

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PHILIP RAY WORKMAN,)	
)	
Petitioner,)	
)	
V.)	No. 03-2660-D
)	
RICKY BELL, Warden,)	
RIVERBEND MAXIMUM SECURITY)	
INSTITUTION,)	
)	
Respondent.)	

ORDER OF PARTIAL DISMISSAL
AND
ORDER DIRECTING THE RESPONDENT TO RESPOND

Petitioner Philip Workman, an inmate under sentence of death at Riverbend Maximum Security Institution in Nashville, Tennessee, has filed a second-in-time First Amended Petition For Writ Of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. In 1996, this Court, the Honorable Julia Smith Gibbons, denied Petitioner's request for habeas relief pursuant to his first petition. That judgment was affirmed on appeal. See Workman v. Bell, 178 F.3d 759 (6th Cir. 1998), cert. denied, 528 U.S. 913 (1999). Post-judgment litigation of that matter continues before the Sixth Circuit Court of Appeals. See Workman v. Bell, no. 06-6451. For the reasons stated below, the Court finds that a response addressing part of the Petition is in order. Accordingly, Respondent is ORDERED,

consistent with this order, to respond to the Petition within thirty days of the date of this order. In all other aspects, the Petition is hereby DISMISSED.

I. BACKGROUND

The facts and procedural history underlying Petitioner's conviction, sentence, and separate habeas proceedings have been set forth numerous times previously and are not essential to the adjudication of this Petition. It is sufficient to observe that, after Petitioner completed his first round of federal review pursuant to § 2254, he sought relief through Tennessee's statutory *coram nobis* procedure. See Tenn. Code Ann. § 40-26-105. In his *coram nobis* proceedings, Petitioner contended that had newly discovered evidence been presented to his trial jury the result of the trial would have been different. Petitioner proffered eye witness and expert testimony designed to undermine trial evidence and otherwise bolster his theory of innocence of first-degree murder. In particular, Petitioner offered 1) the purported recantation of Harold Davis, a key trial witness who originally testified that he saw Petitioner shoot the victim; 2) the purportedly corroborative testimony of a companion of Davis; and 3) the expert testimony of Dr. Cyril Wecht concerning his belief that the bullets fired from Petitioner's gun likely did not cause the fatal injury to the victim. Petitioner also sought to present the testimony of a trial juror, Wardie Parks, who would have testified

that, had he heard the evidence presented by Petitioner in *coram nobis* proceedings, he would not have voted to sentence Petitioner to death. Petitioner was prevented from presenting the juror's testimony due to the *coram nobis* court's application of Tenn. R. Evid. 606(b). The trial court denied *coram nobis* relief and the Tennessee Court of Criminal Appeals ultimately affirmed. State v. Workman, 111 S.W.3d 10 (Tenn. Crim. App. 2002). The Tennessee Supreme Court denied Petitioner's request for permission to appeal the Court of Criminal Appeals' judgment, and Petitioner thereafter filed this habeas petition.

II. CLAIMS RAISED IN THE INSTANT PETITION

Petitioner makes several allegations concerning his treatment on Tennessee's death row, the State's alleged misconduct leading up to the *coram nobis* proceedings, and purported errors of law committed by the state trial and appellate courts in adjudicating Petitioner's *coram nobis* application. Based on these allegations, Petitioner articulates the following constitutional claims in his Petition:

- a. CLAIM 1: The State violated the Sixth, Eighth, and Fourteenth Amendments by interfering with counsels' ability to interview Harold Davis [prior to the *coram nobis* hearing] and by intimidating Davis to testify in a manner beneficial to the State.
- b. CLAIM 2: The State violated the Sixth, Eighth, and Fourteenth Amendments by withholding evidence that in exchange for Harold Davis's testimony at the *error coram nobis* hearing favorable to the State, the State would try to assist Davis resolve criminal charges pending against him.

- c. CLAIM 3: Tennessee's Courts violated the Sixth, Eighth, and Fourteenth Amendments by refusing to consider the testimony of former juror Wardie Parks that had he heard the evidence presented at the *error coram nobis* proceeding he would not have convicted Philip Workman of first-degree murder and sentenced him to death.
- d. CLAIM 4: Because Dr. Cyril Wecht's opinion that Philip Workman did not shoot Officer Oliver is the only expert opinion in the trial and *error coram nobis* record, the evidence is insufficient to support Mr. Workman's conviction of felony-murder and resulting death sentence, in violation of the Sixth, Eighth, and Fourteenth Amendments.
- e. CLAIM 5: Tennessee's appellate courts violated the Eighth and Fourteenth Amendments by failing to conduct the statutorily required proportionality review taking into account the evidence presented at the *error coram nobis* proceeding.
- f. CLAIM 6: By scheduling Mr. Workman's execution four times, and by repeatedly subjecting him to pre-execution procedures such as those described [in the factual allegations of the petition], the State has violated the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [footnote omitted], the Eighth Amendment's prohibition against cruel and unusual punishment, and the due process clause of the Fourteenth Amendment.

