

No. A-06-_____

In The Supreme Court Of The United States

PHILIP WORKMAN,
Petitioner-Applicant,

v.

RICKY BELL, Warden,
Respondent.

APPLICATION FOR STAY OF EXECUTION:

**TO THE HONORABLE JOHN PAUL STEVENS,
CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EXECUTION DATE: May 9, 2007, 1:00 a.m.

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*To The Honorable John Paul Stevens, Associate Justice For The United States Court
Of Appeals For The Sixth Circuit:*

Pursuant to 28 U.S.C. §§1651 and §2101(f), U.S.S.Ct.R. 23, and all other applicable law, Applicant Philip Workman respectfully requests that this Court grant a stay of execution in this matter pending the conclusion of appellate proceeding in the Sixth Circuit and/or the filing and disposition of a petition for writ of certiorari.

I.

This matter involves Workman's amended petition for writ of habeas corpus which was filed in 2004 the United States District Court for the Western District of Tennessee. Workman v. Bell, W.D.Tenn. No. 03-2660. In that petition, Workman has raised claims of constitutional error arising from *coram nobis* proceedings which occurred in 2001. His appeals in the Sixth Circuit have not been decided on the merits, and his request for a stay of execution to litigate those claims has just been denied. See Exhibit 1, 6th Cir. Nos. 07-5526, 5534, 5535 (Order On Motion For Stay).

II.

At a state *coram nobis* hearing, Philip Workman presented unrefuted scientific testimony that he was not guilty of first-degree murder. Dr. Cyril Wecht, M.D., testified unequivocally that the bullet supposedly found by Terry Willis –alleged to have come from Workman's gun – did not kill Lieutenant Oliver.¹ Dr. Wecht also testified that to a reasonable degree of medical certainty, Oliver was not killed by the type of ammunition

¹ Tr. 18-23.

from Workman's gun.² Wecht's testimony is unrefuted.

Given Dr. Wecht's unrefuted testimony at the *coram nobis* hearing, Philip Workman filed a habeas corpus petition in the District Court, alleging (in Claim 4) that there was insufficient evidence to support his conviction. R. 8 (First Amended Petition For Writ Of Habeas Corpus). Wecht's evidence must be considered along with the other evidence at trial, he maintains, because *coram nobis* is part of the criminal process itself, not a separate collateral attack on the criminal judgment.

In his petition, Workman has also raised additional claims, including claims that the state unconstitutionally mistreated and manipulated witness Harold Davis during the *coram nobis* proceedings in violation of Workman's constitutional rights (Claims 1-2); violated his constitutional rights by refusing to consider evidence from juror Wardie Parks who testified that, based on Dr. Wecht's testimony, he never would have voted to convict Workman (Claim 3); violated his Eighth and Fourteenth Amendment rights by failing to take into account the *coram nobis* evidence while conducting proportionality review (Claim 5) and violated the Eighth Amendment by subjected Workman to numerous execution dates. Claim 6.

Relying on this Court's precedent in United States v. Morgan, 346 U.S. 502 (1954), Workman has contended that his claims arising from the conduct of the *coram nobis* proceedings are cognizable in habeas because, as this Court held in *Morgan*, "Such a motion [in the nature of a writ of error *coram nobis*] **is a step in the criminal case itself**. Id. at 506 n.4. As this Court held, *coram nobis* is "not . . . the beginning of a separate

² See e.g., Tr. 136.

civil proceeding.” Id. See R. 20 (Petitioner’s Motion To Reconsider).

Notwithstanding *Morgan*, the District Court held that *Morgan* was not controlling, that Workman’s claims did not, as in *Morgan*, arise out of the criminal case itself,” and that therefore Workman’s claims were not cognizable in habeas. On such grounds, the District Court transferred Claim 4 to the Sixth Circuit, dismissed Claims 1-3 and 5, and held that Claim 6 was more properly brought pursuant to 42 U.S.C. §1983.

III.

Workman’s position is this: The claims presented in his habeas petition are indeed habeas claims, because under *Morgan*, they are challenges to the underlying criminal proceeding itself. The quirk in this case is that the criminal proceedings resumed after the first federal habeas petition was decided. Thus, though his claims are presented in a second-in-time habeas petition, they are first-in-time habeas claims because they simply were not ripe at the time of the first habeas. Indeed, they did not exist yet.

A.

The District Court’s rejection of this Court’s decision in *Morgan* was in error. In concluding that *coram nobis* proceedings were not a part of the criminal proceeding, the District Court rejected the applicability of *Morgan* because it believed that *coram nobis* did not exist in Tennessee criminal cases until 1955, and therefore *Morgan* was irrelevant to the analysis here. Id., citing Green v. State, 216 S.W.2d 305 (Tenn. 1948); State v. Vasques, 2007 WL 715459 (Tenn. Mar. 9, 2007). The District Court’s reliance on *Green* and *Vasques* is demonstrably wrong, however, because the statements made in *Green* and *Vasques* are demonstrably wrong. Contrary to what the District Court held, there is a long history of *coram nobis* proceedings in criminal cases in Tennessee. State v. Fleming, 26

Tenn. 152 (1846); Andrews v. State, 34 Tenn. 550 (1855); State v. Disney, 37 Tenn. 598 (1858). The District Court thus erred on this account.³

B.

Further, the District Court erred in believing that Workman's habeas claim with regard to Dr. Wecht's testimony constitutes a second habeas petition. As Workman has maintained, because his claims challenging the *coram nobis* proceedings challenge the criminal process under *Morgan*, but because those claims did not ripen until after Workman's first habeas had been decided, this claim is a first-in-time habeas claim under Stewart v. Martinez-Villareal, 523 U.S. 637 (1998).

C.

In *Panetti v. Quarterman*, U.S.No. 06-6407, this Court is currently considering whether a habeas petitioner can seek relief in a second-in-time habeas corpus petition when the claims raised in that second petition were not ripe at the time of the first habeas proceeding. That is the precise situation with all the claims presented in Workman's petition, including Workman's Cyril Wecht claim.

IV.

This Court Should Grant A Stay Of Execution

First, because Workman's present appeal involves the question whether a petitioner must comply with the AEDPA's provisions for second petitions when claims in that petition were not ripe at the time of the first petition, this Court should grant a stay of execution

³ And whatever can be said about State v. Mixon, 983 S.W.2d 661 (Tenn. 1999), cited by the District Court for the proposition that *coram nobis* proceedings are post-conviction remedies, it is clear that *Mixon* never considered the applicability of this Court's decision in *Morgan*, which, Workman submits, controls here. Because of *Morgan*, Workman's claims are habeas claims.

pending this Court's impending decision in *Panetti*. Indeed, the issues presented in both cases are identical.

Second, because the District Court rejected Workman's habeas claims by improperly rejected this Court's governing precedent in *Morgan*, this Court should grant a stay on that ground as well, because the decision below conflicts with *Morgan*. Further, the decision below conflicts with the Eighth Circuit's recent decision in Collier v. Norris, ___ F.3d ___, 2007 U.S.App.Lexis 8616 (8th Cir. Apr. 16, 2007). In *Collier*, "Collier's petition requested that the district court review the Arkansas Supreme Court's decisions with respect to his *coram nobis*" and post-conviction petitions. Collier, 2007 U.S.App.Lexis 8616, p.*12. On appeal, the Eighth Circuit – including Justice O'Connor sitting by designation – conducted a lengthy review of the constitutional claims arising from Collier's *coram nobis* proceedings. Id., pp.*13-25. The Eighth Circuit reviewed such claims and denied them on the merits, concluding: "[W]e affirm the district court's denial of habeas relief for Collier's claim regarding the *coram nobis* decision." Id., p.*25.

CONCLUSION

Because the decision below raises issues which will be addressed in this Court's impending decision in *Panetti*, this Court should grant a stay of execution pending *Panetti*, pending the conclusion of the Sixth Circuit appeal and/or the filing of a petition for writ of certiorari following a final ruling by the Sixth Circuit in this matter. In light of the conflict between the lower court decision, this Court's decision in *Morgan*, and the Eighth Circuit's decision in *Collier*, this Court should also grant a stay of execution pending the conclusion of the Sixth Circuit appeal and/or the filing of a petition for writ of certiorari following a final ruling by the Sixth Circuit.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion for stay has been served upon Joseph Whalen, Office of the Attorney General and Reporter, 425 Fifth Avenue North, Nashville, Tennessee 37243, this the 8th day of May, 2007.

