IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,	)	
	)	W2002-00300-SC-R11-PD
v.	)	
	)	(Madison County Circuit Court B-81209)
PHILIP WORKMAN,	)	
	)	**Filed May 29, 2003**
Defendant-Appellant.	)	

PETITION FOR REHEARING

Pursuant to Tenn.R.App.P. 39, Defendant Philip Workman respectfully requests that this Court grant rehearing and grant his application for permission to appeal. Despite "the gravity of this case," *State v. Workman*, No. W2002-00300-CCA-R3-PD (May 19, 2003)(Birch, J., dissenting), this Court has denied the application, even though the Court of Criminal Appeals has made several fundamental errors in denying *coram nobis* relief, including:

(1) Ignoring Harold Davis's substantial *coram nobis* testimony that he did not see the fatal encounter; and overlooking the fact that Davis's purported confusion about the events surrounding the homicide was induced by fear, coercion, and self-preservation;

(2) Failing to recognize that the unrefuted expert evidence – from the beginning of trial to the close of the error *coram nobis* proceeding – demonstrates that Philip Workman did not shoot Ronald Oliver;

(3) Failing to consider the testimony of juror Wardie Parks that Harold Davis's recantation and the unrefuted expert evidence "may have resulted in a different judgment;" and

(4) Failing to provide a new proportionality review of the death sentence,

> where (as a Justice of the Missouri Supreme Court has recently recognized)[1] the proportionality of any death sentence must be reassessed in light of new, record evidence which comes to light after the direct appeal has concluded; where this Court's original affirmance of the death sentence was based exclusively upon death penalty cases in which the death sentence has been overturned; and where the original proportionality review was tainted by an unconstitutional aggravating factor.

For all these reasons, Justice Birch is correct in concluding that Philip Workman's application "raises ... several valid issues" which merit this Court's consideration, especially considering the "gravity of this case." *State v. Workman,* No. W2002-00300-CCA-R3-PD (Tenn. May 19, 2003)(Birch, J., dissenting). The petition for rehearing should be granted.

I. IN DENYING THE APPLICATION, THIS COURT HAS MISAPPREHENDED THE NATURE OF HAROLD DAVIS'S TESTIMONY AND THE FORENSIC PROOF CONCERNING THE ORIGIN OF THE FATAL BULLET

As Justice Birch has aptly noted, Philip Workman has been unjustly convicted and sentence to death and is entitled to relief "under any analysis":

> [U]nder any analysis, the newly-discovered proof that an 'eyewitness' no longer claimed to have seen Workman shoot the officer and the wound causing death was inconsistent with the type of wound which would have been caused by a bullet matching Workman's gun, mandates a conclusion that the evidence 'may have resulted in a different judgment.'

State v. Workman, No. W2002-00300-CCA-R3-PD (Tenn. May 19, 2003)(Birch, J., dissenting). Justice Birch's conclusion is correct, because Harold Davis' *coram nobis* testimony and the unrefuted testimony of eminent forensic pathologist Cyril Wecht – had they been heard by a jury – individually and cumulatively would have resulted in a different verdict.

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[1] State ex rel. Amrine v. Roper, 2003 Mo. Lexis 80 (Mo. Apr. 29, 2003)(Price, J., dissenting).

A. Both The Court Of Criminal Appeals And This Court Have Failed To Consider The Extensive *Coram Nobis* Proof That Harold Davis Did Not See The Shooting And The Reasons Why Davis Equivocated On Cross-Examination

1. Harold Davis Was The Prosecution's Key Witness At Philip Workman's Trial

There is little dispute that Harold Davis was the prosecution's key witness at Philip Workman's trial, and that his testimony was essential to Philip Workman's conviction and death sentence. At trial, Davis claimed that he had seen Workman shoot Oliver (Trial Tr. 655-656, 664) (Davis claiming that Workman shot Oliver from a distance of "[n]o more than two or three feet at the most"), and the prosecution successfully argued for Workman's conviction based upon Davis's purported view of the shooting: "[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....* [Workman has] been identified by Mr. Davis as being the shooter of Lt. Oliver." (Trial Tr. 1056-1057, 1065 (emphasis added)). Yet Harold Davis's testimony at the *coram nobis* hearing critically undermines his testimony at trial.

2. Harold Davis Repeatedly Testified That He Did Not See Workman Shoot Oliver

At the *coram nobis* hearing, Harold Davis repeatedly testified that he did not see Workman shoot Oliver. To fully grasp the significance – and truth – of Davis's *coram nobis* testimony that he did not see Workman shoot Oliver, one need only look at his repeated assertions that he did not, in fact, see the fatal encounter. He testified on no fewer than ten occasions that he did not (as he claimed at trial) see Workman shoot Oliver:

(1) At the beginning of his *coram nobis* testimony, Harold Davis emphatically stated that he did not see the struggle between Workman and the officer

(CN Tr. 144);[2]

(2) He emphasized that his statements in a 1999 videotape, in which he stated that he did not see the shooting, *were not a lie*. (CN Tr. 149);

(3) He testified on more than one occasion that statements to authorities in 2001 that he saw the shooting were not true (CN Tr. 157, 177);

(4) He said that what he said in 1982 was not true and was the product of intimidation from two white people (presumed by him to be police officers) who threatened him (CN Tr. 172);

(5) He said that he didn't see what happened (CN Tr. 177);

(6) He repeated that he did not see Workman shoot Oliver (CN Tr. 344);

(7) He again stated that his trial testimony was not true (CN Tr. 361);

(8) He again stated that his trial testimony was not true (CN Tr. 364);

(9) He again admitted that what he said at trial "wasn't true." (CN Tr. 372);

(10) He emphasized in closing that "*I remember clearly that I did not see him.*" (CN Tr. 396).

Davis's repeated assertions that he had not seen the shooting is evidence which a jury is entitled to consider when evaluating Philip Workman's guilt.

[2] The initial *coram nobis* hearing from August 13 & 14, 2001 is cited as "CN Tr. ___." The continuation of the *coram nobis* hearing on August 16, 2001 is cited as "Aug. 15, 2001 CN Tr. ___." The remainder of the hearing held on October 16, 2001 is cited as "Oct. 16, 2001 CN Tr. ___."

3. The Rejection Of Harold Davis's *Coram Nobis* Testimony Fails To Consider Why Davis Equivocated On Cross-Examination

a. Prior To The *Error Coram Nobis* Hearing The State Located Harold Davis And Attempted To Hide Him In An Outlying Jail

Prior to the *coram nobis* hearing, Mr. Workman searched for Harold Davis, an itinerant drug addict, to no avail. (See 6/27/01 Transcript of the Evidence, p. 1-3). The State, however, located Davis in a Florida jail. (CN Tr. 51). Despite knowing that Mr. Workman was conducting a search for Davis, and despite the fact that the State had located him and had made arrangements to transport him to Memphis, the State did not advise Mr. Workman's counsel that Davis had been located and would appear at the *coram nobis* hearing. (See id. at 100-01). It was not until the day before the hearing that counsel learned that Davis had been located and would appear at the hearing, and then only because Davis's former pastor spotted Davis in the Memphis Airport under police escort. (See id.).

The State did not take Davis to the Shelby County Jail. Rather, it took Davis to the Germantown Jail outside of Memphis. (Id. at 55). As Davis traveled to the Germantown Jail, he thought about events occurring after his trial testimony. Specifically, after Davis told Philip Workman's jury that he saw Workman shoot Oliver, two men came to the motel room where Davis was staying and told him that if he ever changed his trial testimony it would not be good for his health or the health of his family. (CN Tr. 173, 351-55). As expressed by Davis:

> I looked at it like a police officer had been murdered. And this police officer had friends. And I felt that I would have been or my family would have been bodily harmed (if I changed my trial testimony).

(Id. at 352). Upon his arrival at the Germantown Jail, Davis was placed in a cell by himself. In Davis's words:

> It was just quiet. No noise or nothing at all. And all this time it's been in the back of my mind what has been told me. And I knew what I was here for. And I was just scared out of mind. And I told them that I wanted to call my sister, but I called - before I called my sister I called the Commercial Appeal. I felt like it would kind of protect me and them.

(Id. at 355).[3]

b. At The Error Coram Nobis Hearing, After Davis Recanted His Trial Testimony, The State Cross-Examined Him For Three Days, Resulting In Davis's Hospitalization

After Davis recanted his trial testimony, the court decided it would let the State cross-examine Davis "as much as you want." (CN Tr. 195-96; see also id. at 398). The State took the trial court up on its open invitation, and it cross-examined Davis for three days.

At first, Davis stood his ground, reaffirming that he did not see Workman shoot Oliver. (CN Tr. 149 (Davis swears that statement on videotape that he did not see Workman shoot Oliver was not a lie); id. at 157-58 (Davis swears that he lied to authorities when he said he saw Workman shoot Oliver); id. at 172 (Davis: "I'm saying, sir, what I said back in 1982 wasn't true"); id. at 177 ("Q: And you saw what happened, right? A: No sir."). Over time however, the State's treatment of Davis took its toll. At the end of his three-day ordeal, Davis was hospitalized with high blood pressure and brain swelling. (CN Tr. 405-06). By this time, when the State questioned Davis he said he was not sure of anything. (Id. at 402). When questioned by Workman's attorney, however, he remained certain that he did not see Workman shoot Oliver (Id. at 396).

[3] In the opinion of the Honorable Frank Glankler (one of Workman's attorneys), the State's secret dealings with Davis was "without a doubt the most contemptuous, egregious, disingenuous, chicanery that (I have) ever seen fostered upon the judiciary and upon the defendant ...." (CN Tr. 18).

c. Because The Confusion In Davis's Testimony Is A Product Of Fear And Self-Preservation, His Recantation Cannot Be Ignored

Davis related that "self-preservation", or "trying to survive", was the rule of his life. (CN Tr. 173, 179, 192, 195). He acknowledged that as a result, he will tell "the law" anything it wants to hear in order to get it out of his life. (Id. at 295). Because the trial court placed no limits on the questioning of Davis, "the law" cross-examined him for three days. Given Davis's precarious health, given the fears Davis harbored prior to the error *coram nobis* hearing, and given the State's treatment of him prior to that hearing, Davis collapsed, both physically and mentally. His brain swelled and he told "the law" what it wanted to hear, i.e., that he was not sure what he saw.

4. Philip Workman Is Entitled To *Coram Nobis* Relief Given Harold Davis's Testimony That He Did Not See Workman Shoot Oliver

The operative question thus arises: In light of Harold Davis's trial testimony, can it be said that his repeated unequivocal statements at the *coram nobis* proceeding that he did not see the shooting, accompanied by additional equivocal statements of uncertainty brought on by physical and psychological coercion (and ultimate exhaustion) "may have resulted in a different verdict"? The answer is, as Justice Birch notes: "Yes." Especially where the prosecution pointedly relied on Harold Davis's trial testimony to tell the jury that Workman shot Oliver and therefore was guilty of first-degree murder, there is little doubt that Davis's *coram nobis* testimony "may have resulted in a different verdict," especially where, had Davis's trial testimony been discredited before the jury, a reasonable juror would have entertained a reasonable doubt about Philip Workman's guilt.

Because the Court of Criminal Appeals misapprehended and/or overlooked the whole of Davis' *coram nobis* testimony, the Court of Criminal Appeals erroneously believed that Workman was not entitled to relief. This Court has made the same mistake. Rehearing should therefore be

granted.

B. The Court of Criminal Appeals And This Court Have Failed to Recognize That The Expert Testimony Is Unrefuted: Workman Did Not Shoot Oliver

From the beginning of trial to the close of the error *coram nobis* hearing three experts testified – two for the state at trial, and one for Philip Workman at the error *coram nobis* hearing. From these experts only one opinion on the ultimate question emerges: Philip Workman did not shoot Ronald Oliver.

1. The Prosecution's Experts Offered No Opinion On Whether Oliver Was Killed By One Of Workman's Bullets Or By Friendly Fire

At trial, the State presented the testimony of Dr. James Bell and F.B.I. Agent Gerald Wilkes. Dr. Bell testified that he performed the autopsy on Lieutenant Oliver. (Trial Tr. 506). Dr. Bell identified the mortal wound to Oliver and testified that the wound was caused by a bullet from a weapon above .22 or .25 caliber. (Id. at 510). Dr. Bell offered no other opinion on what caused Lieutenant Oliver's mortal wound. Because Workman fired .45 caliber hollow-point bullets, and the police bullets were .38 caliber, (see Trial Exhibit 13), both of which are over .22 or .25, Dr. Bell's testimony offers no opinion on whether Oliver was shot with one of Workman's bullets or by "friendly fire."

The State's other expert at trial, F.B.I. Agent Gerald Wilkes, testified that a pristine bullet found at the crime scene the day after the Oliver shooting was fired from Workman's gun. (Trial Tr. 942). Agent Wilkes testified that had this bullet gone through a human body, he would expect it to exhibit more mutilation than it did, and he would expect to find blood or tissue on it. (Id. at 960). As a result of Agent Wilkes's testimony, the State retreated from any assertion that the pristine bullet was the mortal one that went through Lieutenant Oliver's chest. (Id. at 1083).