First Amended Petition For Writ of Habeas Corpus, no. 03-2660, doc. no. 8 at ¶¶ 102-107. From the foregoing, it appears that the claims raised by Petitioner are easily divisible into claims concerned exclusively with matters arising in the course of Petitioner's state *coram nobis* proceedings (Claims 1-3 and 5) and claims which are broader, if not unrelated, in scope (Claims 4 and 6).

III. JURISDICTION

The Court must first determine whether it may exercise jurisdiction over the merits of the Petition. While's its posture as a second-in-time habeas petition invites immediate scrutiny under 28 U.S.C. § 2244(b),¹ the first, more fundamental, hurdle confronting the Petition is whether or not it raises claims which are even cognizable in federal habeas corpus. Accordingly, the Court must first examine each claim to determine if it is appropriate for habeas corpus review.

A. Claims Based on Petitioner's State *Coram Nobis* Proceedings

As noted above, the majority of the claims raised in the Petition are based on allegations of improper conduct by the State and asserted errors of law by state courts during Petitioner's *coram nobis* proceedings. Petitioner contends that such claims are cognizable in federal habeas corpus because Tennessee courts treat

¹ Section 2244(b), in pertinent part, reads as follows:
(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-
(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

coram nobis proceedings tantamount to motions for new trials, and "federal habeas review exists for issues arising in the context of new trial motions and appeal therefrom." Petition at ¶ 8 (citations omitted).

As an initial matter, the cases Petitioner relies on for his assertion that "federal habeas review exists for issues arising in the context of new trial motions and appeal therefrom," do not, so far as the Court can discern, remotely support such a proposition.² Rather, the cases largely seem to suggest that motions for a new

² Petitioner cites the following cases in support of his assertion that claims about alleged improprieties during his state *coram nobis* proceedings are cognizable in federal habeas corpus: Epsom v. Hall, 330 F.3d 49, 52-53 (1st Cir. 2003), Brown v. Easter, 68 F.3d 1209, 1210-11 (9th Cir. 1995), Landano v. Rafferty, 897 F.2d 661 (3d Cir. 1990), Renzi v. Commonwealth of Virginia, 794 F.2d 155, 158 (4th Cir. 1986), Domainque v. Butterworth, 641 F.2d 8, 13 (1st Cir. 1981), and McKinney v. Walker, 394 F.Supp. 1015, 1016-17 (D. S.C. 1974). In Epsom, The First Circuit simply determined that a habeas petitioner's *pro se* postconviction motion for a new trial sufficiently raised a particular ineffectiveness claim to deem it exhausted for federal habeas purposes. Epsom, 330 F.3d at 52-53. The habeas claim concerned alleged ineffectiveness of counsel at trial and had nothing to do with the conduct of the government or state courts during the actual motion for new trial proceedings. In Brown, the Ninth Circuit was concerned with whether or not a federal district court employed the "proper record" in ruling on the habeas petitioner's application. 68 F.3d at 1211. The Ninth Circuit simply held that the district court properly limited the record before it to that which was exhausted before the state's highest court and not merely developed during state postconviction review. Id. In Renzi, the Fourth Circuit found a federal habeas claim sufficiently exhausted because it was litigated in prior state proceedings, including during the habeas petitioner's motion for a new trial based on after-discovered evidence. 794 F.2d at 158. Once again, the habeas claim had nothing to do with the conduct of the government or the state courts in litigating the motion for a new trial. In Domainque, the First Circuit merely opined that a habeas petitioner's state court motion for a new trial "set Domainque on a route along which he could exhaust state remedies." 641 F.2d at 13. The claims that theoretically could have been exhausted along the "route" of a new trial motion were assorted due process and ineffectiveness claims related to the habeas petitioner's trial which, once again, had nothing to do with the actual conduct of the state court new trial motion. Finally, in McKinney, the district court determined that a habeas petitioner's claim that the state unconstitutionally exercised peremptory strikes in composing a jury venire was sufficiently exhausted, by virtue of having been litigated in a motion for new trial, for purposes of federal habeas review. 394 F.Supp. at 1016-17. Again, the habeas claim had nothing to do with the conduct of the government or the court in litigating the motion for new trial.

trial, or other similar post-conviction procedures, may be sufficient to exhaust claims related to the trial court conviction or sentence for purposes of federal habeas review. As such, they are of no readily apparent relevance to this matter. Petitioner offers no authority to support the cognizability of claims in federal habeas corpus which are concerned exclusively with the conduct of parties and the state courts during *coram nobis* or, for that matter, motions for new trials or other similar post-conviction proceedings.

