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 DENYING RESPONDENT'S MOTION TO DISMISS CLAIM FOUR
AND
ORDER TRANSFERRING PETITION PURSUANT TO 28 U.S.C. § 1631

Before the Court is Respondent's Motion to Dismiss claim four of Petitioner's second-in-time petition for habeas corpus relief. In previous orders, the Court has dismissed five of the six claims asserted in the petition as non-cognizable in habeas corpus and denied Petitioner's motion for reconsideration of the order of dismissal. The Court ordered Respondent to respond to the remaining claim - claim four - in which Petitioner alleged that, in light of certain expert testimony adduced during his state court *coram nobis* proceedings, there is insufficient evidence to support his conviction and sentence of death.

In the response, Respondent asserts that claim four should be dismissed because it "constitutes 'a claim presented in a second or successive habeas corpus application under section 2254 that was

not presented in a prior application,' 28 U.S.C. § 2244(b)(2), and petitioner has failed to obtain authorization from the court of appeals for this Court to consider such a claim. 28 U.S.C. § 22444(b)(3)(A)[sic]." Respondent's Motion to Dismiss Claim 4 and Memorandum in Support, doc. no. 22 at 1. Respondent contends that questions about whether or not Petitioner could have asserted his sufficiency of the evidence claim during his first round of habeas corpus proceedings are reserved for the court of appeals in determining whether to authorize a second or successive filing under § 2244(b)(3)(A). Finally, Respondent appears to suggest that an outright dismissal of claim four is appropriate, rather than the usual procedure of transferring the petition to the court of appeals, in light of the fact that the Court has already ordered the dismissal of the other five claims asserted in the petition.

Petitioner asserts that his sufficiency of the evidence claim "did not accrue until the 2001 *coram nobis* proceedings," Petitioner's Response to Motion to Dismiss, doc. no. 23 at 1, and that, therefore, he could not have presented the claim in his earlier petition. Thus, he concludes, his petition is not second or successive for purposes of § 2244(b). See, e.g., Lang v. United States, 474 F.3d 348 (6th Cir. 2007); In re Bowen, 436 F.3d 699 (6th Cir. 2006).

While it is true that "not every numerically second petition is 'second or successive' for purposes of" § 2244, In re Bowen, 436

F.3d at 704, a petition which satisfies the pre-AEDPA "abuse of the writ" standard suffices as a second or successive petition under § 2244. See id. "Under the abuse of the writ doctrine, a numerically second petition is 'second' when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect." Id. (citing McCleskey v. Zant, 499 U.S. 467, 489 (1991)). Thus, in order to assess whether the remaining claim of Petitioner's second petition constitutes an "abuse of the writ," the Court must turn its attention to the discrete allegation lodged in claim four.

Claim four of the second petition reads as follows:

> 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 and resulting death sentence, in violation of the Sixth, Eighth, and Fourteenth Amendments.

Thus, in claim four Petitioner asks the Court to invalidate his conviction and sentence on the basis of an alleged insufficiency of the convicting evidence that did not emerge until his state court *coram nobis* proceedings. However, a habeas corpus petitioner alleging insufficient evidence in support of his conviction "is entitled to habeas corpus relief if it is found that[,] upon the record evidence adduced *at the trial*[,] no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979)(emphasis added). Contrary to the intimation of Petitioner's response to the motion

to dismiss, and as discussed more fully in the Court's order denying Petitioner's motion to reconsider, Petitioner's *coram nobis* proceedings were post-conviction in nature and, therefore, not a part of his trial. See, e.g., State v. Mixon, 983 S.W.2d 661, 671 (Tenn. 1999)(remarking that "a suit for writ of error coram nobis is a new action"). Thus, however compelling one views the evidence adduced during Petitioner's *coram nobis* proceedings and whatever light it sheds on the evidence adduced at trial, analysis of the sufficiency of the convicting evidence is limited to consideration of the evidence adduced at trial, not after-discovered evidence. See Henderson v. Collins, 184 Fed.Appx. 518, 525 (6th Cir. 2006)("[N]ewly discovered evidence does not apply to an insufficiency claim, which evaluates the evidence that *was* presented without regard to potentially contrary evidence that *might* have been presented . . . .")(emphasis in original). Accordingly, Petitioner's sufficiency of the evidence claim did not "accrue" upon his obtaining Dr. Wecht's testimony in 2001. It had accrued by the time he filed his first habeas petition, and his failure to raise it at that time must be considered either "deliberate abandonment" or "inexcusable neglect."

Given that claim four thus appears to constitute an "abuse of the writ," it must be construed as a "second or successive" petition for purposes of applying § 2244(b). Petitioner may not pursue claim four in this Court without obtaining permission from

the United States Court of Appeals for the Sixth Circuit. § 2244(b)(3)(A). It does not appear that Petitioner has filed any part of his second petition in the Sixth Circuit. Under In re Sims, 111 F.3d 45, 47 (6th Cir. 1997)(per curiam), "when a second or successive petition for habeas corpus relief or 2255 motion is filed in the district court without 2244(b)(3) authorization from [the Sixth Circuit], the district court shall transfer the document to [the Sixth Circuit] pursuant to 28 U.S.C. § 1631." Accordingly, it is hereby ORDERED that the Clerk transfer this petition, pursuant to 28 U.S.C. § 1631, to the United States Court of Appeals for the Sixth Circuit. Given that the Court has already dismissed claims one through three, five, and six of the petition, this order of transfer is limited to the sufficiency of the evidence claim articulated in claim four. See Harper v. Digugliemo, 2006 WL 1308248 at *5 (E.D. Pa. May 11, 2006)(dismissing some claims in second habeas petition and transferring remaining claims to court of appeals pursuant to § 1631). The Clerk shall include a copy of this order and all documents filed in case no. 03-2660 in the materials transferred to the Sixth Circuit Court of Appeals. Because the Court is obligated to transfer claim four of the petition as discussed in this order, Respondent's Motion to Dismiss Claim Four is DENIED.

IT IS SO ORDERED this 27th day of April, 2007.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE