IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN, Petitioner-Appellant,	)	
v.	)	No. 96-6652
RICKY BELL, Warden, Respondent-Appellee.	)	
In re:	)	
PHILIP R. WORKMAN, Movant.	)	No. 00-5367

ON PETITIONER'S MOTION TO REOPEN AND MOTION FOR DECLARATION THAT 28 U.S.C. §2244 DOES NOT APPLY TO SPECIFIED CLAIMS

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLEE

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STATEMENT OF THE CASE

Petitioner, Philip Ray Workman, was convicted by a jury in 1982, after trial, of the first degree felony murder of Memphis Police Lieutenant Ronald Oliver. At a separate sentencing hearing, the same jury sentenced Workman to death pursuant to Tenn. Code Ann. § 39-2-203(g)(1982), finding five statutory aggravating circumstances.[1]

[1] 1) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered; 2) the murder was committed for the purpose of

Following the conclusion of two state post-conviction proceedings in 1986 and 1992, respectively, Workman filed a petition for the writ of habeas corpus in federal district court. (R. 1, J.A. I, 14)[2] The district court denied relief, awarding summary judgment to respondent on all claims and denying Workman's motion for summary judgment. (R. 94, J.A. III. 1293) Judgment was entered on November 14, 1996. (R. 96, J.A. I. 69)

This Court affirmed the judgment of the district court on October 30, 1998. *Workman v. Bell*, 160 F.3d 276 (6th Cir. 1998), *republished at* 178 F.3d 759 (6th Cir. 1998). Workman filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 12, 1998. On May 10, 1999, Workman's petition was denied by the panel, with a portion of the Court's original opinion being deleted. Workman's petition for

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avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant; 3) the murder was committed while the defendant was engaged in committing or was fleeing after committing or attempting to commit, the offense of robbery; 4) the murder was committed by the defendant while he was in or during the escape from lawful custody or place of lawful confinement; and 5) the murder was committed against any law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer. Tenn. Code Ann. § 39-2-203(i)(3), (6), (7), (8), (9) (1982). This Court has previously determined that the jury improperly considered the felony murder aggravator, but that this error was harmless. *Workman v. Bell*, 178 F.3d 759, 774 (6th Cir 1998).

[2] This was actually Workman's second-in-time petition. His first petition was filed November 18, 1987, and dismissed without prejudice on August 27, 1992.

certiorari was denied by the United States Supreme Court on October 4, 1999, *Workman v. Tennessee*, 120 S.Ct. 264 (1999), and this Court issued its mandate on October 12, 1999. Workman's petition for rehearing of the denial of certiorari was denied on November 29, 1999. *Workman v. Tennessee*, 120 S.Ct. 573 (1999).

On January 27, 2000, Workman filed an Application for Commutation to the Governor of the State of Tennessee. A hearing was scheduled on that application for March 9, 2000. On March 5, 2000, Workman filed a Motion to Reopen his habeas corpus case with this Court. On March 8, 2000, Workman withdrew his Application for Commutation.[3] On March 24, 2000, Workman filed a Motion for Leave to File a Second Habeas Corpus Petition, Motion for Declaration That 28 U.S.C. § 2244 Does Not Apply to Specified Claims and a Motion for Stay of Execution. On March 31, 2000, a panel of this Court denied all of Workman's pending motions. On April 3, 2000, Workman filed petitions to rehear and suggestions for rehearing en banc on his Motion to Reopen and his motions regarding application of the provisions of 28 U.S.C. § 2244. On April 4, 2000, this Court granted Workman's petition to rehear en banc and stayed his execution "until further order of the Court."

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

[3] Response of Respondent-Appellee to Petitioner's Motion to Reopen (hereafter, Response to Motion to Reopen), App. E.

FOR REVIEW[4]

The following facts summarize the evidence at Workman's state court trial. Facts relevant to the particular issues before the Court will be set forth in the corresponding sections of the Argument.

