District Attorney's Office for the 30th Judicial District filed its opposition. That opposition contains a report from the Medical Examiner's Office in which Dr. O. C. Smith states that prior to drafting the report he examined a chest x-ray of Lieutenant Oliver. Counsel immediately contacted the Medical Examiner's Office, and on March 2, 2000, counsel obtained a copy of the Oliver x-ray.²¹

2 Coercion Claim

On February 22, 1991, counsel hired Ron Lax, a private investigator, to locate and interview Davis.²² During the year that followed, Mr. Lax searched a national database for information on Davis, contacted Davis's former employer, and contacted Davis's sister,

²¹ On March 6, 2000, Workman initiated litigation in this Court seeking to reopen the previous habeas proceeding. Because clemency should only be sought after judicial remedies have been exhausted, see *Harris v. Collins*, 506 U.S. 390, 411-12, 113 S.Ct. 833, 122 L.Ed.2d 203 (1993), Workman withdrew his clemency application. The Board informed Workman that while there was no procedural bar to applying again for clemency, given the currently scheduled April 6, 2000, execution date, it could not guarantee that any future application would be heard.

²² Declaration of Ron Lax at ¶ 2, App. at 21.

mother, and wife. Despite these efforts, Mr. Lax was unable to locate Davis.²³ Finally, on February 26, 1992, Davis called Mr. Lax from an undisclosed location. Mr. Lax specifically asked Davis if authorities had pressured him to obtain his testimony at Workman's trial. Davis said they had not.²⁴

On September 24, 1999, counsel traveled to Memphis to ascertain whether Davis's sister could identify a man in a photograph. When counsel met with her, he spoke of the imminence of Workman's execution and reminded her about the central role Davis played at Workman's trial.²⁵ After this visit Davis's sister called Davis's mother. Davis's mother thereafter called counsel and gave him the telephone number of a motel in Phoenix, Arizona, where she believed Davis was staying.²⁶

On September 30, 1999, counsel and Jefferson Dorsey, Workman's Clemency Counsel, flew to Phoenix and went to the motel where Davis's mother believed he was staying. The manager informed them that Davis had left the motel about three weeks prior. Over the twelve hours that followed, counsel and Mr. Dorsey canvassed Phoenix searching for Davis. At 11:00 p.m. they found him at a Motel 6.²⁷

Davis admitted that he did not see Workman shoot Oliver, and he said that authorities

²³ *Id.* at ¶¶ 3-7, App. at 21-22.

²⁴ *Id.* at ¶ 8, App. at 22.

²⁵ Declaration of Christopher M. Minton at ¶ 3, App. at 20.

²⁶ *Id.* at ¶ 4, App. at 20.

²⁷ Declaration of Jefferson T. Dorsey at ¶ 2, App. at 23.

9

threatened to arrest him if he did not travel to Memphis and testify at Workman's trial.²⁸

A month and a half later, Mr. Dorsey located Davis at a Phoenix area jail.²⁹ In an emotional statement, Davis confirmed that authorities threatened to arrest him if he did not testify at Workman's trial. In addition, Davis said that after he arrived in Memphis to do so, he told the prosecution that he did not feel comfortable about testifying against Workman at trial. Davis said that a man thereafter threatened his well-being and that of his family if he did not testify against Workman.³⁰

3. Herrera Claim

In *Herrera v. Collins*, 506 U.S. 390, 118 S.Ct. 853, 122 L.Ed.2d 203 (1993), the United States Supreme 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. The Court went on to opine that the threshold showing for such a claim would be "extraordinarily high." *Id.* Workman did not have sufficient evidence to meet this burden until the discovery of the Oliver x-ray.

As discussed above, Workman is actually innocent of capital felony-murder if the bullet that killed Oliver did not come from his gun. In the previous habeas proceeding, this Court expressed "no doubt" that if the fatal bullet emerged from Oliver's body intact, it could not

²⁸ See Exhibit 1 at 9/30/99 Videotape of Davis Interview.

²⁹ Declaration of Jefferson T. Dorsey at ¶ 3, App. at 23.

³⁰ See Exhibit 1 at 11/20/99 Videotape of Davis Interview.

have come from Workman's gun.³¹ It nonetheless denied Workman relief because the record before it did not compel a conclusion that the bullet emerged from Oliver's body whole.³² Thus, during the prior proceeding Workman did not have sufficient evidence to raise a Herrera claim. The recent discovery of the Oliver x-ray, however, provides the needed evidence.

The Oliver x-ray establishes that the bullet that killed Oliver emerged from his body intact. This fact leaves "no doubt" that the fatal bullet did not come from Workman's gun. The Oliver x-ray thus makes Workman's Herrera claim available for the first time. For the reasons discussed in Section II.A.1, above, that x-ray only recently became available.

B Innocence Prong

The prosecution based its case that Workman shot Oliver on (1) Davis's testimony that he saw such an event, and (2) police testimony that only Oliver and Workman had weapons.³³ If the jury had known that authorities coerced Davis to commit perjury, it would have discredited his testimony. Knowledge that authorities took an active role in creating false evidence would also have given the jury reason to discredit police testimony. In this environment, proof by the Oliver x-ray that the fatal bullet could not have come from Workman's gun would have produced one result: a jury finding that Workman did not shoot Oliver, and Workman is therefore not guilty of capital felony-murder.

³¹ Workman v. Bell, 173 F.3d at 767.

³² Id.

³³ Prosecution Closing Argument, App. at 24-26.

11

III INTERPRETING SECTION 2244(b) IN A WAY THAT WOULD FORECLOSE WORKMAN FROM FILING A SECOND HABEAS PETITION WOULD RENDER THAT STATUTE UNCONSTITUTIONAL

This Court must construe federal statutes to avoid constitutional questions if such a construction is "reasonably possible." Arnett v. Kennedy, 416 U.S. 134, 162, 94 S.Ct. 1693, 40 L.Ed.2d 15 (1974). As Section II. above, demonstrates, interpreting 28 U.S.C. § 2244(b) in a way that allows Workman to file a second habeas petition is not only reasonably possible, it is required. If this Court nonetheless interprets Section 2244 in a contrary manner, it will render that statute unconstitutional.

A procedural limitation on a defendant's ability to press a claim violates the Constitution if imposing the limitation "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Molien v. California, 505 U.S. 437, 445, 113 S.Ct. 2572, 120 L.Ed.2d 353 (1992). Interpreting Section 2244 to deny Workman leave to press claims demonstrating that he is innocent of capital murder would do just that.

Concern about the injustice that results from the conviction of an innocent person lies at the core of our criminal justice system. Schlup v. Bell, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 370, 90 S.Ct. 1068, 1077, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). That concern takes on added significance when the issue is not just whether an innocent man will go to prison, but whether he will be executed. Schlup, 513 U.S. at 324-25 (executing an innocent person is "the quintessential miscarriage of

judges").

If Workman establishes his claims, he will prove that he is actually innocent of capital murder and cannot be executed. In this motion, he makes a substantial and compelling showing that he can do so. This Court would offend values that form the basis of our criminal justice system if it were to interpret Section 2244(b) in a way that withheld from Workman an opportunity to demonstrate his innocence. To avoid rendering Section 2244(b) unconstitutional, this Court must grant Workman leave to prove his claims.

IV CONCLUSION

Workman makes a prima facie showing that (1) the factual bases for his new claims were not discoverable through the exercise of due diligence; and (2) but for the errors the new claims assert, no reasonable juror would have found Workman guilty of capital felony murder. This Court should therefore grant Workman leave to file a second habeas petition asserting that the new claims entitle him to habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 3.23.2008

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