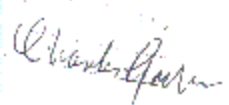


IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE

PHILIP R. WORKMAN,)
)
 Petitioner,)
)
 v) No. P-3908
) Divided III
 STATE OF TENNESSEE,)
)
 Respondent.)



MEMORANDUM IN SUPPORT OF
 MOTION TO REOPEN POST-CONVICTION PETITION

New scientific evidence establishes that Philip Workman did not shoot Memphis Police Lieutenant Ronald Oliver. Specifically, a recently produced x-ray establishes that the bullet that killed Lieutenant Oliver did not fragment - it emerged from his body whole. Based on this fact, the Chief Medical Examiner for the State of Georgia concludes that the bullet that killed Lieutenant Oliver did not come from Workman's gun. Under Tennessee law, Workman is therefore innocent of capital murder.

Harold Davis was the only person who ever claimed that he saw an event the scientific evidence says did not happen. On September 24, 1989, Vivian Porter exposed Davis's lie. She affirmed that Davis was with her the night of the Oliver shooting, and neither of them saw Workman, or anyone else, shoot Oliver. Counsel subsequently tracked down Davis who, in an emotional statement, confirms that he was not present at the Oliver shooting and his trial testimony was a lie.

The only other evidence that suggested Workman shot Oliver were police claims that only Workman and Oliver fired weapons. The night Oliver died, however, he fired his service revolver and Workman sustained a shotgun wound. The Original Police Report confirms what these facts tell us - officers other than Oliver fired weapons during the incident.

Workman's evidence undermines the entire case against him. It points unerringly to the conclusion that he did not receive a fair trial. Because the execution of a man who is innocent is a repulsive, constitutionally intolerable event, this Court must grant this motion to reopen and hold a hearing on Workman's claims.

1 IF WORKMAN DID NOT FIRE THE BULLET THAT KILLED OLIVER, HE IS NOT GUILTY OF CAPITAL MURDER

The felony-murder rule in Tennessee is simple and straight forward. For a felon to be

guilty of felony-murder, the deadly force must come from him or one acting in concert with him. If deadly force comes from a third-party attempting to thwart the crime the felon is attempting to commit, while the felon is guilty of a non-capital offense, he is not guilty of felony-murder. State v. Esinger, 296 S.W.2d 879, 883 (Tenn. 1956); State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988). Because there is no evidence that Workman had an accomplice, if the bullet that killed Oliver did not come from Workman's gun, Workman is innocent of felony-murder.

II THE JURY BASED IT FINDING THAT WORKMAN SHOT OLIVER ON THE TESTIMONY OF DAVIS AND POLICE OFFICERS

On August 5, 1981, Workman entered a Memphis Wendy's restaurant after it closed at 10:00 p.m. As Workman gathered the restaurant's money, an employee tripped a silent alarm. Memphis Police Officers Ronald Oliver, Aubrey Stoddard, 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.

Workman's capital murder conviction required the jury to find that the bullet that killed Oliver came from Workman's gun. To establish this critical fact, the prosecution presented the testimony of Harold Davis, Stoddard, and Parker.

Davis testified that he saw a white male shoot Lieutenant Oliver (TR 655), and he had identified Workman's picture as that of "the person (he) saw that night that everything happened." (TR 639). Stoddard and Parker denied firing their weapons. Based on this testimony, the prosecution argued that

(Workman's) name identified by Mr. Davis as being the shooter of Lieutenant Oliver. (TR 1065).

[T]wo people fired a weapon. Who were those two people? The defendant and Ronald Oliver. Officer Stoddard never fired his weapon. Officer Parker never fired his weapon. He testified to that. So, they're the only two people that fired the weapons. Did Lieutenant Oliver raise and turn his revolver around and show himself? Well, that's ridiculous. So who shot and killed Lieutenant Oliver? Philip Workman.

(TR 1065, 1084-85). The jury agreed, and it convicted Workman of capital murder.

III WORKMAN DID NOT SHOOT OLIVER

A Scientific Evidence Establishes That Workman Did Not Shoot Oliver

Workman's gun was loaded with .45 caliber aluminum jacketed hollow point bullets ("Silver Tip Bullets"). Because such bullets expand upon impact, they rarely exit a body they strike. In the rare instance when a Silver Tip Bullet exits a body it strikes, it creates an exit wound significantly larger than the entry wound.