Petitioner's failure to offer on-point authority supporting this Court's exercise of habeas jurisdiction over claims based on his *coram nobis* proceedings is understandable given that it is well-established in the Sixth Circuit that "error committed during state post-conviction proceedings can not provide a basis for federal habeas relief." Alley v. Bell, 307 F.3d 380, 387 (6th Cir. 2002)(citing Kirby v. Dutton, 794 F.2d 245, 247 (6th Cir. 1986)). Thus, claims of constitutional violations occurring during state post-conviction proceedings are generally not cognizable as federal habeas corpus claims. See Alley, 307 F.3d at 386-87 (finding noncognizable a due process claim based on alleged judicial misconduct occurring during state post-conviction proceedings); Miller v. Francis, 269 F.3d 609, 621 (6th Cir. 2001)(denying due process claim that state appellate court applied incorrect standard of review during state post-conviction proceedings); Kirby, 794

F.2d at 247-48 (affirming denial of habeas petition alleging Sixth, Eighth, and Fourteenth Amendment violations in state post-conviction proceedings).

Petitioner seeks to sidestep this legal reality by asserting that Tennessee's *coram nobis* procedure is not "post-conviction" in nature. Rather, he suggests, *coram nobis* proceedings are to be treated like simple motions for a new trial which are otherwise time-barred by Tenn. R. Crim. P. 33(b). See Petition ¶ 8 (quoting State v. Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995)). In Tennessee, *coram nobis* relief is limited "to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding." Tenn. Code Ann. § 40-26-105. "The writ of error *coram nobis* is an 'extraordinary procedural remedy,' filling only a 'slight gap into which few cases fall.'" Freshwater v. State, 160 S.W.3d 548, 553 (Tenn. Crim. App. 2004) (quoting State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999)). However, despite the statutorily maintained distinctions between Tennessee's *coram nobis* and other post-conviction relief procedures, there can be no doubt but that Tennessee's *coram nobis* statute is a mechanism for pursuing some form of state post-conviction relief. Furthermore, as noted above, even if a *coram nobis* action were more properly considered a new trial motion rather than a form of post-conviction relief,

Petitioner has still failed to show that matters arising in the course of a motion for a new trial are not so collateral to the judgment of conviction obtained at trial as to render them beyond the pale of federal habeas jurisdiction. Finally, this Court has previously considered a claim similar to Petitioner's and determined that Tennessee's *coram nobis* procedure is a post-conviction proceeding for purposes of applying Kirby, thus concluding that claims based on the course and conduct of Tennessee's *coram nobis* proceedings are not cognizable in habeas corpus. In Payne v. Bell, 194 F.Supp.2d 739, 741-43 (W.D. Tenn. 2002), the habeas petitioner's "fourth claim for relief allege[d] that his Fourteenth Amendment rights were violated by the failure of the Tennessee courts to conduct an evidentiary hearing on [his] petition for writ of error *coram nobis*." This Court recognized that Kirby was controlling and determined that the petitioner's constitutional claim was not cognizable in habeas corpus. Id. at 742-43. Thus, for the foregoing reasons, the Court concludes that claims based on alleged constitutional violations occurring during Petitioner's state *coram nobis* proceedings are not properly before the Court in the form of a petition pursuant to 28 U.S.C. § 2254. Accordingly, Claims 1-3 and 5 are DISMISSED.

C. Claim 6: Challenge to Capital Punishment Protocols

Petitioner also contends that the State's procedures in anticipation of previously scheduled execution dates have deprived

him of rights guaranteed by the Eighth and Fourteenth Amendments, as well as the United Nations Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment. In particular, Petitioner complains that, in preparation for his previous pending execution dates, the State has repeatedly relocated him from his customary cell to a separate holding cell near the execution chamber for the period known as "death watch," maintained constant surveillance during "death watch," restricted his access to his personal materials, and prohibited him from "contact visits" with his family and attorneys. Petition at ¶¶ 39-44.

