IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAR 2 1 2001

LEONARD GREEN, Clerk

PHILIP R. WORKMAN,
Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

Nos. 96-6652, 00-5367

RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO REOPEN AND TO APPOINT A SPECIAL MASTER AND IN OPPOSITION TO PETITIONER'S MOTION FOR STAY OF EXECUTION

INTRODUCTION

Eleven days prior to his rescheduled execution, Workman returns to this Court, once again shouting spurious allegations of fraud on the court in hopes of reopening previously concluded litigation in his case. On the basis of that motion, he also moves for a stay of execution. But, as before, there has been no fraud on the court. Moreover, because his most recent "motion to reopen" is nothing more than another attempt to pursue a successive habeas petition, this Court should not even entertain the merits of his motion.

ARGUMENT

I. WORKMAN'S MOTION TO REOPEN MUST BE DISMISSED AS A SUCCESSIVE HABEAS PETITION.

At the outset, the proper scope of Workman's motion to reopen must be clarified. While it seeks to reopen "the proceedings" in this Court, namely, Workman's first habeas petition, No. 96-6652, and his prior motion for leave to file a second habeas petition, No. 00-5367, it actually relates only to the latter. The motion to reopen is based on Workman's claim of actual innocence;[1] he alleges that respondent's counsel misrepresented the availability of executive clemency as a remedy to address such a claim. In *Herrera v. Collins*, 506 U.S. 390, 393, 400 (1993), the Supreme Court held that a claim of actual innocence is not cognizable in a federal habeas proceeding; assuming, *arguendo*, that the right to bring such a claim existed, though, the Court further opined that any such right would be limited to "truly persuasive" demonstrations of innocence for which no other state avenue, such as clemency, existed. *Id.* at 417. To the extent, then, that the existence of executive clemency could ever have material relevance in a habeas case, it would only be in the context of an actual innocence claim.

But Workman's first habeas petition included no actual innocence claim. Indeed, when this Court denied Workman's petition to rehear the judgment affirming the denial of his first habeas petition, this Court declined to express a view on actual innocence and

[1] *See* Motion to Reopen, ¶¶ 1, 5.

merely noted that state clemency proceedings — not this Court's habeas review — are the appropriate forum for such claims.[2] Likewise, when respondent filed his response to Workman's March 6, 2000, motion to reopen his first habeas petition, he emphasized that Workman had withdrawn his first opportunity to have such an issue addressed in a clemency proceeding.[3] Workman sought to bring an actual innocence claim only as part of his March 23, 2000, motion for leave to file a second habeas petition. Accordingly, and despite Workman's effort to implicate both prior proceedings, his motion to reopen relates only to the motion for leave to file a second petition, No. 00-3367.

Properly recognized as such, his motion to reopen must fail. Workman's motion for leave to file a second habeas petition was denied by a panel of this Court on March 31, 2000. When such a motion is denied, "[n]o motion or request for reconsideration, petition for rehearing, or any other paper seeking review of the granting or denial of authorization will be allowed." 6 Cir.R. 22(b)(6), *citing* 28 U.S.C. § 2244(b)(3)(E); *In re Rieg*, 190 F.3d 479 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 1538 (2000). While a

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[2] *See* May 10, 1999, order denying petition for rehearing.

[3] *See* March 8, 2000, Response of Respondent-Appellee to Petitioner's Motion to Reopen his first habeas petition, pp. 10, 12. Workman had suggested in his motion to reopen that he had brought claims in his first petition asserting his innocence; respondent pointed out that "petitioner [had] mischaracterize[d] the relevant claims presented in his habeas corpus petition."

majority of the members of this Court, sitting *en banc*, purported to vacate that order,[4] the *en banc* Court itself subsequently determined, on the basis of *King*, that the panel's decision was not subject to *en banc* reconsideration. *Workman v. Bell*, 227 F.3d 331, 334, 338 (6th Cir. 2000), *cert. denied*, __ S.Ct. __, 2001 WL 178265 (U.S. Feb. 26, 2001)(No. 00-7620). There being no provision for reconsideration of the denial of Workman's request for permission to file a second habeas petition, the instant "motion to reopen" must be treated as another attempt to pursue a successive petition, itself subject to the AEDPA's restrictions on such petitions. *See* 28 U.S.C. § 2244(b).

Applying those restrictions, Workman's motion to reopen fares no better than did his motion for leave to file a second habeas petition. Because Workman's motion raises the same claim presented in that March 23, 2000, application, namely, actual innocence, it must be dismissed pursuant to 28 U.S.C. § 2244(b)(1).[5] But even if construed as a claim not previously presented, it similarly fails to satisfy the requirements of 28 U.S.C. § 2244(b)(2). Even assuming that Workman's "evidence" regarding clemency proceedings qualifies as newly discovered under § 2244(b)(2)(B)(i), it does not even relate to, much less establish, Workman's innocence under § 2244(b)(2)(B)(ii).

Workman argues, though, that this Court has inherent authority to reopen his prior motion for leave to file a second habeas petition, despite the AEDPA's restrictions,

[4] *See* order of April 4, 2000, granting petition for rehearing *en banc*.

[5] For the same reasons, any ruling of this Court on this basis would likewise not be subject to rehearing or reconsideration. *See* 28 U.S.C. § 2244(b)(3)(E).

because he alleges a fraud on the court. In support thereof, he cites, *inter alia*, this Court's September 5, 2000, decision, denying his motion to reopen his first habeas petition. *Workman v. Bell*, *supra*, 227 F.3d 331. In the opinions issued with the Court's order on that date, all members of the *en banc* court did agree that they were not precluded from entertaining the motion to reopen the first habeas petition on the basis of an alleged fraud upon the court. *Id.* at 335, 341. In support thereof, both opinions cited to the United States Supreme Court's opinion in *Calderon v. Thompson*, 523 U.S. 538 (1998). There, the Supreme Court suggested, in dicta, that a court of appeals was not constrained by the provisions of the AEDPA from exercising its inherent authority to recall a mandate denying habeas relief upon proof that a fraud had been perpetrated on the court. *Id.* at 557.

But Workman would have this extremely narrow exception to the AEDPA's restrictions on successive habeas petitions broadened to a degree that the Supreme Court could not have contemplated. Case No. 00-5967, the motion for leave to file a second habeas petition, is not a case in which a judgment on appeal has been rendered; instead, it is a case in which the Court has exercised its statutory gatekeeping authority to determine whether or not a successive habeas petition may be instituted in the district court. *See generally Carlson v. Pitcher*, 137 F.3d 416, 417-18 (6th Cir. 1998)(gatekeeping provisions of § 2244 require petitioner to make prima facie showing that he is entitled to relief before permission to file successive motion may be granted). While logic may

support the proposition that a court of appeals should not be rendered powerless to recall its mandate and review a dispositive judgment on appeal in the face of proof that egregious bad faith of one of the parties led to such a judgment, these same considerations do not mandate that the court have such authority when executing what is essentially a screening function to prevent endless habeas litigation. *Id.* at 418. Indeed, the very statute that establishes this gatekeeping function also renders the panel's decision final. *See* 28 U.S.C. § 2244(b)(3)(E). It would frustrate one of Congress' primary goals in enacting the AEDPA if a habeas petitioner could bypass its provisions and gain reconsideration of the denial of his successive application simply by slapping a "fraud" label on his motion. *See United States v. Woods*, 169 F.3d 1077, 1079 (7th Cir. 1999)(captions do not matter; court must determine the substance of the motion).

II. WORKMAN'S ALLEGATIONS PROVIDE NO EVIDENCE OF A FRAUD ON THE COURT.

Assuming that this Court may entertain the merits of Workman's petition, his allegations fail to support a conclusion that a fraud has been, or even may have been, perpetrated upon this Court in connection with its decision to deny Workman's motion for leave to file a second habeas petition. Workman rests his claim of fraud upon allegations of improprieties in the clemency proceedings conducted in his case. Accordingly, he reasons, respondent misrepresented when he made reference to the

availability of clemency[4] in the course of opposing authorization for Workman to file an actual innocence claim.

Workman's position is fatally flawed for at least two reasons. First, even accepting Workman's allegations as true — and respondent unequivocally disputes them[5] — the adequacy of the clemency proceedings conducted in Workman's case is completely immaterial to his claim of actual innocence. As respondent noted previously, "claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation . . ." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). This is particularly the case when such claims are brought in a second or successive petition. *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (new claims based on newly discovered evidence must establish that, *but for constitutional error*, the petitioner would not have been found guilty). It was only in the context of a discussion, in dicta, of the scope of any *assumed* such right that the Supreme Court made any reference to the relevance of existing clemency proceedings. *Herrera*, *supra*, 506 U.S. at 417.[6] Respondent's references, then, to Workman's efforts

[4] Respondent's pleadings were filed in March, 2000 — a time when neither of the clemency hearings conducted in Workman's case had yet been scheduled.

[5] In point of fact, the Attorney General *did not* maintain a dual role in Workman's clemency proceedings. Respondent recognizes, though, that, for the purpose of addressing this motion, it may be necessary to proceed on the assumption that Workman's allegations are true. *See Workman v. Bell*, *supra*, 227 F.3d at 339.

[6] The Supreme Court made no suggestion that the adequacy of such a remedy need also be assessed.

to avail himself of a clemency hearing,[1] made in the same context, cannot have formed the basis for this Court's denial of his actual innocence claim. Accordingly, Workman's allegation that such references by respondent were somehow inaccurate likewise cannot lead to any conclusion that the denial of his motion to file a second habeas petition was improvident. *Compare Danjaljuk v. Parmley*, 10 F.3d 338, 339, 356 (6th Cir. 1993)(court vacated prior judgment only upon proof that, as a result of prosecutorial misconduct, it had improvidently affirmed district court's denial of habeas relief in extradition case). Workman was denied an opportunity to file an actual innocence claim because such claims are not cognizable on federal habeas review, not because he had another avenue — clemency — open to him. The allegations regarding clemency that Workman now presents could have made no difference to the panel's decision even if Workman had presented them before.

Second, Workman's allegations of improprieties in the clemency proceedings have no bearing on the validity of statements made to this Court by respondent regarding clemency. In his response to Workman's bid to file a second habeas petition, respondent merely quoted pertinent excerpts from the dicta in *Herrera* regarding clemency and referenced the fact that Workman had applied for executive clemency, only to withdraw

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[1] *See* Response in Opposition to Motion for Leave to File a Second Habeas Corpus Petition, p. 17.

his application prior to a scheduled hearing.[10] As noted above, similar references to clemency were made in response to Workman's motion to reopen his first habeas petition.[11] Again, even assuming that Workman's allegations about the clemency proceedings are true, they do not, and cannot, support a conclusion that respondent's references were in any way made in bad faith. *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991) (Invocation of the inherent power to alter a prior judgment requires a finding of bad faith). Indeed, no allegation made by Workman tends even to render these references by respondent untrue, inaccurate or even misleading. Consequently, they provide no evidence, much less proof, of a fraud upon the court. Workman's efforts to paint them with such a brush, while creative, are offensive and speak only to the depths to which a condemned prisoner will reach in pursuit of his own interest.

Based on the information Workman presents in support of his motion, his hyperbolic characterizations of his clemency proceeding as "corrupt" and "a show with a prearranged result" are reckless and unjustified, if not slanderous. It is sufficient, for purposes of this motion, to state only that the speculation, innuendo and outright distortion in which Workman engages does not comport with reality.[12] But Workman

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[10] *See* Response in Opposition to Motion for Leave to File a Second Habeas Petition, p. 17.

[11] *See* Response of Respondent-Appellee to Motion to Reopen, p. 12.

[12] For example, Workman points to an "interrogation" of a witness, Vivian Porter, by Parole Board members as evidence that the result of his clemency hearing was "preordained." But Workman fails to disclose to this Court the plain reality

goes beyond this information and again cries "fraud" — based on nothing more than the mere fact that respondent's earlier pleadings made some reference to clemency. If these circumstances are sufficient to justify anything beyond a summary denial of Workman's motion to reopen, then it is difficult to envision circumstances that *would not* support a claim of fraud on the court. A court's action to vacate a prior final judgment to correct a fraud on the court should be reserved for those rare circumstances in which some egregious conduct has caused the Court to render that judgment in error. *See Chambers v. Nasco, Inc.*, *supra*, 501 U.S. at 36-38, 40; *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U.S. 238, 245 (1944); *Pierre v. Johnson*, 197 F.3d 147, 153 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 2204 (2000); *Danjetjak v. Petrosky*, *supra*, 10 F.3d at 349, 353-54. This extraordinary power of the court should not be invoked routinely in situations where a party seeks merely to gain otherwise unavailable reconsideration of a decision he is unhappy with, or worse, to engender further delay.

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that, prior to the hearing, both Workman and the State submitted written, detailed presentations to the Board, laying out their respective positions. As this Court has had opportunity to observe, even on paper, Ms. Porter's statements are highly suspect. It is not at all surprising, then, for Board members to have questioned her credibility at the hearing. Any adult with a modicum of common sense would have done the same.

CONCLUSION

For the reasons advanced, Workman's Motion to Reopen and to Appoint a Special Master should be denied under 28 U.S.C. § 2244(b)(1) as a successive petition. In the alternative, it should be denied as without merit. Workman's Motion for Stay of Execution should likewise be denied.

Respectfully submitted,

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