The bullet that killed Lieutenant Oliver created an entry wound to Oliver's left chest and a smaller exit wound to the right side of his back. Recognizing that these wounds were inconsistent with wounds caused by Silver Tip Bullets, the United States Court of Appeals for the Sixth Circuit stated that

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 fact that 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). At the time of this opinion, the record did not establish that the fatal bullet emerged from Lieutenant Oliver whole because the State had previously failed to produce an x-ray taken of Lieutenant Oliver's chest.

On June 2, 1995, Workman served a federal subpoena for any x-ray taken of Lieutenant Oliver. Appendix at N. Although such an x-ray existed, the State did not produce it. Appendix at N. Workman only learned of the x-ray's existence on February 28, 2000, when the District Attorney's Office for the 50th Judicial District mentioned it in papers filed with Tennessee's Board of Probation and Parole. Counsel immediately contacted the State, and on March 2, 2000, counsel obtained a copy of the x-ray. On March 4, 2000, counsel took the x-ray to Dr. Kris Sperry, the Chief Medical Examiner for the State of Georgia. Dr. Sperry reviewed it and informed counsel that it compels the conclusion the Sixth Circuit considered critical - the bullet which killed Oliver emerged from his body in one piece. App. at 4(340) (Declaration of Dr. Kris Sperry); see also App. at 4(40) (Declaration of Dr. Kris Sperry). This fact leaves "no doubt" - Workman did not shoot Lieutenant Oliver.

B. Harold Davis Was With Vivian Porter. Neither Saw Who Shot Oliver.

At Workman's trial, Harold Davis claimed that he saw a white male shoot Lieutenant Oliver (TR 655), and he had identified Mr. Workman's picture as that of "the person (he) saw that night that everything happened." (TR 659). No other witness testified that he saw who shot

Lieutenant Oliver. Vivian Porter, however, affirms that Davis was with her the night Oliver died, and neither saw the shooting.

In a video-taped interview and affidavit, Porter states that the night of the shooting, Davis and she rode in a car. As they drove past the Wendy's, they saw numerous police cars parked on the Wendy's lot. Porter affirms that Davis and she did not drive onto the Wendy's lot, nor did they park their car on the side of the road and walk onto the lot. Rather, they drove past the Wendy's and later learned on the news that it was the site of a robbery and police shooting. App. at 7 (9/24/99 Affidavit of Vivian Porter (original on file with Tennessee Supreme Court) at ¶¶ 3-4); see also 9/24/99 Videotape of Vivian Porter Statement, filed contemporaneously herewith. Davis confirms what Porter swears to - he never saw Workman, or anyone else, shoot Oliver.

In an emotional video-taped interview, Davis states that he was not at the Wendy's Restaurant to see Workman, or anyone else, shoot Oliver. He states his testimony that he saw Workman shoot Oliver is a lie, and he committed perjury at Workman's trial because he was coerced by authorities. (Exhibit 1 at 11/20/99 Videotape of Harold Davis. Davis's statement is more than an unadorned recantation. It is fully consistent with the testimony of police officers and the State's own documents.

C. The Testimony Of Police Officers And The State's Own Documents Confirm What The Scientific Evidence, Vivian Porter, And Harold Davis Tell Us - Davis Was Not Present At The Crime Scene

Davis claimed at trial that he parked his car on the Wendy's lot, saw the Oliver shooting, and he remained at the scene as a "bunch" of additional police officers arrived. (TR 653-64). Police officers and police documents establish that, as Davis now admits, he was not on the Wendy's lot.

At roll call for the shift during which Oliver died, police were instructed to be alert for an African-American male who was robbing Wendy's Restaurants at closing time. (TR 673). Davis is an African-American male. He claimed that he parked his car on the vacant Wendy's parking lot, he saw Workman shoot Oliver, and he remained there as a "bunch" of additional police officers arrived. (TR 653-64). The initial responding officer, however, first surveyed the scene for any potential suspects, determined that none were in the vicinity, and he then ran to assist Oliver and Stoddard. (TR 720).

After the additional officers arrived, they took statements from every person who witnessed either the robbery or the shootout in the parking lot, recorded those statements in police reports, and made a sketch of the crime scene. The police reports nowhere mention Davis or any person who could have been him. App. at 12 (Memphis Police Documents). The crime scene diagram contains no car where Davis claimed he parked. App. at 12 (Memphis Police Documents).

Police arrested Workman an hour and a half after Oliver was shot. At 3:30 a.m., they held a lineup which every witness to the Wendy's robbery attended. Davis did not attend the lineup. App. at 12 (Memphis Police Documents).

