

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

FILED

December 13, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

PHILIP R. WORKMAN,)
)
Petitioner,)
)
v)
)
STATE OF TENNESSEE,)
)
Respondent.)

S.Ct. No. M1999-01334-SC-DPE-PD

ORAL ARGUMENT REQUESTED

**REPLY TO STATE’S RESPONSE TO
MOTION FOR CERTIFICATE OF COMMUTATION**

I THE ATTORNEY GENERAL HAS A DUTY TO SERVE JUSTICE

The [Attorney General] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935). Of course in the above quoted passage Justice Sutherland was referring to the United States Attorney. However, for the purpose of the point stressed by Justice Sutherland, the Attorney General of Tennessee or any state falls within the same description. Therefore, Mr. Workman invites the Attorney General to join him in the request that this Court review the evidence that he has placed before it.

Surely the Attorney General does not take the position that it is permissible to convict and

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sentence a man to death on perjured testimony. Here there is plain evidence of perjured testimony. If “justice shall be done,” as the Attorney General clearly has a duty to ensure, then the Office of the Attorney General must agree that evidence of a death sentence tainted by perjury is something that must be reviewed by the Justices of this Court. Surely the Attorney General is not arguing that “justice” is served by a conviction and sentence of death that is substantially supported by perjured testimony.

II IT IS APPARENT THAT THE ATTORNEY GENERAL HAS YET TO SERIOUSLY REVIEW THE PRESENT EVIDENCE THAT THE SENTENCE OF DEATH IN THIS CASE HANGS ON A THREAD OF PERJURED TESTIMONY

In its response to Mr. Workman’s motion for a certificate of clemency, the State once again asserts the non sequitur that “the validity and correctness of [Workman’s] conviction and sentence have been repeatedly upheld and have now been passed upon by no fewer than 17 judges.”¹ This statement denies the reality that no court has reviewed the evidence that Harold Davis and Vivian Porter now bring to this Court. No court has reviewed the evidence presented through Dr. Cyril Wecht. When this Court last reviewed the evidence in this case, on January 30, 1984, Workman v. State, 667 S.W.2d 44 (Tenn. 1984), rehearing denied Mar. 19, 1984, cert. denied, 469 U.S. 873 (1984), fundamental to this Court’s affirming the judgment in this matter was its understanding that Philip Workman, during a struggle with Officers Oliver and Stoddard, “broke free of the officers, shot Lt. Oliver in the chest and Officer Stoddard in the arm, fired a second shot toward Stoddard, and fled toward the auto parts store next to Wendy’s. Workman, 667 S.W.2d at 46. This evidence, accepted at the time as the truth, has now been shown to have been the product of Harold Davis’s perjury.

¹ State’s Reply at 2.

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Certainly the Attorney General, as a man sworn to seek justice for all Tennesseans, after carefully reviewing the evidence presented will agree that the evidence now available in this matter has either never been seen by any court or never seriously reviewed and will agree this Court must review this evidence and carefully consider Mr. Workman's request for a Certificate of Clemency.

III THIS COURT MUST INDEPENDENTLY ENSURE THAT JUSTICE IS DONE IN MR. WORKMAN'S CASE

The State does not contest that Harold Davis's perjured testimony condemned Philip Workman. The State points to no evidence, in or out of the record, that Davis was present at the Oliver shooting. Rather, the State asserts only that Workman's evidence is "not worthy" of this Court's consideration. Consider for the moment the magnitude of this position. The State asserts that Philip Workman should be executed without any court determining whether he has been condemned by false evidence. The State takes this position despite the fact that Davis's statement is not just an unadorned recantation - it is fully supported by statements from eyewitnesses, police documents, and ballistics evidence. Yet the State maintains this Court should not even look at the evidence and order Workman's immediate execution. In making this demand, the State asks to commit an injustice simply so it can say the litigation is over.

This Court should not ignore evidence that perjured testimony has condemned a man who is innocent of any capital offense. This Court has the power to consider the evidence, either by looking at it yourself or by appointing a Special Master to review the evidence and making findings for your review. The potential execution of the first person in Tennessee in forty years requires no less.