2. The Testimony Of Dr. Cyril Wecht, M.D. At The *Coram Nobis* Hearing Establishes That Workman Did Not Shoot Oliver

While neither Dr. Bell nor Agent Wilkes offered any opinion on whether Philip Workman shot Lieutenant Oliver, at the error coram nobis hearing Dr. Cyril Wecht did. Dr. Wecht, a nationally-known and respected forensic pathologist, testified unequivocally that the bullet that killed Lieutenant Oliver did not come from Philip Workman's gun. (Oct. 16 CN Tr. 23, 136-37). Dr. Wecht based his opinion on the facts that (1) the bullets in Workman's gun were .45 caliber aluminum-coated hollow-point bullets, (2) such bullets expand when they strike a body, (3) because they expand, they do not exit once they penetrate a body, (4) Dr. Wecht had never seen a bullet such as Workman's exit a body, and (5) the bullet that killed Lieutenant Oliver exited his body, leaving an exit wound smaller than the entrance wound. (Id. at 19-25).

C. Philip Workman Is Entitled To *Coram Nobis* Relief

In light of the evidence presented at trial in which Harold Davis was the prosecution's key witness, Harold Davis's *coram nobis* testimony, coupled with Dr. Wecht's *coram nobis* testimony "may have affected the jury's verdict." Especially where the prosecution bore the burden of proving guilt beyond a reasonable doubt, the testimony of Davis and Dr. Wecht establishes compelling proof that a reasonable juror may have voted to acquit Philip Workman of the greater charge of first-degree murder. See also Section II, *infra* (actual juror in this case has stated, under oath on offer of proof, that this new evidence would have changed his verdict).

Indeed – and this point cannot be overemphasized – the very fact that Justice Birch as a reasonable person agrees that the evidence may have changed the verdict conclusively establishes that a reasonable juror could reach the same conclusion. In other words, the very fact that Justice

Birch has dissented on the initial denial of the application means that the petition for rehearing must be granted, because, by definition, Philip Workman has established his entitlement to relief. Thus, the petition for rehearing should be granted.

II. The Court Of Criminal Appeals And This Court Have Erroneously Failed To Consider The Testimony Of Juror Wardie Parks

While it is highly significant that at least one justice of this Court finds that Harold Davis's and Dr. Wecht's *coram nobis* "may have resulted in a different judgment," at least one of the jurors who initially heard the evidence at trial – Wardie Parks – has also testified under oath that his verdict would have been different had he heard the new *coram nobis* evidence. Despite the fact that *the very question before this Court is whether the juror's verdict may have been different,* the Tennessee courts have refused to consider this highly probative evidence and have instead inserted their own opinion because Mr. Parks's testimony is purportedly inadmissible under Tenn.R.Evid. 606(b). Rule 606(b), however, cannot be applied in such a manner to prohibit the consideration of Wardie Parks' testimony.

As the Sixth Circuit has made clear, a state cannot apply Rule 606(b) to prevent a defendant from proving a valid legal claim, because under such circumstances, the application of Rule 606(b) precludes a defendant or petitioner from having his case decided based upon all relevant proof, a violation of due process. Doan v. Brigano, 237 F.3d 722, 728 (6th Cir. 2002)(state cannot put forth Rule 606(b) as a ground for refusing to consider evidence necessary for showing that defendant's rights were violated).

Further, as the Colorado Supreme Court has held, Rule 606(b) cannot be used to prevent introduction – as here – of evidence of a juror's post-deliberative conduct. Stewart v. Rice, 47 P.3d

316 (Colo. 2002). As that court has explained, without violating Rule 606(b), jurors may testify about occurrences after the jury's deliberations have concluded. That is exactly the situation here. Wardie Parks's testimony does not impeach his prior verdict: it is testimony about what his new verdict is in light of all the evidence. It is hard to see how a court can require Philip Workman to show that the verdict may have been different without allowing him to show conclusive proof that the verdict would have been different. While it is true that the *coram nobis* determination is ultimately made by a court, such a determination cannot be made if the judge has refused to consider all the evidence. And here, it wasn't made upon consideration of the most critical evidence of all – evidence that considering all of the proof, an actual juror now believes that Philip Workman is not guilty.

The application of Rule 606(b) thus has not only prevented Philip Workman from receiving a full hearing on his *coram nobis* petition, but it has removed jurors from having any say in the ultimate question whether Philip Workman is guilty. While Wardie Parks's view of the evidence is critical – as it should be because it is his determination of guilt which is at issue here – it has been rendered irrelevant. While this hardly seems fair, cases such as Doan and Stewart make clear that such a conclusion is also simply wrong. Rehearing should be granted.