D The State's Story: Police Missed Spotting Davis Or His Car On The Vacant Parking Lot, Davis Drove His Car Off The Lot Without Being Noticed, And Davis Called Police The Next Day To Inform That He Saw The Oliver Shooting

The first mention of Davis in the police file reads

8/6/81 approximately 12:30 p.m. while still on the scene at Jack's Pit Stop the writer was contacted there by Sgt. B.O. Wheeler and he stated a male black had called from the Airport Inn, located at Elvis Presley and Brooks by the name of Harold Davis. The male black had stated that he was at the Wendy's on North Thomas the night of the shooting and observed the male white shoot the police officer.

App. at 12 (Memphis Police Document).

To credit any assertion that Davis was present to witness the Oliver shooting, one must believe that police alert for a black male who was robbing Wendy's restaurants at closing time failed to see a black male in the middle of a vacant Wendy's parking lot after the Wendy's had been robbed at closing time. One must believe that police failed to notice as Davis drove his car away, and it took Davis's telephone call to police before they became aware that Davis was on the vacant Wendy's lot when they arrived.

E Why Did Stoddard and Parker Deny Firing Weapons?

As the prosecution informed the jury at closing argument, police had every right to fire at Workman, a fleeing felon. (TR 1056). At trial policemen denied they took advantage of this option. Officer Parker testified he could not get his pistol out of his holster to fire at Workman (TR 675-76), and Officer Stoddard testified that he did not fire a shot. (TR 655-56). Police documents and an eyewitness statement raise questions about the veracity of this testimony.

The Original Police Report recounts that Oliver, Stoddard, and Parker all fired weapons.

App. at 12 (Memphis Police Document). A disinterested witness, Steve Craig, confirms this report by swearing that Parker fired a shotgun he carried during the incident. App. at 8 (5/15/95 Declaration of Steve Craig (original on file with the United States District Court for the Western District of Tennessee) at * 3).

IV CLAIM 1: Executing Workman Despite His Showing That He Is Innocent Of Capital Murder Would Violate The Law Of The Land, Constitute A Cruel And Unusual Punishment, And Constitute Inhumane Treatment

A Executing A Man Probably Innocent Of Capital Murder Violates The Tennessee Constitution

No Tennessee court has decided whether Article I, §§ 8, 16, and 32 of the Tennessee Constitution prohibit the execution of a man who presents substantial evidence that he is factually innocent of capital murder. Because executing a man who is probably innocent is a repulsive, constitutionally intolerable event, this Court should rule that such an execution violates the Tennessee Constitution.

Workman does not concede that *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), precludes this Court from finding that his execution would violate the Federal Constitution. See Section V, below. Whatever limitations *Herrera* establishes, however, this Court, in its capacity as an arbiter of the Tennessee Constitution, is free to expand the minimum level of protection mandated by the Federal Constitution. *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999); *Burdick v. State*, 845 S.W.2d 204, 207 (Tenn. 1992); *Dick v. Norris*, 751 S.W.2d 814, 838 (Tenn. 1988). *Herrera* itself indicates that this Court should do so.

The *Herrera* Court believed that it was limited by concerns animating Our Federalism and the traditional deference paid to the states in criminal matters. To afford these policies proper deference, the *Herrera* Court ruled that federal courts are not forums in which to re-litigate state trials, and a claim of actual innocence does not warrant federal relief unless evidence of innocence is so overwhelming that it would be unconstitutional to refuse granting the petitioner a new trial. Because this Court is not limited by the federalism concerns that provided the basis for the *Herrera* decision, it is not bound to follow that decision and should not do so. Rather, this Court should follow the Connecticut Supreme Court, the Illinois Supreme Court, the Florida Supreme Court, the Supreme Court of South Dakota, and the en banc Texas Court of Criminal Appeals, all of which recognize that executing a man probably innocent of a capital offense is, in

their state, a constitutionally intolerable event. Clayton v. Commissioner of Correction, 732 A.2d 754, 757 (Conn. 1999); People v. Washington, 665 N.E.2d 1430, 1537 (Ill. 1996); Roberts v. State, 678 So.2d 1232, 1235 (Fla. 1996); Jarner v. Dooley, 590 N.W.2d 463, 471 (S.D. 1999); Ex parte Elizondo, 947 S.W.2d 200, 205 (Tex.Crim.App. 1995)(en banc).

B Inexpensive Of What Standard This Court Chooses To Determine Factual Innocence, Workman Is Not That - Factually Innocent Of Capital Murder

Courts employ varying standards in assessing whether a petitioner establishes the requisite probability of innocence sufficient to make his execution unconstitutional. For example, Connecticut courts require a petitioner to show that all the evidence, that is the evidence presented at trial and at the post-conviction proceeding, (1) clearly and convincingly establishes that the petitioner is actually innocent of the crime for which he was convicted; and (2) no reasonable fact finder considering the evidence would find the petitioner guilty. Miller v. Commissioner of Correction, 700 A.2d 1108, 1130-31 (Conn. 1997). Illinois courts conclude that relief on an actual innocence claim is appropriate if the evidence in support of that claim is new, material, noncumulative, and of such conclusive character as would probably change the result on retrial. People v. Washington, 665 N.E.2d at 489. Texas courts afford a petitioner relief if he proves by clear and convincing evidence that a jury would acquit him based on the newly discovered evidence. Ex parte Elizondo, 947 S.W.2d at 205. And the Herrera Court itself opined that a truly persuasive demonstration of actual innocence in a capital case would render the condemned's execution unconstitutional. Herrera v. Collins, 505 U.S. at 417. Under any of these standards, Workman establishes his innocence of capital murder.

The scientific evidence establishes that Workman did not shoot Lieutenant Oliver. Every bit of trial testimony on which the jury relied to find that Workman shot Oliver has been discredited. Because the fatal bullet did not come from Workman's gun, under any standard, Workman establishes his innocence. This Court should therefore *grant* the Motion To Reopen, hold an evidentiary hearing, and rule that the Tennessee Constitution forbids executing a man who is probably innocent of any capital offense.

V CLAIM 2: Executing Workman Despite His Showing That He Is Innocent Of Capital Murder Would Violate The Eighth And Fourteenth Amendments To The United States Constitution

While the United States Supreme Court rejected Herrera's claim of factual innocence,

Chief Justice Rehnquist, writing for the majority, stated

We may assume for the sake of argument in deciding this case, 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 4, 7. In addition to this expression by the Chief Justice, six Justices indicated that the Constitution precludes the execution of a person who persuasively establishes his innocence. See Herrera, 506 U.S. at 419 (O'Connor, Kennedy, JJ., concurring) ("the execution of a legally and factually innocent person would be a constitutionally intolerable event"); id. at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial ... would render unconstitutional the execution of petitioner in this case"); id. at 430 (Blackmun, Stevens, Souter, JJ., dissenting) ("Nothing could be more contrary to contemporaneous standards of decency ... or more shocking to the conscience ... than to execute a person who is actually innocent"). Thus, where a petitioner makes a persuasive showing that he is actually innocent of the crime for which he has been sentenced to death, the Constitution precludes his execution.

For the reasons discussed in Section IV, above, under any standard used to judge a Herrera claim, Workman establishes that he is innocent of capital murder. Because Workman's execution would therefore violate the Eighth and Fourteenth Amendments to the United States Constitution, this Court should grant the Motion To Reopen, hold an evidentiary hearing, and grant Workman post-conviction relief.

VI CLAIM 3: Executing Workman Despite Knowing That Davis And Police Testified Falsely Would Violate The Law Of The Land

To establish an Eighth and Fourteenth Amendment violation for the use of false testimony at his trial, Workman has to establish, among other things, that the prosecution knew the testimony was false. See, e.g., United States v. Hawkins, 969 F.2d 169, 175 (6th Cir. 1992). While Workman believes that he can establish the requisite knowledge, see Section VII, below, under the circumstances of this case the Tennessee Constitution precludes Workman's execution irrespective of whether the prosecution knew its case against him was false.

There is no societal interest in executing a man who demonstrates that the jury's decision to convict him of a capital offense was based on false testimony. For purposes of the Law of the Land Clause of the Tennessee Constitution, whether the prosecution knew these assertions were

false is irrelevant. Once a condemned demonstrates that the State's entire case against him was false, the Law of the Land Clause of the Tennessee Constitution precludes his execution. That is the case here.

The jury found that Workman fired the bullets that killed Oliver, and was therefore guilty of felony-murder, based on (1) the testimony of Davis that he saw such an event, and (2) the testimony of police officers that only Workman and Oliver fired weapons. We now know that Davis lied when he testified that he saw Workman shoot Oliver. We now know that police lied when they testified that only Workman and Oliver fired weapons. On these two lies, the State based its entire case that Workman shot Oliver. Without these lies, there is no evidence that Workman shot Oliver. Under these circumstances, executing Philip Workman violates the Law of the Land Clause of the Tennessee Constitution.

VII CLAIM 4: The State Violated The Eighth And Fourteenth Amendments By Knowingly Presenting False Testimony

A State violates the Eighth and Fourteenth Amendments when it knowingly presents material false testimony at a criminal trial. United States v. Huggins, 969 F.2d at 175. Such is the case here.

