

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

PHILIP RAY WORKMAN,)	
)	
Petitioner,)	
)	
v.)	No. 03-2660
)	Judge Donald
RICKY BELL, Warden,)	
Riverbend Maximum)	
Security Institution,)	
)	
Respondent.)	

RESPONDENT'S MOTION TO DISMISS CLAIM 4
AND MEMORANDUM IN SUPPORT

On September 3, 2003, petitioner filed a Petition for Writ of Habeas Corpus. On August 27, 2004, petitioner filed a **A**irst Amended Petition for Writ of Habeas Corpus. **@** On April 2, 2007, this Court dismissed all claims presented in that petition but one **C** Claim 4 **C** and directed respondent to respond to that claim. Respondent now moves to dismiss Claim 4, as well, pursuant to 28 U.S.C. § 2244(b). Claim 4 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. § 2244(b)(3)(A).

ARGUMENT

As this Court noted in its order of April 2, 2007, petitioner's original petition for habeas relief (No. 94-2577) was denied by this Court in 1996. In this successive petition, petitioner challenges the sufficiency of the evidence on which he was convicted of felony murder. Such a claim was not presented in his original petition. The clear provisions of 28 U.S.C. § 2244(b)(2) demand that it be dismissed, unless petitioner can satisfy the statutory criteria set forth in § 2244(b)(2)(A) or (B). But petitioner must seek to do that in the court of appeals **C** not in this Court.

In its order directing a response to this Claim, the Court stated that **A**ot all second-in-time habeas petitions are second or successive, **@**and queried whether petitioner's claim **A**ould have been asserted during the initial habeas proceedings . . . [g]iven that some forensic evidence . . . was not available to the Petitioner during prior habeas proceedings. **@**(R. 19, p. 12) But whether the factual predicate for a claim could have been discovered previously is not a question for determining whether a claim is second or successive **C** it is a question for determining whether a second or successive claim can nevertheless be authorized for filing. See 28 U.S.C. § 2244(b)(2)(B)(i), (ii) (requiring petitioner to show that the **A**actual predicate for the claim could not have been discovered previously through the exercise of due diligence, **@**and that the facts underlying the claim provide clear and convincing evidence of actual innocence). The argument that this claim is based on

evidence that was not previously available to petitioner is thus one for him to make to the court of appeals. If it were otherwise **C** if a habeas petitioner could file a **A**second-in-time**@**habeas claim simply by asserting that the facts on which the claim was based were not previously available to him **C** the requirements of § 2244(b)(2)(B)(i)&(ii) would be rendered meaningless.

Furthermore, that petitioner purports to have new evidence relating to his conviction for felony murder is logically irrelevant to Claim 4, by which petitioner seeks to challenge the sufficiency of the convicting evidence. Evidence or opinions petitioner obtained years after his criminal trial, and presented at his coram nobis hearing, have no relevance to the question whether the trial evidence on which the jury based its decision to convict in 1982 could reasonably support a finding of guilt beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-319 (1979).

Claim 4 of the petition should be dismissed.¹

¹Normally this Court would be obligated to transfer a second or successive petition to the court of appeals. See In re Bowling, 422 F.3d 434, 440 (6th Cir. 2005), cert. denied, 126 S.Ct. 1353 (2006) (citing In re Sims, 111 F.3d 45, 47 (6th Cir. 1997)). But this Court already has ordered the dismissal of five of the six claims presented in the habeas petition.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

/s/ Joseph F. Whalen

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served through the electronic filing system on counsel for petitioner, Paul Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37202 on this the 11th day of April, 2007.

/s/ Joseph F. Whalen

JOSEPH F. WHALEN
Associate Solicitor General