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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAR 6 - 2000

ATTORNEY GENERAL'S
OFFICE

PHILIP R. WORKMAN,)	
)	
Petitioner-Appellant,)	No. 96-6636
)	
v.)	Death Penalty Habeas Corpus Case
)	
RICKY BELL, Warden,)	Execution Date: 4/6/2000
)	
Respondent-Appellee.)	

MOTION TO REOPEN

In violation of a federal court order, the Office of the Shelby County Medical Examiner (Medical Examiner's Office) suppressed an x-ray of Memphis Police Lieutenant Ronald Oliver's chest. The x-ray establishes, beyond any doubt, that Philip Workman did not fire the bullet that killed Lieutenant Oliver. Pursuant to the All Writs Act, 28 U.S.C. § 1651, Fed.R.Civ.P. 60(b)(6), and this Court's inherent power to protect the integrity of the judicial process, Workman respectfully requests that this Court reopen this case and order that he receive an unconditional writ of habeas corpus. In support thereof, Workman shows:

1. On July 18, 1994, Workman filed in the District Court his habeas corpus petition. Workman's petition asserted, among other things, that constitutional violations prevented his jury from hearing evidence that he did not fire the bullet that killed Memphis Police Lieutenant Ronald Oliver.
2. On June 1, 1995, the District Court authorized Workman to serve subpoenas pursuant to Fed.R.Civ.P. 45.
3. On June 2, 1995, Workman served the Medical Examiner's Office with a subpoena requesting, among other things, any x-ray taken of Lieutenant Oliver's corpse. While the

Medical Examiner's Office produced documents responsive to Workman's subpoena, it did not produce an x-ray taken of Lieutenant Oliver's chest.

4. In the proceedings that followed, Workman, the District Court, and this Court relied on the subpoena response of the Medical Examiner's Office as establishing that an x-ray was not made of Lieutenant Oliver's chest.

5. On October 29, 1996, the District Court granted the State summary judgment.

6. On October 30, 1998, this Court affirmed the District Court's decision granting the State summary judgment.

7. On February 28, 2000, Workman learned for the first time that the Medical Examiner's Office possesses an x-ray of Lieutenant Oliver's chest.

8. The Oliver x-ray establishes, beyond any doubt, that the bullet that killed Lieutenant Oliver did not come from Workman's gun, and Workman is therefore innocent of capital murder.

WHEREFORE, Workman respectfully requests that this Court:

1. Reopen this habeas corpus case;
2. Rule that Workman is entitled (a) to an unconditional writ of habeas corpus; (b) to a conditional writ of habeas corpus; or (c) to have this case remanded to the District Court for further summary judgment proceedings at which Workman can present the Oliver x-ray; and
3. Order such other relief as this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 6, 2000, I hand-delivered a copy of the foregoing to:

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ATTORNEY GENERAL
OFFICE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN,)	
)	
Petitioner-Appellant,)	No. 96-6656
)	
v.)	Death Penalty Habeas Corpus Case
)	
RICKY BELL, Warden,)	Execution Date: 4/6/2000
)	
Respondent-Appellee.)	

MEMORANDUM IN SUPPORT OF MOTION TO REOPEN

Prior to summary judgment proceedings, Philip Workman served the Office of the Shelby County Medical Examiner (Medical Examiner's Office) a subpoena requesting production of, among other things, any x-ray taken of Memphis Police Lieutenant Ronald Oliver's corpse. In responding to the subpoena, the Medical Examiner's Office suppressed an x-ray establishing that Workman did not fire the bullet that killed Lieutenant Oliver. To prevent a miscarriage of justice born of fraud, this Court must reopen this case and issue an unconditional writ of habeas corpus.

I IN VIOLATION OF THE DISTRICT COURT'S DULY ISSUED SUBPOENA, THE STATE SUPPRESSED THE OLIVER X-RAY DURING THE HABEAS PROCEEDINGS

A District Court Proceedings

On July 18, 1994, Workman filed in the District Court a habeas corpus petition challenging the constitutional validity of his first-degree murder conviction and resulting death sentence.¹ Workman asserted, among other things, that constitutional violations prevented his

¹ Joint Appendix ("J.A.") at 14.

jury from hearing evidence that the bullet that killed Lieutenant Oliver did not come from his gun, and he was therefore innocent of capital murder.² See State v. Sayers, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988). The State answered,³ and the District Court set deadlines for discovery and the filing of summary judgment motions.

On June 1, 1995, the District Court entered pursuant to Rule 6 of the Rules Governing Section 2254 Cases an Agreed Order authorizing Workman to serve Fed.R.Civ.P. 45 subpoenas for documents and things.⁴ 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.⁵ After serving the subpoena, Workman filed proof of service in the District Court.⁶ While the Medical Examiner's Office produced documents responsive to Workman's Rule 45 subpoena, it did not produce the Oliver x-ray.⁷

Workman forwarded the material he received from the Medical Examiner's Office to Dr. Kris Sperry, a pathologist the District Court authorized Workman to hire. Dr. Sperry reported to counsel that Workman's gun contained .45 caliber silver-tip hollow-point bullets, and these bullets expand upon entering a human body. Because they expand they rarely exit, and if they do they leave an exit wound significantly larger than the entry wound. Dr. Sperry

² J.A. at 27-68.

³ J.A. at 636.

⁴ 6/1/95 Agreed Order, Attached Appendix ("App.") at 1.

⁵ Exhibit A to Subpoena In A Civil Case, App. at 4.

⁶ Subpoena In A Civil Case, App. at 3.

⁷ Subpoena Response, App. at 6-32.

noted that Lieutenant Oliver's corpse had an exit wound that was slightly smaller than the entry wound. He therefore reported that Lieutenant Oliver's mortal wound was inconsistent with a wound that would have been caused by one of Workman's bullets.⁸

The State moved for summary judgment arguing, among other things, that Workman could not prove his allegation that the bullet that killed Lieutenant Oliver did not come from his gun.⁹ Workman responded by, among other things, filing Dr. Sperry's Report. The District Court faulted the Sperry Report because it does not state that Oliver's wound could not have been caused by one of Workman's bullets,¹⁰ and it granted the State summary judgment.¹¹

B. Sixth Circuit Proceedings

On appeal, Workman argued that the Sperry Report created a genuine issue respecting whether Workman shot Lieutenant Oliver, and the District Court's grant of summary judgment to the State was therefore improper.¹² At oral argument, Judge Nelson specifically asked Workman's counsel, "Was the body x-rayed?" Based on the subpoena response of the Medical Examiner's Office, counsel responded "Not that I am aware of", and counsel agreed with Judge Nelson's statement that there was no indication in the record that an x-ray was taken. Thereafter, the following exchange occurred between Judge Nelson and counsel for

⁸ J.A. at 1076-77.

⁹ See J.A. at 835.

¹⁰ J.A. at 1326.

¹¹ J.A. at 1382-83.

¹² Brief of Appellant at 12-15.

Workman.

Judge Neilson:

I should disclose to you that I've been reading with interest a couple of articles by one Martin L. Fackler And he says as you say and as everyone agrees that upon entering the body these bullets expand. And if they do exit they leave a wound substantially larger than the entrance wound. He also says, however, that they frequently disintegrate. And you'll have fragments of the bullet going off in different directions. Here as I recall the bullet apparently struck a rib at least the autopsy report discloses a fractured rib. And I wonder if you're in a position to comment on the suspect likelihood that what happened here was that the bullet fragmented and that what exited the body was not the entire bullet but a little piece of bullet.

Mr. Minton:

You're Honor, I'm not able right now to answer that question.

On October 30, 1998, this Court issued its opinion. Based on its understanding that no

x-ray was taken of the Oliver corpse, this Court wrote

If a .45 caliber hollow point bullet had gone all the way through Lt. Oliver's chest and emerged in one piece, we have no doubt that the exit wound would have been larger than the entry wound. It hardly follows, however, that Lt. Oliver could not have been shot with the type of ammunition Workman was firing - *because the record in no way compels the conclusion that the bullet which killed the officer emerged from his body in one piece.*

Workman v. Bell, 178 F.3d 759, 767 (6th Cir. 1998)(emphasis added).