New scientific evidence, the sworn testimony of Vivian Porter, the recantation of Harold Davis, and the State's own documents demonstrate that when Davis claimed that he saw Workman shoot Oliver, he lied. The Original Offense Report and the sworn testimony of Steve Craig demonstrate that when police claimed that only Oliver and Workman fired weapons, they lied. Because the State's entire case that Workman shot Oliver rested on these lies, the false testimony is material.

Once a convicted person demonstrates that evidence presented at his trial was false, the question of whether the prosecution knew it was false must be resolved at a hearing. Briagar v. LeFevre, 460 U.S. 325, 342 n.29, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); see Levinson v. Basic, Inc., 786 F.2d 741, 749 (6th Cir. 1986) (given the vagaries in proving knowledge, summary judgment inappropriate on this issue), *rev'd on other grounds*, 485 U.S. 224 (1988). For this reason alone, this Court should allow Workman to reopen his post-conviction proceeding and hold a hearing. Even if Workman needed to make an additional showing that the prosecution knew the testimony of Davis and police was false, Workman does so.

Information known to police and knowledge they gain in a an investigation is imputed to the prosecution. U.S. v. Buchanan, 891 F.2d 1438, 1442 (10th Cir. 1989)(citing cases); Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984); Brown v. Parkash, 541 F.2d 447, 450-51 (4th Cir. 1976); Taylor v. Meppin, 581 F.Supp. 358, 362 (E.D. La. 1984); Riviera v. Martin, 484 F.Supp. 162, 164 (W.D. Va. 1980). Workman's evidence demonstrates that within minutes after Oliver was shot, police knew who witnessed events on the Wendy's parking lot, and Davis was not one of those persons. In addition, police knew that no vehicle was parked where Davis testified he parked his car, watched events, and then waited for other police to arrive. Because this knowledge is imputed to the prosecution, Workman's evidence establishes that the State knew Davis testified falsely.

In addition, Workman's evidence establishes that policemen other than Oliver fired weapons. Stoddard and Oliver would therefore recognize as false their testimony that only Oliver and Workman fired weapons. Because this knowledge is imputed to the prosecution, Workman's evidence establishes that the State knew Stoddard and Parker testified falsely.

VI CLAIM 5: By Withholding The X-Ray Prior To Trial, The State Violated Article 1, § 8 And 16 Of The Tennessee Constitution And The Eighth And Fourteenth Amendments To The United States Constitution

The State violates the Tennessee and United States Constitutions when it withholds prior to trial material, exculpatory evidence. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 5375, 87 L.Ed.2d 481 (1985). Such is the case here.

Prior to trial, Workman requested that the State produce any medical or scientific exculpatory evidence. (Tech. Rec. 18) The State did not produce the x-ray of Lieutenant Oliver's chest.

The x-ray is exculpatory because it establishes that the bullet that killed Lieutenant Oliver did not fragment, and this fact, in turn, leaves "no doubt" - Workman did not shoot him.

Withheld exculpatory evidence is material if there exists a "reasonable probability" that had the evidence been disclosed the result of the trial would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the trial's outcome. United States v. Bagley, 473 U.S. at 674.

The x-ray establishes a fact which, to date, establishes that Workman did not shoot.

Lieutenant Oliver. Because Workman's jurors had to make such a finding to convict him of capital murder, there is a reasonable probability that had the jury not been withheld, Workman would not have been convicted of capital murder.

IX CONCLUSION

New scientific evidence establishes that Workman did not shoot Lieutenant Oliver, and he is therefore innocent of capital murder. We now know that every bit of evidence on which the jury based its finding that Workman shot Oliver is false. Under these circumstances, Workman's conviction would be repulsive, constitutionally intolerable, event. Pursuant to T.C.A. § 40-13-217(a)(2), (4) (Michie), this Court should therefore grant Workman's Motion To Reopen, order an evidentiary hearing, and rule that Workman is entitled to post conviction relief.

Respectfully submitted,

John W. Pierotti, (#7851)
Robert L. Hutton (#13496)
OLANKLER BROWN PLLC
One Commerce Square - Suite 1700
Memphis, Tennessee 38103
(901) 525-1322

By: John Pierotti - JWP
John Pierotti

Robert L. Hutton
Robert L. Hutton

Marjorie Bristol
OFFICE OF THE POST-CONVICTION DEFENDER
531 Church Street - Suite 600,
Nashville, Tennessee 37243
(615) 253-1985

By: Marjorie Bristol - JMB
Marjorie Bristol

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by hand delivery upon the District
Attorneys Office for the 20th Judicial District, 201 Poplar Avenue, Memphis, Tennessee, 38103,
this 20th day of February, 2001.
28th March

Robert L. Hutton