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A THIS COURT CAN DECIDE FOR ITSELF WHETHER PERJURED TESTIMONY CONDEMNED PHILIP WORKMAN

1 This Court Can Consider The Issue

The State represents that the only issue before this Court is whether Workman has “unsuccessfully pursued all state and federal remedies for testing the validity and correctness of [his] conviction and sentence. Heck VanTran v. State, ___ S.W.2d ___, No. W1998-00175-SC-R11-PD (Tenn., filed November 23, 1999, at Jackson)(for publication).”² The quoted portion of Van Tran, however, comes from the following passage in that case:

In Tennessee, execution is imminent only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner’s conviction and sentence.³

When the quoted portion of Van Tran is put in its original context, one recognizes that there is no support for the State’s position that when it moves to set an execution date, the only issue is whether the defendant has any available post-conviction remedy.

Likewise, there is no authority for the State’s assertion that this Court can only recommend commutation in a case that is before it on direct appeal. While this Court in Bass v. State, 231 S.W.2d 707 (Tenn. 1950), (discussed in Mr. Workman’s motion for a certificate of clemency) recommended commutation in such a case, nothing in Bass, nothing in any other case, and nothing in any statute precludes this Court from recommending commutation in the circumstances presented here. Indeed, as Justice Henry has recognized, this Court may make a determination that executive

² State’s Reply at 1.

³ Van Tran v. State, 1999 WL 1060445 at *7 (Tenn. 1999).

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commutation is appropriate in any case that is before it. Collins v. State, 550 S.W.2d 643, 649 (Tenn. 1977)(Henry, J., concurring in part; dissenting in part).

2. This Court Can Look At The Evidence

Rule 22(a), T.R.A.P., specifically provides that if a motion is based on matters not appearing in the record, it shall be accompanied by affidavits or other evidence in support thereof. Workman has moved for a Certificate of Commutation. In his motion, Workman cites matters not appearing in the record, and he provides affidavits and other evidence in support of those matters. The substance of Rule 22(a) plainly supports the procedure that Mr. Workman has invoked. Moreover, Rule 22(c), TRAP, provides that “[o]n request of a party or on its own motion, the appellate court may place any motion on the calendar for hearing.”

In addition, the State’s request that this Court set a date for Workman’s execution does not involve this Court’s appellate review function, a function which is traditionally limited to consideration of record evidence. Rather, it is akin to an original action, much like an Attorney General petition requesting that this Court review the constitutionality of a statute. See In re Burson, 909 S.W.2d 768 (Tenn. 1995). Indeed, this Court has assigned this case a number that was never assigned it before, thus demonstrating that the matter before it does not involve appellate review of a prior action. Because this is a new case, because new evidence is relevant to this Court’s determination, because T.R.A.P. 22(a) specifically provides for the filing of such evidence, and because T.R.A.P. 22(c) provides for hearings on motions, the Court can consider the material Workman files.

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B IF THIS COURT DOES NOT FEEL IT CAN CONSIDER WORKMAN'S EVIDENCE, IT SHOULD APPOINT A SPECIAL MASTER TO DO SO

This Court has inherent power to fashion a procedure for this case to address the situation it presents. See State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998). If the Court does not feel it can consider Workman's evidence, it should appoint a Special Master. See In re Burson, 909 S.W.2d 768 (Tenn. 1995).

In Burson, the Attorney General petitioned this Court to review the constitutionality of a statute. This Court heard oral argument, and, after doing so, determined that its decision required factual findings. It therefore appointed a Special Master for the purpose of taking evidence and making findings. After the Special Master did so, this Court employed his findings to resolve the Attorney General's petition. In re Burson, 909 S.W.2d at 777 .

This Court has before it overwhelming evidence that perjured testimony condemned Workman to die. It has evidence that Workman may be innocent of any capital offense. Before it orders Workman's death, it must consider that evidence. If it does not feel that it can consider Workman's evidence in the first instance, it should appoint a Special Master to do so and report to the Court his/her findings.

IV CONCLUSION

The Attorney General's obligation is to see that justice is done. Workman's evidence raises the very real, and very frightening, possibility that perjured testimony condemned him. If the Attorney General truly cared about justice, he would not seek Workman's immediate execution. He would agree that before we execute Philip Workman, we must resolve whether false evidence has condemned him.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on _____, I hand
delivered a copy of the foregoing to:

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Donald E. Dawson