C Discovery Of The Oliver X-Ray

On January 29, 2000, Workman filed with the Tennessee Board of Probation and Parole 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.

II THE OLIVER X-RAY LEAVES NO DOUBT; WORKMAN DID NOT SHOOT LIEUTENANT OLIVER

During oral argument, Judge Nelson correctly noted that "everyone agrees that upon entering the body (Workman's) bullets expand." This Court therefore recognized in its Workman opinion that if the fatal bullet emerged from Lieutenant Oliver's body whole, it could not have come from Workman's gun. This Court ruled against Workman because the record did not compel a conclusion that the bullet emerged from Lieutenant Oliver's body intact. At that time, the record did not compel such a conclusion because it did not contain the Oliver x-ray. That x-ray was absent from the record for one reason: the Medical Examiner's Office suppressed it.

On March 4, 2000, counsel showed Dr. Sperry the Oliver x-ray. Dr. Sperry reported that it establishes that the fatal bullet emerged from Oliver's body whole - it did not fragment.¹³ As this Court recognizes, this fact establishes that Workman did not shoot Lieutenant Oliver.

III TO PREVENT A MISCARRIAGE OF JUSTICE BORN OF FRAUD, THIS COURT MUST REOPEN THIS CASE AND ISSUE AN UNCONDITIONAL WRIT OF HABEAS CORPUS

A This Court Possesses Authority To Reopen This Case

This Court possesses authority to vacate a judgment rendered upon proof that a fraud has been perpetrated upon the court. Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). This power is necessary to maintain the integrity of the courts,

¹³ 3/4/2000 Sperry Declaration, App. at 33.

for "tampering with the administration of justice ... involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). In Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), this Court exercised its power to reopen a habeas case on facts similar to those presented here.

In Demjanjuk, the District Court issued denaturalization, deportation, and extradition orders upon a finding that the petitioner was a notorious Nazi war criminal, "Ivan the Terrible." This Court affirmed, and the petitioner was taken to Israel where he was convicted of war crimes and sentenced to death.

Six and a half years after this Court affirmed the District Court's orders, it learned that the Government had failed to produce documents the petitioner had requested during discovery. The documents contained a significant amount of information indicating that petitioner was not, as the District Court had found, "Ivan the Terrible." Pursuant to Fed.R.Civ.P. 60(b)(6), the All Writs Act, and its inherent power to protect the integrity of the judicial process, this Court reopened the petitioner's appeal to determine whether the prior proceedings had been tainted by fraud. Finding that the Government recklessly deprived the petitioner and the federal courts of vital information indicating that the petitioner was not "Ivan the Terrible", this Court vacated its previous judgment and that of the District Court. Demjanjuk, 10 F.3d at 356.

B This Court Should Reopen This Case And Issue An Unconditional Writ Of Habeas Corpus

As in Demjanjuk, Workman requested through discovery a specific document which a government record custodian had in its custody, but which the custodian withheld. As in Demjanjuk, the failure to comply with the discovery request deprived Workman, the District Court, and this Court of vital evidence that he is innocent of the charges that were brought against him. As in Demjanjuk, this Court should reopen this case.

Upon reopening a case, a court has wide discretion in choosing the relief it will order. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. at 245. In habeas corpus cases, 28 U.S.C. § 2243 authorizes federal courts to dispose of habeas petitions "as law and justice require." This mandate "is broad with respect to the relief that may be granted", Carafas v. LaVallee, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968), and it confers upon courts the power to grant an outright discharge in an egregious cases. See Burton v. Johnson, 975 F.2d 690, 693 (10th Cir.1992).

For six and a half years the Medical Examiner's Office suppressed the Oliver x-ray establishing that Workman is innocent of capital murder. The Medical Examiner's Office did not reveal that the x-ray exists until weeks before Workman's scheduled April 6, 2000, execution. It did not do so in a belated response to the subpoena Workman had issued, but inadvertently in a report it prepared for filing *in support of Workman's execution*. Suppressing evidence that a man is innocent of capital murder while preparing a report for use against him