Petitioner concedes that his claim is not viable to the extent that he asserts any rights pursuant to the United Nations Convention. See Petition at 26 n.1. However, he maintains that his treatment on Tennessee's death row violates the Eighth Amendment's protection against cruel and unusual punishment and the due process protections of the Fourteenth Amendment. It is important to note that this part of the Petition does not appear to challenge Petitioner's eligibility for execution or even the method of execution which Tennessee might employ. Rather, it appears that Petitioner is simply challenging the conditions of his confinement during the "death watch" phase of Tennessee's execution protocol. Whatever the ultimate merit of the Eighth and Fourteenth Amendment claims Petitioner makes in this regard, such claims are not

appropriate for federal habeas corpus. Hodges v. Bell, 170 Fed. Appx. 389, 392-93 (6th Cir. 2006)(holding that Tennessee death row inmate's "complaints about the conditions of his confinement . . . do not in any way implicate the validity of his conviction or duration of his state-court sentence. . . . As such, Hodges's allegations are a proper subject for a § 1983 action, but fall outside of the cognizable core of habeas corpus relief.")(citing Nelson v. Campbell, 541 U.S. 637, 643 (2004), and Muhammed v. Close, 540 U.S. 749, 750 (2004)). Petitioner's claim alleging constitutional violations based on his repeated exposure to the procedures of "death watch" does not question the validity of his state court conviction or sentence and is therefore more properly the domain of a complaint pursuant to 42 U.S.C. § 1983. See Hill v. McDonough, 126 S.Ct. 2096, 2101-02 (2006); Nelson, 541 U.S. at 647. Claim 6 does not articulate a constitutional claim which is cognizable in habeas corpus. Accordingly, Claim 6 is DISMISSED.

B. Claim 4: The Sufficiency of the Evidence

Petitioner also contends that there is insufficient evidence of his guilt in light of the forensic testimony of Dr. Wecht at the *coram nobis* proceedings. As noted supra, n.1, the Court is barred from exercising jurisdiction over any habeas claim that was previously litigated in a separate habeas application. 28 U.S.C. § 2244(b)(1). The Court is also barred, in certain circumstances, from exercising jurisdiction over a habeas claim that was not

presented in a previously litigated habeas petition. § 2244(b)(2). However, as Petitioner relates, not all second-in-time habeas petitions are second or successive for purposes of applying § 2244(b). See, e.g., In re Bowen, 436 F.3d 699, 704 (6th Cir. 2006).

Challenges to the sufficiency of the convicting evidence are typically cognizable in habeas corpus. In his previous habeas application, Petitioner challenged the sufficiency of the evidence supporting certain aggravating circumstances. It does not appear that he challenged the general sufficiency of the evidence to support the underlying conviction. While Petitioner states that the expert opinion predicated the instant sufficiency of the evidence claim emerged during the *coram nobis* proceedings and is based on the expert's review of the victim's autopsy, photographs of the victim, and the ammunition carried by Petitioner, see Petition at ¶ 87, it is unclear, for purposes of applying § 2244(b), whether the instant claim could have been asserted during the initial habeas proceedings. Given that some forensic evidence, consisting of an x-ray of the victim, was not available to the Petitioner during prior habeas proceedings, further inquiry in this regard is appropriate.

In the event the Court determines that § 2244(b) does not preclude review of Petitioner's sufficiency of the evidence claim, additional impediments to consideration on the merits remain. For

example, subject to applicable tolling, petitions for habeas relief pursuant to 28 U.S.C. § 2254 are subject to the one-year statute of limitations contained in § 2244(d)(1). Section 2254 petitioners are also generally required to exhaust their habeas claims in the state courts prior to seeking relief in federal court. Rose v. Lundy, 455 U.S. 509, 510 (1982).

The record before the Court is insufficient for the Court to conclusively determine the applicability of the second or successive habeas restrictions of § 2244(b), the statute of limitations of § 2244(d), or the exhaustion requirement to Petitioner's discrete claim about the sufficiency of the convicting evidence in light of Dr. Wecht's *coram nobis* testimony. Accordingly, the Court finds that a response from Respondent is appropriate. In ordering a response, the Court makes no findings of fact or law other than that the sufficiency of the evidence claim at issue here is typically cognizable in habeas corpus and deserves further inquiry in these proceedings.

Respondent is hereby ORDERED, pursuant to Rule 4 of the Rules Governing Section 2254 Cases, to submit, within thirty days of the date of this order, its response to Petitioner's First Amended Petition For Writ of Habeas Corpus, to the extent that the Petition presents claims which, consistent with this order, may be cognizable before this Court in the exercise of its habeas corpus jurisdiction.

IV. CONCLUSION

Claims 1-3, 5 and 6 of Petitioner's First Amended Petition For Writ of Habeas Corpus allege claims which are not cognizable in the exercise of this Court's habeas corpus jurisdiction and are therefore DISMISSED. The Respondent is ORDERED to submit its response to the remaining portions of the Petition within thirty days of the date of this order.

IT IS SO ORDERED, this 2nd day of April, 2007.

s/Bernice B. Donald

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE