IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN,	)	
Petitioner,	)	
	)	
v.	)	**Nos. 06-6451/07-5031**
	)	**Capital Case**
RICKY BELL	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR STAY OF EXECUTION

Petitioner moves for a stay of the May 9, 2007, execution of his 1982 death sentence for the murder of a police officer in the line of duty so that he may prosecute his appeal from the district court's denial of his Fed.R.Civ.P. 60(b) motion for relief from the court's 1996 judgment denying him habeas relief. Petitioner's motion should be denied. He has absolutely no likelihood of success on appeal. And while petitioner insists that he is entitled to a stay because this Court granted a stay last Fall under similar circumstances in *Donnie Johnson v. Ricky Bell*, No. 05-6925 (6th Cir.), petitioner's case is *not* Donnie Johnson's case. The stay issued in *Johnson* came just two years after the conclusion of Johnson's federal habeas proceedings,[1] and prior to

[1]This Court affirmed the denial of habeas relief in *Johnson* in 2003, *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), and the Supreme Court denied certiorari in 2004. *Johnson v. Bell*, 541 U.S. 1010 (2004).

this Court's issuance of the stay in *Johnson*, the execution of Johnson's sentence had been stayed on only one other occasion.[2] As discussed below, and as this Court well knows, petitioner's case presents a vastly different picture.

I. THERE IS NO BASIS FOR A STAY OF EXECUTION BECAUSE THERE IS NO LIKELIHOOD OF SUCCESS ON THE MERITS OF PETITIONER'S APPEAL.

It is well-settled that in order to warrant a stay of execution, a prisoner must demonstrate a likelihood of success on the merits, s*ee Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (before granting stay of execution, federal court must consider the likelihood of success on the merits); *see also Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006) (prisoner seeking stay of execution must show a "significant possibility of success on the merits"); and in this instance, petitioner must demonstrate a strong likelihood of success on the merits of his appeal from the denial of relief. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (factors regulating issuance of stay pending appeal include "whether the stay applicant has made a strong showing that he is likely to succeed on the merits"). Contrary to petitioner's assertions, he has not shown, and cannot show, any likelihood of success, much less a strong one.

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[2]On November 9, 2004, the district court stayed Johnson's first post-habeas execution date of November 16, 2004, pending its ruling on Johnson's Rule 60(b) motion. *See Donnie Johnson v. Ricky Bell*, No. 97-3052 (W.D.Tenn.).

Petitioner touts the fact that the district court granted him a certificate of appealability on his claim that certain of his habeas claims should be reopened because the judgment on those claims had been procured by a fraud on the court. But as petitioner himself emphasized to the district court, and as the district court itself observed, the question whether to grant a COA has nothing to do with the merits of a claim. *See* R. 205, Order Granting Certificate of Appealability, p. 6 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337, 342) ("[A] COA does not require a showing that the appeal will succeed. . . . The question is the debatability of the underlying constitutional claim, not the resolution of that debate."). So even in the regular case, the issuance of a COA thus says little about a petitioner's likelihood of success on appeal.

But the issuance of a COA in petitioner's case, in particular, says *nothing* about his likelihood of success on appeal; this is so because, while at the COA stage the district court inquired only if it can be debated whether the court resolved petitioner's Rule 60(b) motion *correctly*, on appeal this Court reviews the district court's resolution of petitioner's motion only for an *abuse of discretion*. *Futernick v. Sumpter Township*, 207 F.3d 305, 313 (6th Cir. 2000).[3] Indeed, the district court itself stated

[3]Respondent urged the district court to incorporate this standard of appellate review into the standard for determining whether to issue a COA in the first place. *See* R. 198-1, Response in Opposition to Petitioner's Application for a Certificate of

that "it [could not] conclude that Petitioner has demonstrated a likelihood or 'significant possibility' of success on the merits of his appeal," due in part to "the narrowed scope of appellate review in an appeal of a district court's denial of a Rule 60(b) motion." (R. 206, Order Denying Motion for Stay of Execution, p. 6).

In order to succeed on appeal, then, petitioner must be able to show, not that the district court was wrong to deny his claim under Rule 60(b) that the state perpetrated a fraud on the court, but that the district court abused its discretion in denying this claim under Rule 60(b). An abuse of discretion occurs when the district court relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard. *Apanovitch v. Houk*, 466 F.3d 460, 476 (6th Cir. 2006). Petitioner is unable to show any of these things; indeed, he makes no effort in support of his motion for a stay to show that he can.

Appealability, pp. 1-4. The district court "acknowledg[ed] the appealing logic of Respondent's contention that a COA should not issue because 'it makes little sense to inquire, as a threshold matter, about the debatability of whether the district court was *correct* in deciding the way it did, only then to abandon correctness and inquire on appeal only whether the district court *abused its discretion* in deciding the way it did.'" (R. 205, Order Granting Certificate of Appealability, pp. 4-5) The court nevertheless opted to apply the standard set forth by this Court in footnote 1 of its opinion in *United States v. Hardin*, __ F.3d __, 2007 WL 817267 (6th Cir. Mar. 20, 2007), which merely reiterates the standard from *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

In denying petitioner's Rule 60(b) motion, the district court concluded that petitioner "[did] not properly set forth the elements of a 'fraud on the court claim' . . . or attempt to demonstrate how his motion properly fits within the parameters of such an action." (R. 177, Order Denying Motion for Relief from Judgment, p. 13) The court found that petitioner had failed to lodge any credible allegation of fraudulent conduct on the part of the state's habeas attorneys.

> The prospect of holding a hearing which would necessarily require the Defendant to prove grave ethical and professional misconduct on the part of the state's habeas attorneys strikes the Court as particularly untoward in the absence of any colorable allegation of such misconduct. This Court will not provide the forum for a spectacle of desperate accusation by allowing the Petitioner to recklessly seek to impugn the professional, indeed moral, character of attorneys against whom he cannot even muster sufficient evidence to make a non-frivolous allegation of fraud.

(*Id.*, pp. 18-19)[4] The district court acknowledged, in rejecting petitioner's claim, that this Court had split evenly in a prior proceeding in this case, *Workman v. Bell*, 227 F.3d 331 (6th Cir. 200) (en banc), with respect to the standard for determining

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[4]Petitioner's motion for a stay references an allegation against a member or members of the State Attorney General's Office, but such an allegation did not appear in his Rule 60(b) motion for relief from judgment, *see* R.161, First Amended Motion for Equitable Relief from Judgment, pp. 13, 25, 29, and appears to be nothing more than a *post hoc* response to the district court's finding that "Petitioner [did] not direct any of his various allegations of fraud or misconduct at the state habeas attorneys who litigated this matter previously." (R. 177, Order Denying Motion for Relief from Judgment, p. 14)

whether the allegedly fraudulent conduct of state officials can be imputed to the state habeas attorneys in federal court — a "broader" and a "more stringent" standard. (*Id.*, pp. 14-15 (quoting *Buell v. Anderson*, 2002 WL 31119679 (6th Cir. Sept. 24, 2002)).[5]

But whether or not this presents a "thorny issue," as petitioner puts it, is of no matter here, because it would be of no matter on petitioner's appeal. Whatever may be said about the district court's decision to apply the "more stringent" standard to reject petitioner's claim, it cannot be said to constitute an abuse of discretion, because the court did not employ an *erroneous* legal standard. The "more stringent" standard fully comports with this Court's precedent, *see Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993) (fraud on the court is conduct "on the part of an officer of the court").[6] The opinion in *Workman* advocating application of a "broader" standard, representing as it does one of the two opinions of an evenly divided en banc court,

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[5]This thus marks not just the second but the *third* time that petitioner has cried "fraud on the court" in this case, *see also Workman v. Bell*, 245 F.3d 849 (6th Cir. 2001), an accusation that is generally regarded as "rare." *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005); *see id*. (reopening a final judgment on the basis of fraud on the court "must be not just a high hurdle to climb but a steep cliff-face to scale").

