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INTRODUCTION

Petitioner Philip R. Workman desires to file a second habeas corpus petition containing the following claims.

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, and Workman is therefore innocent of capital murder (X-Ray Claim). See U.S. v. Bakley, 473 U.S. 667 (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).

3. The knowing use of Harold Davis's perjured testimony violated the Eighth and Fourteenth Amendments (Perjured Testimony Claim). U.S. v. Augurs, 427 U.S. 97 (1976)

4. Tennessee's failure to provide Workman a corrective judicial process to consider 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.2d 335 (6th Cir. 1938); Sanders v. Sullivan, 803 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 (1993).

In Ture Hagerd and In re Sonshine, two panels established that 28 U.S.C. § 2244 does not apply to a second habeas petition if

(1) the petitioner filed a first petition prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA); and

(2) under pre-AEDPA law, courts would have considered the claims presented

in the second petition. Because that is precisely the case here, the panel's decision that 28 U.S.C. § 2244 applies¹ to Workman's proposed second habeas petition is contrary to Hagerd and Sonshine, and the en banc Court should therefore rehear this case.

In addition, the panel's decision to apply Section 2244 precludes Workman from presenting claims which demonstrate that he is actually innocent of capital murder. Such a result offends fundamental principles of justice, and is, therefore, unconstitutional. To maintain the constitutionality of Section 2244, the en banc Court must rule that Section 2244 does not apply.²

I BACKGROUND

While Workman was robbing a Memphis Wendy's Restaurant, 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 fired a shot through his left leg that wounded 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. Severs, 759 S.W.2d 935, 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.

¹ Workman attaches the panel decision as an Appendix to this rehearing request.

² While a determination that specified claims do not meet Section 2244 standards cannot be reviewed by the en banc Court, that Court can review the preliminary issue of whether Section 2244 even applies. Stewart v. Martinez-Villareal, 118 S.Ct. 1620 21(1998); Mancuso v. Herbert, 166 F.3d 97, 99-100 (2nd Cir. 1999).

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

As Judge Nelson correctly noted at oral argument before the panel, 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, the panel recognized that the fatal bullet could not have come from Workman's gun if it emerged from Oliver's body intact.³ 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;⁴ and (2) any photographs or other demonstrative material necessary for the preparation of Workman's defense.⁵ Despite the fact that the trial judge granted these motions,⁶ the State withheld from Workman's counsel an x-ray demonstrating that the bullet that killed Lieutenant Oliver emerged from his body intact.⁷

B Prior To Trial The State Created A False Case To Testify That He Saw Workman Shoot Oliver

The day after the Oliver shooting, Harold Davis approached police to tell them that he

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

⁴ 9/29/81 Motion For Production Of Exculpatory Evidence, Appendix filed with the panel in No. 00-5367 ("App.") at 2.

⁵ 9/29/81 Motion For Discovery, App at 5.

⁶ 12/17/81 Orders, App. at 8, 9.

⁷ See Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen (filed with the panel) at 33 (Declaration of Dr. Kris Sperry); Exhibit B to 9/13/93 Petitioner's Response To Respondent's Motion For Partial Summary Judgment (filed in the District Court) (Trial Counsel's File).

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.⁸

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.⁹

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.¹⁰

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.

⁸ See Exhibit 1 filed with the panel at 11/20/99 Videotape of Davis Interview.

⁹ See *id.*

¹⁰ See *id.*

Davis testified that after he parked his car on the vacant Wendy's parking lot, he saw a white male leave the Wendy's building. Davis then testified that from a distance of approximately ten feet, he saw Workman struggle with police, level his gun at Oliver, and shoot him from two feet away.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.¹² The jury credited Davis's testimony and sentenced Workman to death.

II THE PANEL'S DECISION TO APPLY SECTION 2244 IS CONTRARY TO HANSELD AND SONSHINE

A Hanserd And Sonshine Establish This Circuit's Retrospectivity Analysis

In In re Hanserd, 123 F.3d 922 (6th Cir. 1997), a panel 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 the AEDPA. Because Congress did not specifically state whether Section 2244 applies in such a situation, the panel turned to rules found in Landgraf v. USI Film Products, 511 U.S. 244 (1994), to decide Section 2244's temporal reach.

The Hanserd panel 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. Hanserd, 123 F.3d at 924; see also In re Sonshine, 152 F.3d 1133, 1135 (6th Cir. 1997).

¹¹ TR 655-56, 664 (Davis Testimony), App. at 10-11, 15.

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

B The Panel's Decision Is Contrary To Hanserd And Sunshine

1 Hanserd/Sunshine Step One: The AEDPA Changed Controlling Law

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 (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 (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 (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.

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2 Hanserd/Sunshine Step Two: Applying The AEDPA Would Attach New Legal Consequences

As to the second step in this Circuit's retroactivity analysis, the Sunshine panel recognized that 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 those claims would have an impermissible retroactive effect. Sunshine, 133 F.3d at 1135. For the following reasons, pre-AEDPA law would allow Workman to present his claims in a second petition, and the panel's decision is contrary to Hanserd and Sunshine.

a X Ray Claim

i Cause & Prejudice

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

In November 1990, Workman requested pursuant to the Tennessee Public Records Act any document in the possession or control of the Shelby County Medical Examiner's Office relating to, or reflecting upon, the Oliver shooting.¹³ 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.¹⁴ And in June 1995, Workman served on the Medical Examiner's Office a subpoena specifically requesting production of any x-ray taken of Oliver's corpse.¹⁵ Again,

¹³ 11/5/90 Letter from Christopher M. Minton to Medical Examiner, App. at 18-19.

¹⁴ Declaration of Christopher M. Minton at ¶ 2, App. at 20.

¹⁵ Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen (Filed with the panel) at 4 (Exhibit A to Subpoena In A Civil Case).

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the Medical Examiner's Office failed to produce the Oliver x-ray.¹⁶

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 clemency 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. G. 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, 486 U.S. 214, 223 (1988).

Workman establishes prejudice resulting from the failure to produce the Oliver x-ray. After reviewing the record, the panel expressed "no doubt" that if the bullet that killed Oliver emerged from his body intact, it could not have come from Workman's gun.¹⁷ The Oliver x-ray establishes just that - the fatal bullet emerged from Oliver whole.¹⁸ Thus, the Oliver x-ray demonstrates that Workman is innocent of capital felony-murder, and he cannot be executed. Seyers, 759 S.W.2d at 938. A defendant suffers prejudice when evidence that he is innocent of the crime charged is withheld from him. See U.S. v. Bailey, 473 U.S. 667, 674 (1985).

¹⁶ Id. at 6-32 (Subpoena Response).

¹⁷ Workman v. Bell, 178 F.3d 759, 767 (6th Cir. 1998).

¹⁸ Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen (filed in this Court) at 33 (Declaration of Dr. Kris Sperry).

ii Actual Innocence

As discussed above, the Oliver x-ray establishes that the fatal bullet emerged from Oliver intact, this fact leaves no doubt that Workman did not shoot Oliver, and Workman is therefore innocent of capital murder under Tennessee law.

b Coercion Claim

i Cause & Prejudice

While Workman did not present a Coercion Claim in his first petition, he 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.¹⁹ During the year that followed, Mr. Lax searched for, but was unable to locate, Davis.²⁰ 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.²¹ 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, 753 (1991)(to establish cause, a petitioner must point to "something that cannot fairly be attributed to him").

¹⁹ Declaration of Ron Lax at 7-8, App. at 21.

²⁰ Id. at 11 3-7, App. at 21-22.

²¹ Id. at 18, App. at 22.

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.²² On September 30, 1999, counsel and Jefferson Dorsey, Workman's Clemency Counsel, flew to Phoenix and, after considerable effort, located Davis at a motel.²³ 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.²⁴ A month and a half later, Mr. Dorsey located Davis at a Phoenix area jail.²⁵ 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.²⁶

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

²² Declaration of Christopher M. Minton at ¶ 4, App. at 20.

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

²⁴ See Exhibit 1 filed with the panel at 9/30/99 Videotape of Davis Interview.

²⁵ Declaration of Jefferson T. Dorsey at ¶ 3, App. at 23.

²⁶ See Exhibit 1 filed with the panel at 11/20/99 Videotape of Davis Interview.

at 271-72.

ii 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 of actual innocence.

c 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.²⁷ For the reasons discussed in Section II.B.2.b.ii, above, Workman's Perjured Testimony Claim is tied to a showing of actual innocence.

d Jones Claim

While Workman did not present his Jones 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 undersigned counsel on September 24, 1999, that Davis was with her the night Oliver was shot; and (2) Davis told undersigned counsel and Workman's Clemency Counsel on October 1, 1999, and November 20, 1999, that he lied at Workman's trial. Workman has cause for not

²⁷ See Exhibit 1 filed with the panel (Videotape of Davis interviews).

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 Ms. Porter and counsel.²⁸ At that meeting, Ms. Porter signed a sworn statement that Davis was her the night Oliver was shot and neither she nor Davis saw the shooting.²⁹

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.³⁰ Ms. Moden's failure to give Workman Ms. Porter's name in 1992 constitutes cause for the absence of allegations respecting Ms. Porter in prior proceedings.

As discussed in Section U.B.2.b.i. 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 available State court - the Tennessee Supreme Court. That Court responded by stating that no State remedy is available for Workman's new evidence.³¹ It was only then that Workman's

²⁸ Declaration of Christopher M. Minton at ¶ 3, App. at 20.

²⁹ *Id.*; 9/24/99 Affidavit of Vivian Porter (original filed in Tennessee Supreme Court), App. at 27.

³⁰ Declaration of Ron Lax at ¶ 7, App. at 22.

³¹ 1/3/00 Order, App. at 29, 31.

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Jones Claim became available for federal review. As a result, Workman establishes 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.³² 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.

e. 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

³² 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.

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 THE PANEL'S DECISION TO APPLY SECTION 2244 RENDERS THAT STATUTE UNCONSTITUTIONAL

Federal courts must construe federal statutes to avoid constitutional questions if such a construction is "reasonably possible." Arnett v. Kennedy, 416 U.S. 134, 162 (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. The panel's decision that Section 2244 nonetheless applies renders 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." Mulins v. California, 505 U.S. 437, 445 (1992). Interpreting Section 2244 to deny Workman leave to press claims demonstrating that he is innocent of capital murder does just that.

Concern about the injustice that results from the conviction of an innocent person lies at the heart of our criminal justice system. Schlag v. Delo, 513 U.S. 298, 325 (1995). 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. Schlag, 513 U.S. at 324-25 (executing an innocent person is "the quintessential miscarriage of justice").

If Workman establishes his claims, he will prove that he is actually innocent of capital murder and cannot be executed. Workman makes a substantial and compelling showing that

he can do so. By applying Section 2244 to preclude Workman from presenting his claims, the panel has offended values that form the basis of our criminal justice system. To avoid rendering Section 2244(b) unconstitutional, the en banc Court must rule that Section 2244 does not apply.

IV CONCLUSION

Under the retroactivity analysis Hansford and Sonshino establish, Section 2244 does not apply to Workman's proposed second habeas petition. The panel's decision to apply Section 2244 is contrary to those cases and renders that statute unconstitutional. Rehearing en banc should be granted, and the en banc Court should rule that Section 2244 does not apply to Workman's proposed second petition.

Respectfully submitted,

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