On the evening of August 5, 1981, Workman robbed, at gunpoint, the Wendy's restaurant on Danny Thomas Boulevard in Memphis. A total of 3 police officers initially responded to the robbery -- Lt. Oliver and Officers Stoddard and Parker. (J.A., III. 1435-36, 1480) Officer Stoddard and Lt. Oliver both responded to the north side of the restaurant, which is the side from which Workman exited. (J.A., III. 1436, 1478) Parker responded to the south side. After being confronted by Lt. Oliver at the restaurant exit, Workman fled across the parking lot. (J.A., III. 1478) Stoddard and Oliver caught up to Workman, and wrestled with him across the Wendy's parking lot and into an adjacent parking lot. (J.A., III. 1479, 1482) There, Workman removed a gun from his pants and shot Stoddard in the right arm, knocking him several feet backwards to the ground. (J.A., III. 1479-80, 1482) While falling to the ground, Stoddard heard

[4] Petitioner's corresponding statement consists in large part of the allegations he presented in support of his previously denied claims for habeas relief, and argument thereon. In some instances, he presents these allegations— largely rejected by the district court in the habeas case— as if they were a part of the evidence at his state court trial. These allegations are not fact, nor are they relevant to the issues presently before the Court.

several more shots. (J.A., III. 1479) When Stoddard looked up he saw Oliver down on the ground and Workman running away. (J.A., III. 1480, 1482)

Harold Davis, a computer operator from Tacoma, Washington, witnessed the shooting. While in the restaurant parking lot, Davis heard Oliver tell Workman to "hold it," and then saw the two men struggling. (J.A., III. 1411) He saw Stoddard come to Oliver's assistance and Workman struggling with the two officers. (J.A., III. 1411) Davis observed Workman shoot Stoddard and then, holding the gun at chest or stomach height, shoot Oliver. (J.A., III. 1411, 1412) As Oliver fell, he was firing at Workman. Workman fired back and fled. (J.A., III. 1411, 1412)

Officer Parker, who had been checking the south side of the restaurant building, ran to the north side after hearing shots fired. (J.A., III. 1437-38) When he emerged on the north side, he saw Oliver falling to the ground. (J.A., III. 1438-39) Parker checked on Stoddard, who had been shot in the arm, and Oliver and then noticed Workman running through the parking lot. (J.A., III. 1439) When Workman saw Parker, Workman fired a shot at him. (J.A., III. 1440, 1480, 1483) Parker attempted to return fire, but Workman spun away before Parker could shoot. (J.A., III. 1440) Workman then fled across the parking lot and into an adjacent wooded, residential area. (J.A., III. 1442) After radioing the police dispatcher regarding the situation, Parker pursued Workman. (J.A., III. 1443) Neither Stoddard nor Parker ever fired a shot. (J.A., III. 1458; T.R., XIV. 1122-23)

Workman was apprehended in the same wooded area approximately an hour after the shooting. (J.A., III. 1447) He told officers that he had thrown his gun into the woods. (T.R., XII. 759) His gun was soon located alongside a truck under which Workman had hid while police were searching for him.(T.R., XII. 797-798) The gun, a .45 caliber semi-automatic Colt pistol, which was capable of carrying 7 rounds (J.A., III. 1499D, 1499H), was found in a condition indicating that all its rounds had been fired. (T.R. , XII. 798-799) Oliver's service revolver was found by his feet with six spent shell casings in the cylinder. (T.R., XI. 722) An autopsy of Lt. Oliver revealed that he had died as the result of a single gunshot wound. (J.A., III. 1404) His body exhibited an entrance wound on the front left side of his chest, and an exit wound in the back, near his right shoulder blade. (J.A., III. 1399, 1401) The autopsy showed that Lt. Oliver had suffered internal gunshot wound injuries to his diaphragm, stomach, both lungs and heart. (J.A., III. 1400) The medical examiner, Dr. James Bell, testified that Oliver's wounds were consistent with his having been shot with a high caliber bullet. (J.A., III. 1401)

During his own testimony, Workman stated that after running from the officers, he fell on the parking lot. (J.A., III. 1513) He stated that, while trying to give up his gun, he was hit or grabbed and then "I guess I pulled the trigger" and "[t]he gun fired." (J.A., III. 1514-15) He stated that he then heard gunfire coming from his right, turned to it, and "I guess I shot again." (J.A., III. 1515) On cross-examination, Workman admitted,

