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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

ATTORNEY GENERAL'S  
OFFICE

In re: PHILIP R. WORKMAN,  
Movant.

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

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PETITIONER PHILIP RAY WORKMAN'S  
MOTION FOR DECLARATION THAT 28 U.S.C. § 2244  
DOES NOT APPLY TO SPECIFIED CLAIMS

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

Applying 28 U.S.C. § 2244 to specified claims would have an impermissible retroactive effect. Workman therefore respectfully requests that this Court declare that Section 2244 does not apply to specified claims, and he may file a second habeas petition asserting them without obtaining leave from this Court to do so.<sup>1</sup>

**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). See U.S. v. Bagley, 473 U.S. 667, 674, 105 S.Ct. 3375, 67 F.3d 481 (1985).

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). See U.S. v. Heller, 830 F.2d 150, 152-54 (11th Cir. 1987); U.S. v. Yavuzca, 161 F.3d 1165, 1190 (9th Cir. 1998); U.S. v. Jackson, 535 F.2d 832, 847 (7th Cir. 1991).

3. The knowing use of Harold Davis's perjured testimony violated the Eighth and Fourteenth Amendments (Perjured Testimony Claim). See U.S. v. Anaya, 427 U.S. 97, 103, 96 S.Ct. 2392, 40 L.Ed.2d 342 (1976).

4. Tennessee's failure to provide Workman a corrective judicial process to consider

<sup>1</sup> In Com. v. Bell, No. 3:00-0209 (M.D. Tenn. March 18, 2000), the United States District Court for the Middle District of Tennessee held that issues respecting whether 28 U.S.C. § 2244 applies to claims in a proposed second habeas petition should initially be addressed by this Court.

new evidence establishing that Davis committed perjury at Workman's trial violates the Eighth and Fourteenth Amendments (Jones Claim). See Jones v. Kentucky, 97 F.3d 333 (6th Cir. 1998); Sanders v. Sullivan, 863 F.2d 218, 222-27 (2nd Cir. 1988).

5. Executing a man who is innocent of capital murder violates the Eighth and Fourteenth Amendments (Herrera Claim). Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 857, 122 F. Ed.2d 203 (1993).

**I RETROACTIVITY ANALYSIS**

In In re Hamner, 123 F.3d 922 (6th Cir. 1997), this Court considered the applicability of 28 U.S.C. § 2244 to a second 28 U.S.C. § 2255 motion when the first 2255 motion was filed prior to the effective date of Anti-Terrorism and Effective Death Penalty Act (AEDPA). Because Congress did not specifically state whether Section 2244 applies in such a situation, this Court turned to rules found in Landgraf v. USI Film Products, 511 U.S. 344, 114 S.Ct. 1484, 128 L.Ed.2d 229 (1994), to decide Section 2244's temporal reach.

This Court noted that Landgraf requires a two-step analysis. First, a court must determine whether the new legislation made any change to controlling law. Second, a court must decide whether applying the new law would attach new legal consequences to conduct antedating the new legislation. Hamner, 123 F.3d at 924.

**II APPLYING SECTION 2244 TO WORKMAN'S CLAIMS WOULD HAVE AN IMPERMISSIBLE RETROACTIVE EFFECT**

**A Landgraf Step One: The AEDPA Changed Controlling Law**

As to the first Landgraf step, prior to the AEDPA an inmate could pursue new claims in a second habeas petition if the inmate could demonstrate (1) cause for failing to raise the

new issue in the first proceeding and prejudice arising therefrom; or (2) a colorable showing of actual innocence. *McCleskey v. Zant*, 499 U.S. 467, 495, 111 S.Ct. 1454, 113 L.Ed.2d 617 (1991). Under the AEDPA, however, an inmate may present a new claim if (1) the claim relies on a new rule of constitutional law or the factual predicate for the claim could not have been discovered through the exercise of due diligence; and (2) the facts, if proven, would establish that but for constitutional error, no factfinder would have found the inmate guilty of the underlying offense. 28 U.S.C. § 2244(b)(2). By providing these new and different standards, the AEDPA changed the law controlling when a habeas petitioner can present new claims in a second habeas petition.

Similarly, prior to the AEDPA an inmate could present in a second petition a claim he presented in a first petition if resolving the claim would serve the ends of justice. *Sanders v. U.S.*, 373 U.S. 1, 15, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). Hearing a claim serves the ends of justice if the claim is tied to a colorable showing of actual innocence. *Kuhlmann v. Wilson*, 477 U.S. 436, 451, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Under the AEDPA, however, a claim that was presented in a prior petition shall be dismissed. 28 U.S.C. § 2244 (b)(1). By providing this new rule, the AEDPA changed the law controlling a habeas petitioner's ability to present in a second petition a claim he presented in his first petition.

#### D Landgraf Step Two: Applying The AEDPA Would Attach New Legal Consequences

As to the second *Landgraf* step, a court must determine whether the petitioner could have presented his claims under pre AEDPA law. If so, any application of 28 U.S.C. § 2244 to preclude a court's consideration of these claims would be an impermissible retroactive

effect. *In re Spaulding*, 132 F.3d 1133, 1135 (6th Cir. 1997). For the following reasons, pre-AEDPA law would allow Workman to present his claims in a second petition.

#### 1 X-Ray Claim a Cause & Prejudice

While Workman did not present his X-Ray Claim in his first petition, he has since not doing so.

In November 1990, Workman requested pursuant to the Tennessee Public Records Act any information in the possession or control of the Shelby County Medical Examiner's Office relating to, or reflecting upon, the crime for which Workman was convicted of first-degree murder and sentenced to death - the shooting of Memphis Police Lieutenant Ronald Oliver.<sup>2</sup> While the Medical Examiner's Office produced documents responsive to counsel's request, it did not produce an x-ray taken of Oliver's chest.<sup>3</sup> And in June 1993, Workman served on the Medical Examiner's Office a subpoena specifically requesting production of any x-ray taken of Oliver's corpse.<sup>4</sup> Again, the Medical Examiner's Office failed to produce the Oliver x-ray.<sup>5</sup>

Workman first learned that the Oliver x ray existed on February 28, 2000. On that date, the District Attorney's Office for the 30th Judicial District filed its opposition to a

<sup>2</sup> 11/5/90 Letter from Christopher M. Minton to Medical Examiner, contemporaneously filed Appendix ("App." at 18-19).

<sup>3</sup> Declaration of Christopher M. Minton at ¶ 2, App. at 20.

<sup>4</sup> Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen (filed in this Court) at 4 (Exhibit A to Subpoena In A Civil Case).

<sup>5</sup> *Id.* at 6-12 (Subpoena Response).

emergency request Workman had filed with the Tennessee Board of Probation and Parole. 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.

While Workman had requested the Oliver x-ray prior to and during the habeas proceedings in the District Court, it was not produced. Workman therefore establishes cause for not raising his X-Ray Claim during prior proceedings. See Amadio v. Zant, 436 U.S. 214, 223, 105 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

Workman seeks habeas relief from the failure to produce the Oliver x-ray. This Court has "no doubt" that if the bullet that killed Oliver emerged from his body intact, it could not have come from Workman's gun.<sup>6</sup> The Oliver x-ray establishes just that - the fatal bullet emerged from Oliver whole.<sup>7</sup> Thus, the Oliver x-ray demonstrates that Workman is innocent of capital felony-murder, and he cannot be executed. State v. Farmer, 296 S.W.2d 879, 883 (Tenn. 1956); Woodruff v. State, 51 S.W.2d 843, 845 (Tenn. 1932); State v. Boyers, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988). A defendant suffers prejudice when evidence that he is innocent of the crime charged is withheld from him. See U.S. v. Bagley, 473 U.S. 667, 674, 105 S.Ct. 3373, 87 L.Ed.2d 481 (1985); U.S. v. Augurs, 427 U.S. 97, 112 n.21, 96 S.Ct. 2102, 49 L.Ed.2d 342 (1976); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Giglio v. U.S., 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

<sup>6</sup> Workman v. Bell, 178 F.3d 759, 767 (6th Cir. 1998).

<sup>7</sup> Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen (filed in this Court) at 33 (Declaration of Dr. Kris Sperry).

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b Actual Innocence

As discussed above, the Oliver x-ray establishes that the fatal bullet emerged from Oliver intact, and this fact serves to indicate that Workman did not shoot Oliver. Because Workman did not shoot Oliver, he is innocent of capital murder under Tennessee law. Workman's X-Ray Claim is therefore tied to a colorable showing of actual innocence.

3 Coercion Claim

a Cause & Prejudice

Workman did not present a Coercion Claim in his first petition, but has cause for not doing so.

Prior to filing his first petition, Workman hired Ron Lax, a private investigator, to locate and interview the only person who testified at Workman's trial that he saw Workman shoot Oliver, Harold Davis.<sup>8</sup> During the year that followed, Mr. Lax searched for, but was unable to locate, Davis.<sup>9</sup> Mr. Lax was finally able to speak with Davis on or about February 26, 1992, when Davis called from an unknown location. In that telephone interview, Mr. Lax specifically asked Davis if authorities had pressured him into testifying at Workman's trial. Davis lied, specifically saying that he was not pressured.<sup>10</sup> This lie caused Workman to refrain from raising a Coercion Claim, and Workman therefore establishes cause for not doing so. See Coleman v. Thompson, 501 U.S. 722, 733, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)(ca

<sup>8</sup> Declaration of Ron Lax at ¶ 2, App. at 21.

<sup>9</sup> Id. at ¶¶ 3-7, App. at 21-23.

<sup>10</sup> Id. at ¶ 8, App. at 22.

establish cause, a petitioner must point to "something that cannot fairly be attributed to him").

Workman first learned that authorities coerced Davis into testifying falsely against him when counsel located Davis in Phoenix, Arizona.

In September 1999, after undersigned counsel spoke with Davis's sister, Davis's mother called counsel and gave him the telephone number of a motel in Phoenix, Arizona, where she believed Davis was staying.<sup>11</sup> On September 30, 1999, counsel and Jefferson Dorsey, Workman's Clemency Counsel, flew to Phoenix and after considerable effort, located Davis.<sup>12</sup> Davis admitted that he did not see Workman shoot Oliver, and he said that authorities threatened to arrest him if he did not travel to Memphis and testify at Workman's trial.<sup>13</sup> A month and a half later, Mr. Dorsey located Davis at a Phoenix area jail.<sup>14</sup> In an emotional statement, Davis confirmed that he did not see Workman shoot Oliver and that he testified against Workman because authorities had threatened him.<sup>15</sup>

Workman establishes prejudice arising from Davis's lie that he was not pressured into testifying at Workman's trial. Davis was the only person who testified that he saw Workman shoot Oliver. Because Workman's felony murder conviction required such an event to have taken place, Davis was the only witness to provide evidence that Workman was guilty of a

<sup>11</sup> Declaration of Christopher M. Minton at ¶ 4, App. at 20.

<sup>12</sup> Declaration of Jefferson T. Dorsey at ¶ 2, App. at 23.

<sup>13</sup> See Exhibit 1 at 9/30/99 Videotape of Davis Interview.

<sup>14</sup> Declaration of Jefferson T. Dorsey at ¶ 3, App. at 23.

<sup>15</sup> See Exhibit 1 at 11/20/99 Videotape of Davis Interview.

capital crime. As a result, the authorities' coercion of Davis to testify falsely at Workman's trial prejudiced Workman. See ILS v. Agurs, 427 U.S. at 103; Napue v. Illinois, 360 U.S. at 271-72.

b Actual Innocence

The bullet that killed Oliver did not come from Workman's gun, and Workman is therefore innocent of felony-murder. Workman's jury found that Workman shot Oliver because Davis falsely testified that he saw such an event. Without Davis's false testimony, there is no direct evidence that Workman shot Oliver. Thus, Workman's claim that authorities coerced Davis to testify falsely is tied to a colorable showing that Workman did not shoot Oliver, and he is therefore innocent of felony murder.

3 Perjured Testimony Claim

Workman presented his Perjured Testimony Claim in his first petition. It was only after that proceeding was completed that Davis gave statements admitting that he committed perjury at Workman's trial.<sup>16</sup> For the reasons discussed in Section II.B.2.b, above, Workman's Perjured Testimony Claim is tied to a showing of actual innocence.

4 Actual Claim

While Workman did not present his Perjured Testimony Claim in his first petition, he has cause for not doing so.

Workman did not have definitive proof that Davis committed perjury at Workman's trial until (1) Vivian Porter, a friend of Davis's at the time of the Oliver shooting, told

<sup>16</sup> See Exhibit 1 (Videotape of 9/30/99 and 11/20/99 Davis interviews).

undersigned counsel on September 24, 1999, that Davis was with her the night Oliver was shot; and (2) Davis told Workman's lawyers on October 1, 1999, and November 20, 1999, that he lied at Workman's trial. Workman has cause for not finding this evidence until recently

On September 24, 1999, counsel traveled to Memphis, Tennessee, to see if Davis's sister, Jacqueline Moden, could identify a man in a photograph. Ms. Moden told counsel that Vivian Porter was with Davis the night Oliver was shot, and Ms. Moden arranged a meeting between Mr. Porter and counsel.<sup>17</sup> At that meeting, Mr. Porter signed a sworn statement that Davis was her the night Oliver was shot and neither she nor Davis saw the shooting.<sup>18</sup>

In Mr. Lax's previous investigation, Mr. Lax asked Ms. Moden in 1992 who might have information about Davis's involvement in the Oliver shooting. At that time, Ms. Moden did not give Mr. Lax Ms. Porter's name.<sup>19</sup> Ms. Moden's failure to give Workman Ms. Porter's name in 1992 constitutes cause for the absence of allegations respecting Mr. Porter in prior proceedings

As discussed in Section II.B.2.a, above, Davis's 1992 statement to Mr. Lax constitutes cause for the absence of allegations in prior proceedings that Davis admits that he lied at Workman's trial.

After obtaining the Porter and Davis statements, Workman presented them to the first

<sup>17</sup> Declaration of Christopher M. Minton at ¶ 3, App. at 20.

<sup>18</sup> Ill. 9/24/99 Affidavit of Vivian Porter (original filed in Tennessee Supreme Court), App. at 27.

<sup>19</sup> Declaration of Ron Lax at ¶ 7, App. at 22.

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available State court - the Tennessee Supreme Court. That Court responded by stating that no State remedy is available for Workman's new evidence.<sup>20</sup> It was only then that Workman's Jones Claim became available for federal review. As a result, Workman established cause for not presenting it previously. See *Coleman v. Thompson*, 501 U.S. at 753.

Workman establishes prejudice arising from the State's failure to provide him a corrective judicial process for presentation of a claim that his conviction and death sentence are based on testimony which the key Government witness has credibly recanted.<sup>21</sup> Any State court reviewing the current evidence could arrive at only one finding - when Davis claimed at trial that he saw Workman shoot Oliver, Davis lied. Because Workman's felony-murder conviction required a finding that Workman shot Oliver, and because Davis was the only witness who claimed to have seen such an event, any State court would have to conclude that Davis's false testimony was material. Thus, if a State process were available, Workman would have his first degree murder conviction and death sentence declared invalid. The failure of the State to provide Workman such a process is therefore prejudicial to Workman.

<sup>20</sup> 1/3/00 Order, App. at 29, 31.

<sup>21</sup> The recent statements of Porter and Davis that Davis did not see Workman shoot Oliver are supported by the Oliver x-ray's revelation that the fatal bullet emerged from Oliver whole, and it therefore could not have come from Workman's gun. In addition, while Davis testified that he parked his car on the Wendy's lot and was at the scene when a "bunch" of police officers responded, (1) every civilian and police eyewitness to events before, during, and immediately after the Oliver shooting did not see Davis or any car that could have belonged to him; (2) contemporaneous police reports listing witnesses to events surrounding the shooting do not mention Davis; (3) the crime scene diagram reflects that no vehicle was parked on the Wendy's lot in the place where Davis claimed he parked his car; and (4) Davis did not attend a lineup held upon Workman's capture which every available witness attended. See Workman's Opening Brief at 15-23.

5 Herrera Claim

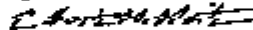
Workman did not present a Herrera Claim in his first petition.

Because Workman's Herrera Claim asserts that he is actually innocent of the crime for which he was convicted and sentenced to die, that claim is tied to a colorable showing of actual innocence. As a result, under pre-AEDPA law, Workman would have been allowed to present it in a second petition.

III CONCLUSION

Under pre-AEDPA law, Workman would have been able to present his claims in a second habeas corpus petition. If this Court were to apply AEDPA Section 2244 to preclude Workman from presenting his claims, it would be giving that section an impermissible retroactive application. As a result, this Court should declare that Section 2244 does not apply to the claims Workman desires to present in a second habeas petition.

Respectfully submitted,



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