III. Philip Workman Has Been Denied A Fair Consideration Of The Proportionality Of The Death Sentence In Light Of New Evidence And New Circumstances

The Tennessee Code charges this Court with the duty of reviewing the appropriateness of every death sentence imposed in this State. This review includes ascertaining whether (1) the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating circumstances; and (2) the death sentence is disproportionate considering both the nature of the crime

and the defendant. T.C.A. § 39-13-206(c)(1)(C, D). While this Court made such a determination in 1984 when disposing of Philip Workman's direct appeal, the propriety of that initial review is now in serious question for at least three reasons:

(1) First, in 1984, this Court did not consider either Harold Davis's testimony that he lied when he testified at trial that he saw Workman shoot Oliver, and the unrefuted expert opinion of Dr. Cyril Wecht that Workman did not shoot Oliver. This new evidence is clearly relevant to (1) whether the aggravating circumstances outweigh the mitigating circumstances (See, e.g., Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001)(if Workman did not shoot Oliver he is innocent of first-degree murder); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001)(residual doubt about the defendant's guilt constitutes a non-statutory mitigating circumstance); and (2) the nature of the crime for purposes of proportionality review.

As Judge William Ray Price of the Missouri Supreme Court recently recognized, under these circumstances a court charged with appellate review of death sentences must reconsider the propriety of the death sentence in light of the new evidence. In Amrine v. Roper, 2003 Mo. LEXIS 80 (Mo. April 29, 2003), witnesses who identified the prisoner as the person who killed a fellow inmate recanted. Given these recantations, a majority of the Missouri Supreme Court vacated the prisoner's first-degree murder conviction. Judge Price dissented, expressing his belief that the prisoner had not yet established that he was entitled to relief on his first-degree murder conviction. As to the death sentence, however, Judge Price wrote:

> The Supreme Court of Missouri is charged under section 565.035.3 with determining whether the death penalty is excessive or is disproportionate considering, among other things, "the strength of the evidence." .... I believe this is a continuing duty that must be addressed in light of new evidence such as the recantations in this instance. An assessment of the death penalty cannot withstand this analysis when it is based

> solely upon the testimony of witnesses all of whom recant, even though the recantations are not believed.

Amrine v. Roper, 2003 Mo. LEXIS 80 at *26.

As in Amrine v. Roper, the only witness who testified that he saw Philip Workman shoot Lieutenant Oliver has recanted. Judge Price recognizes that the effect of this recantation on the imposition of the death penalty must be assessed whether or not the recantation is believed. In addition, unlike Amrine, Philip Workman presents unrefuted expert testimony that he did not shoot Lieutenant Oliver. No appellate court has considered this new evidence in assessing the propriety of Philip Workman's death sentence. This Court should therefore grant rehearing and grant the Rule 11 application so that the propriety of Philip Workman's death sentence is considered in light of the new evidence.

(2) Second, when affirming the death sentence on direct appeal, this Court found the death sentence to be proportional based upon a comparison with three other felony-murder cases in which the death sentence had been imposed: State v. Harries, 657 S.W.2d 414 (Tenn. 1983); State v. Laney, 654 S.W.2d 383 (Tenn. 1983)); and Houston v. State, 593 S.W.2d 267 (Tenn. 1980). See State v. Workman, 667 S.W.2d 44, 46 (Tenn. 1984). However, in each of these cases, the death sentence has subsequently been overturned: Harries' by the United States District Court (see Harries v. Bell, No. 3:84CV00579 (M.D.Tenn. Aug. 23, 2002); Houston's by the Sixth Circuit, which overturned his conviction as well (see Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995)); and Laney's by the state trial court following this Court's decision in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). With this Court having affirmed the death sentence based exclusively on death sentences which have been overturned, this Court must conduct a new proportionality review.

(3) Third, and finally, this Court affirmed the death sentence based upon the jury's finding, as an aggravating circumstance in this case, that the case involved a felony-murder. However, it is clear under any view, that this Court's consideration of this circumstance was error, in light of this Court's subsequent decision in State v. Middlebrooks, *supra.*

In sum, therefore, a new proportionality review is mandated in light of the new evidence, in light of this Court's earlier reliance on cases in which the death sentence has been overturned, and in light of this Court's decision in Middlebrooks. The petition for rehearing should be granted.

CONCLUSION

This Court should grant the petition for rehearing, grant the application for permission to appeal and grant Philip Workman relief from his conviction and/or relief from his death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 29, 2003, I placed in the United States Mail, first-class postage prepaid, a copy of the foregoing addressed to:

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