"I pulled the trigger, yes sir ... I had my hand around the gun and I guess it was pointed at the officers." (J.A., III. 1541)

SUMMARY OF THE ARGUMENT

Workman's Motion to Reopen is devoid of any factual allegations sufficient to state a claim that a fraud was perpetrated on this Court during the appellate proceedings in this case. Nor does it contain factual allegations sufficient to justify any further proceedings in this case. Absent such a showing, his motion is the functional equivalent of a successive habeas petition raising a claim that has been previously determined. Accordingly, the motion must be dismissed pursuant to 28 U.S.C. §2244(b)(1).

Even if Workman's Motion to Reopen is not subject to such dismissal, it should be denied on the merits. Workman has not, and cannot, demonstrate the perpetration of a fraud on this Court with respect to the non-production of the autopsy x-ray of police lieutenant Ronald Oliver. There has been no showing, nor is there any reason to conclude, that any party to, or attorney involved in, this habeas corpus proceeding was involved in the x-ray's non-production. Nor has there even been any showing of, or reason to conclude, bad faith on the part of the non-party from whom the x-ray was requested.

Moreover, the lack of the autopsy x-ray during the prior proceedings in this case did not cause, and could not have caused, this Court erroneously to affirm the district court's denial of habeas relief in this case. The x-ray evidence does nothing to alter the determination by this Court, or the district court, that summary judgment was properly awarded to the respondent.

The provisions of 28 U.S.C. §2244, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, are properly applied so as to bar Workman's successive habeas petition, as a panel of this Court has separately determined. Application of the provisions of section 2244(b) to bar Workman's claims based on allegedly new evidence does not create an impermissible retroactive effect, as it does not attach new legal consequences to Workman's pre-AEDPA conduct. The application of these statutory restrictions to Workman's successive petition also does not constitute an unconstitutional suspension of the writ of habeas corpus.

ARGUMENT

I. WORKMAN'S MOTION TO REOPEN FAILS TO STATE A CLAIM OF FRAUD ON THE COURT; HIS MOTION SHOULD BE DISMISSED AS A SUCCESSIVE HABEAS PETITION.

More than three years after the entry of the district court's judgment denying Workman's petition for habeas corpus relief, and more than one year after this Court's decision affirming that judgment, Workman seeks to reopen his case, alleging that a fraud has been perpetrated on the Court. Workman's motion, however, fails to allege any facts sufficient to warrant the reopening of his habeas petition; nor does it allege facts sufficient to justify any further proceedings on the motion.

A. Workman's Motion to Reopen Fails to Allege Facts Sufficient to State a Claim of Fraud on the Court.

In support of his position that the Court has the authority to take the action he seeks, Workman invokes the Court's inherent authority, citing *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U.S. 238 (1944), and this Court's decision in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). He also invokes Fed.R.Civ. P. 60(b)(6) and 28 U.S.C. § 1651, apparently in reliance on *Demjanjuk*. While these cases arguably support the proposition that such inherent power "allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated on the court," *Chambers v. Nasco, Inc., supra*, 501 U.S. at 44, these cases also make clear that, as a result of the traditional rule against altering prior judgments, "invocation of the inherent power would require a finding of bad faith." *Id.*, at 49. Only the most egregious conduct will rise to the level of fraud on the court. *Fierro v. Johnson*, 197 F.3d 147, 153 (5th Cir. 1999), *petition for cert. filed* (March 21, 2000) (U.S. No. 99-8740). *See, e.g., Chambers v. Nasco, Inc., supra*, 501 U.S. at 36-38, 40 (district court properly imposed sanctions against litigant and his attorney for misconduct, including fraudulent transfer of property to deprive court of jurisdiction, intentional withholding of information from the court, filing false and frivolous pleadings, and engaging in a "series of meritless motions and pleadings and delaying actions," despite repeated warnings from the court); *Hazel-Atlas Glass Company v. Hartford-Empire Company, supra*, 322 U.S. at 245 (court of appeals' decision reversed due to a litigant's "deliberately planned and carefully executed scheme to defraud" the court of appeals); *Demjanjuk v.*

Petrovsky, supra, 10 F.3d at 349, 353-354 (government attorneys deliberately withheld requested exculpatory information in their possession with a reckless disregard for the truth).