[6]In contrast, the so-called "broader" standard, which would allow alleged misconduct of state officials to be imputed to the state's federal habeas attorneys and thus create a sort of "constructive fraud" on the court, tends to fly in the face of this Court's precedent and to distort the essence of what it means to perpetrate a fraud on the court.

has no precedential effect, *see United States v. Grey Bear*, 863 F.2d 572, 573 (8th Cir. 1988); indeed, the en banc order that it accompanies rejects petitioner's fraud on the court claim. *See Workman*, 227 F.3d 331.[7] In short, petitioner cannot win on appeal; there is thus no basis at all on which to grant a stay of execution.

II. BALANCING THE RESPECTIVE INTERESTS WEIGHS HEAVILY IN FAVOR OF DENYING A STAY.

Nearly twenty-six years have passed since petitioner's murder of Memphis Police Lieutenant Ronald Oliver. This Court affirmed the denial of habeas relief in petitioner's case in 1998, *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), and the Supreme Court denied certiorari a year later. *Workman v. Bell*, 528 U.S. 913 (1999). Petitioner has thus been engaged in post-habeas litigation in an effort to forestall the execution of his sentence for the last seven-and-a-half years. And the execution of that sentence has been delayed on five prior occasions — twice by stays granted by this Court in 2000 and 2001,[8] once by a stay granted by the Tennessee Supreme Court

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[7]The district court also determined that "the only known appellate case to resolve this issue clearly applied the 'more stringent' standard." (R. 177, Order Denying Motion for Relief from Judgment, p. 18 (citing *Fierro v. Johnson*, 197 F.3d 147, 155-156 (5th Cir. 1999)).

[8]*Workman v. Bell*, 209 F.3d 940 (6th Cir. 2000); *Philip Workman v. Ricky Bell*, Nos. 96-6652/00-5367 (6th Cir. Jan. 26, 2001).

in 2001,[9] once by executive reprieve in 2003,[10] and once by the federal district court in 2004.[11] If the State's interests in enforcing its own criminal judgments are "all but paramount" at the conclusion of federal habeas proceedings, *see Calderon v. Thompson*, 523 U.S. 538, 557 (1998), then at this juncture, the State's interests in enforcing this particular judgment must be *nothing* but paramount.

Furthermore, while petitioner points to the fact that he faces irreparable harm, it also appears that allowing the State to proceed to "execute its moral judgment in [this] case," *Calderon*, 523 U.S. at 556, would nonetheless be in petitioner's own interests. Petitioner has recently complained that the repeated cycle in his case of setting, staying, and re-setting the execution of his sentence, which is almost entirely the result of his own legal efforts, is causing him "mental distress."[12] If indeed petitioner is being harmed by continuing to have his sentence looming, rather than executed, then that harm can also be addressed by denying his motion for a stay.

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[9]*Workman v. State*, 41 S.W.3d 100 (Tenn. 2001).

[10]*See Workman v. Bell*, No. 03-2660 (W.D.Tenn. Sept. 15, 2003) (docket minutes reflecting withdrawal of motion for stay of execution in light of executive reprieve).

[11]*Philip Workman v. Ricky Bell*, Nos. 94-2577; 03-2660 (W.D.Tenn. Sept. 2, 2004).

[12]*See Workman v. Bell*, No. 03-2660 (W.D.Tenn.) (proposed "Second Amended Petition for Writ of Habeas Corpus," pp. 25, 26 (filed as attachment to R. 21, Motion to Amend)).

CONCLUSION

Petitioner's motion for stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by facsimile and by first-class mail, postage prepaid, to Paul Bottei, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee, 37203, on this the 2nd day of May, 2007.

/s/ Joseph F. Whalen

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JOSEPH F. WHALEN
Associate Solicitor General