Furthermore, the type of fraud that would warrant invocation of such inherent power involves only those "actions that interfere with [the] administration of justice." *Demjanjuk v. Petrovsky, supra*, 10 F.3d at 351. "[T]hus, only actions that actually subvert the judicial process can be the basis for upsetting otherwise settled decrees." *Id.* Accordingly, "[c]ases dealing with fraud on the court often turn on whether the improper actions are those of parties alone, or if the attorneys in the case are involved," because attorneys are officers of the court. *Id.*, at 352.[5] *See Banks v. United States*, 167 F.3d 1082, 1083 (7th Cir. 1999) (court has authority to reopen only if it finds that counsel's conduct affected the integrity of its own proceedings); *Fierro v. Johnson, supra*, 197 F.3d at 154 (only the most egregious conduct by a party in which an attorney is implicated will constitute fraud on the court). *See also Chambers v. Nasco, Inc., supra*, 501 U.S. at 35-38 (fraudulent conduct of a party and his attorney); *Hazel-Atlas Glass Company v. Hartford-Empire Company, supra*, 322 U.S. at 247 (fraudulent conduct of a party and its attorney), *Demjanjuk v. Petrovsky, supra*, 10 F.3d at 354 (misconduct of government

[5] In *Demjanjuk*, both the party — the United States Department of Justice — and its attorneys were one and the same, and the alleged misconduct involved the Department's attorneys.

attorneys in habeas litigation).

> Fraud upon the court should ... embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and *relief should be denied in the absence of such conduct.* (emphasis added)

7 Moore's Federal Practice and Procedure, ¶ 60.33, *quoted in Demjanjuk v. Petrovsky, supra*, 10 F.3d at 352.[6] Such conduct must be sufficiently alleged. An appellate hearing on a petition to impeach a judgment based on fraud is "not just a ceremonial gesture," and the petition "must contain the necessary averments, supported by affidavits or other acceptable evidence." *Hazel-Atlas Glass Company v. Hartford-Empire Company, supra*, 322 U.S. at 248.

Workman's Motion to Reopen[7] is devoid of factual allegations sufficient even to state a claim that a fraud was perpetrated on the Court during his federal habeas proceedings.[8] He merely offers proof that in 1995 he caused a subpoena for records

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[6] Accordingly, the allegations included in Workman's supplemental brief regarding the actions of police and prosecutors before and during his original trial — allegations that formed the basis of his previously denied habeas claims — are immaterial. *See also Fierro v. Johnson*, 197 F.3d 147, 153 (5th Cir. 1999)(allegation of fraud on a federal court implicates only the conduct of the relevant parties during the federal habeas proceedings).

[7] Considered together with the memorandum contemporaneously filed in support thereof.

[8] While Workman's motion is deficient under any standard, support lies for requiring him to support his allegation of fraud on the court with clear and convincing evidence. *See Madonna v. United States*, 878 F.2d 62, 64-65 (2nd Cir. 1989), *citing Booker v.*

to be issued to the Shelby County Medical Examiner's Office, a non-party to the habeas litigation, and that the subpoena included a request for an autopsy x-ray, and that an x-ray was not included in the materials produced in response thereto no more than 10 days later.[9] He also presents proof that such an x-ray exists, which it does.[10]

But Workman's motion fails to make even a conclusory allegation that any litigant or party to, or attorney in, the habeas proceedings was involved in the subpoena transaction between himself and the medical examiner's office. Nor does he offer any proof that could even arguably support such an allegation. The conduct of the non-party agency to whom he directed the subpoena cannot form the basis of a claim of fraud on the court because it cannot be imputed to respondent or the government attorneys handling the habeas litigation.[11] *See Fierro v. Johnson*, *supra*, 197 F.3d at 155

Dugger, 825 F.2d 281, 283-84 (11th Cir. 1987); *United States v. MacDonald*, 979 F.Supp. 1057, 1063 (E.D.N.C. 1997), *aff'd*, 161 F.3d 4 (4th Cir. 1998)(unpublished decision).

[9] Workman's additional allegation in his Supplemental Brief that he issued a public records request to the medical examiner's office in 1990 is of no consequence. The request did not specify the x-ray, nor is the x-ray considered a public record. Response to Motion to Reopen, App. B at 2, ¶ 7. *See* Tenn. Code Ann. § 38-7-110 (public documents limited to county medical examiner *reports*, toxicological *reports*, and autopsy *reports*).

[10] *See* Response to Motion to Reopen, App. D.

[11] The Shelby County Medical Examiner's Office is a *county*, not a state, agency, Tenn. Code Ann § 38-7-104, and is not represented by the Office of the State Attorney General. *See* Tenn. Code Ann. § 8-6-109(b)(1) (attorney general responsible for direction of all civil litigated matters in which the state of Tennessee or any officer, department, agency, board, commission or instrumentality *of the state* may be interested).

(knowledge of contents of police report cannot be imputed to state's attorneys in federal habeas case).

Moreover, while Workman conclusorily alleges that the county medical examiner's office "suppressed" the x-ray, he presents no facts to demonstrate any bad faith or fraudulent conduct by that agency. He offers no evidence to suggest, for example, that the medical examiner's office intentionally withheld the x-ray, or that anyone in that office was even aware of the existence of the x-ray, which was then nearly 14 years old. The sole basis for his cavalier allegation of fraud is simply the assertion that the x-ray was not produced. Period.

Thus, this case stands in marked contrast to the circumstances that gave rise to the Court's appointment of a special master in *Demjanjuk v. Petrovsky*, *supra*, 10 F.3d at 358. There, the Court was confronted with the "undisputed fact" that, prior to extradition proceedings, the Department of Justice had in its possession exculpatory evidence indicating that Demjanjuk may not have been the person wanted for murder in a foreign country; the fact that such evidence was not disclosed to Demjanjuk during related habeas proceedings despite numerous requests of the government; and the concession by counsel for the Department of Justice that "mistakes were made." *Id.* The Court was also presented with Demjanjuk's allegation that this evidence was known to the Department of Justice attorneys handling the habeas litigation. Accordingly, the question before the Court was whether those attorneys engaged in prosecutorial

misconduct by not disclosing such evidence. *Id.* There are no such facts, allegations or questions before this Court in this case. Accordingly, *Demjanjuk* provides no support for Workman's request that this case be assigned to a special master for additional fact-finding concerning the x-ray. In view of the glaring legal insufficiency of that request, no further fact-finding proceedings are either justified or necessary in order for the Court properly to dispose of Workman's motion.

B. Workman's Motion to Reopen Must Be Dismissed as a Successive Habeas Petition.

In the absence of factual allegations sufficient even to state a claim that a fraud has been perpetrated on the court, Workman may not invoke any inherent authority of the Court to remedy such fraud. *Fierro v. Johnson, supra*, 197 F.3d at 153. His Motion to Reopen, then, is more properly characterized as a motion for relief from judgment, *see* Fed.R.Civ.P. 60(b), or, more correctly as it pertains to this Court, a motion to recall the mandate. *See Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997) (motion to recall mandate is court of appeals' equivalent of Rule 60(b) motion). Such a motion is the functional equivalent of a second or successive application for purposes of 28 U.S.C. 2244(b). *Id.*, and cases cited therein. *See United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998), *cert. denied*, 526 U.S. 1011 (1999); *see also McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) (Rule 60(b) motion is practical equivalent of successive habeas petition). A motion to recall the mandate or to reopen a case to readjudicate old arguments on the basis of new

evidence is a successive collateral attack that must be evaluated under the AEDPA's mechanism. *Burris v. Parke, supra*, 130 F.3d at 784. *See Calderon v. Thompson*, 523 U.S. 538, 553 (1998) (court's action on a motion to recall the mandate is subject to AEDPA).

Here, Workman should not be permitted to avoid the restrictions against a second or successive habeas petition simply by restyling his motion. *See United States v. Woods*, 169 F.3d 1077, 1079 (7th Cir. 1999) (captions do not matter; the court must determine the substance of the motion). By its own terms, his Motion to Reopen seeks merely to resurrect a claim that has been previously determined. A federal court may not reassess old theories in light of new evidence. *Burris v. Parke, supra*, 130 F.3d at 785. Accordingly, his Motion to Reopen must be dismissed pursuant to 28 U.S.C. § 2244(b)(1).

II. WORKMAN'S MOTION TO REOPEN SHOULD BE DENIED ON THE MERITS BECAUSE NO FRAUD HAS BEEN PERPETRATED ON THE COURT.

Even if Workman's Motion to Reopen were not subject to dismissal pursuant to section 2244(b), it should still be denied on the merits as he has not shown, and cannot show, the perpetration of a fraud on this Court.

A. Workman Cannot Show Bad Faith in the Non-production of the X-Ray.

Not only has Workman failed even to allege a fraud on the court sufficient to

warrant invocation of this Court's inherent power to reopen and vacate a prior judgment or decision, he *cannot* show that any such fraud occurred. As discussed above, while the actions or inactions of the county medical examiner's office could not as a matter of law support Workman's conclusory allegations of fraud, there is simply no reason to conclude that the medical examiner's office acted in anything but good faith at all times. Assuming that the autopsy x-ray was not produced in response to Workman's 1995 subpoena — and respondent concedes that he has no reason to dispute this point — its non-production appears to have been attributable to nothing more than the particular manner in which x-rays and other such records were stored and maintained by the Shelby County Medical Examiner's Office in 1995, and the consequent lack of a search for it or an inability to locate it. The death in 1987 of Dr. James Bell, who performed the autopsy, also appears to have been a contributing factor.[12] There is absolutely no indication that the x-ray was deliberately "withheld;" nor is there any evidence of bad faith on the part of the medical examiner's office. Instead, there is every indication that office personnel dutifully responded to Workman's subpoena in a short period of time and received no further inquiry with regard to the lack of the autopsy x-ray. Against such evidence, Workman's claim of a

[12] *See* Response to Motion to Reopen, App. B.

"miscarriage of justice born of fraud"[13] is rank hyperbole.

Nor is there any reason to believe, much less conclude, that either the respondent, or attorneys acting on his behalf, acted in bad faith or engaged in any misconduct relative to the autopsy x-ray. The subpoena issued by Workman in 1995 followed express notice, both from the respondent's attorney and the district court, specifically informing Workman that, to the extent he sought information from non-party agencies such as the local police department or the county medical examiner's office, he would be required to make specific requests directly to such agencies.[14] As the district court ordered less than three months prior to the issuance of Workman's subpoenas, respondent would "not be put in the position of having to obtain documents from other agencies and entities to furnish to petitioner." (J.A., I. 5)[15] For Workman now to come before this Court and allege that the respondent or the state's attorneys handling the habeas litigation were not only responsible for, but were guilty of bad faith in, the

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[13] Memorandum in Support of Motion to Reopen, p. 1.

[14] *See* Petitioner's Motion for Leave to Conduct Discovery, Ex. C (J.A., I. 4, Doc. No. 29); March 8, 1995, order denying Petitioner's Motion for Leave to Conduct Discovery (J.A., I. 5, Doc. No. 35).

[15] Document No. 35. While this order was issued on Workman's motion seeking to conduct discovery through respondent of records from the Memphis Police Department, its terms are equally applicable to the county medical examiner's office. Certainly, Workman's subsequent issuance of a subpoena for the medical examiner's records evinces his acknowledgment that respondent and his attorneys would not be obligated to obtain and produce them.

non-production of a record of the county medical examiner's office is, to put the matter bluntly, outrageous.

Workman himself bears some accountability for the omission of the x-ray evidence. First, Workman's focus on the subpoena he issued in 1995 to obtain the medical examiner's records and the x-ray loses sight of the fact that the x-ray has existed since the day after Lt. Oliver was killed — August 6, 1981. (J.A., II. 1023) Workman's attorneys received a copy of the autopsy report prior to his 1982 trial. (J.A., II. 1023) Nevertheless, there is no indication that Workman ever made a direct request for records to Dr. Bell or his office until 1990, or that he made any specific request for the x-ray until 1995.[16]

Second, even when he finally subpoenaed the x-ray in 1995, Workman did not diligently work to secure its production. He represents that, in addition to not receiving the x-ray in response to his subpoena, he also did not receive autopsy photographs, which he had also requested.[17] It had been abundantly clear since Workman's trial in 1982, however, that autopsy photographs existed.[18] Workman thus knew or should have known that he had not received the complete records of the medical examiner's

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[16] *See* Response in Opposition to Petitioner's Motion for Leave to File Second Habeas Corpus Petition, *et. al,* Sec. I.B(1), pp. 6-10.

[17] *See* Memorandum in Support of Motion to Reopen, App. at 5-32.

[18] Dr. Bell literally had the photographs in his lap while he testified at Workman's trial. (J.A., III. 1397-1398)

office in response to his subpoena.[19] This should have at least prompted further inquiry with respect to both the photographs and the x-ray. Workman makes no showing, however, that he conducted any follow-up to the medical examiner's response; nor did he file a motion to compel production, as he had done in reaction to the response he received to another subpoena he issued during this same time period.[20] Instead, he acquiesced in the response and assumed that an x-ray did not exist. Certainly more diligence than this was due for a piece of evidence that Workman now claims to be so vital.

B. The Lack of the X-ray Did Not Cause this Court Erroneously to Affirm the Denial of Habeas Relief.

Even if Workman were able to show the requisite bad faith necessary to make out a claim of fraud on the court, there is no basis in logic to conclude that the omission of the autopsy x-ray in prior proceedings "resulted in the district court and this court improvidently approving" the denial of Workman's writ of habeas corpus. *Demjanjuk v. Petrovsky, supra*, 10 F.3d at 356.

In his habeas corpus petition, Workman claimed, in pertinent part, that the state knowingly presented the false testimony of Harold Davis, Officer Aubrey Stoddard and

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[19] In fact, due to Dr. Bell's death in 1987, Workman was in the best position to know this.

[20] *See* Document No. 52 (J.A., I. 6)

Officer Steven Parker, (J.A., I. 45-46),[21] to show that Workman, and no one else, shot and killed Lieutenant Oliver.[22] In support of this claim, Workman presented the affidavit of a pathologist, Dr. Kris Sperry, in an effort to show that the wounds suffered by Lt. Oliver were inconsistent with the ammunition in Workman's gun on the night of the murder.[23] (J.A., II. 1076) The district court awarded summary judgment to respondent on this claim, in addition to all of Workman's other claims for relief. This Court affirmed the district court's judgment. Workman now contends that the omission of the autopsy x-ray from these proceedings rendered the decision to affirm the grant of summary judgment on this claim improper and the product of fraud on the court. It did not.

Summary judgment is appropriate when there exists no genuine issue as to any material fact, and the facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*, 96 F.3d 174, 178 (6th Cir. 1996). When confronted with a properly-supported motion for

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[21] ¶¶ 117(c)(3),(7),(9); 117(d)(2); 117(e)(2),(4).

[22] Workman claimed that this false testimony was offered to "preclude a finding" that a police officer, namely Stoddard or Parker, shot Lt. Oliver. (J.A., 46, ¶ 117(e). The district court referred to this as Workman's "friendly-fire" theory. (J.A., III. 1234 n. 20)

[23] While it does not appear that Workman specifically offered this evidence to support his claim that the state knowingly presented false testimony from Stoddard and Parker, the district court considered it on those claims as well, *see* J.A., III. 1325, and Workman argued on appeal that this evidence showed that the prosecution's evidence was false. (Brief of Appellant, pp. 12-15)

summary judgment, the non-moving party must set forth sufficient evidence to create a genuine issue for trial. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999)(en banc), *citing Klepper v. First American Bank*, 916 F.2d 337, 341-42 (6th Cir. 1990). A genuine issue for trial exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 788 (6th Cir. 2000), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "Entry of summary judgment is appropriate 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case'..." *Williams v. Mehra, supra*, 186 F.3d at 689, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In order to prove a constitutional claim stemming from alleged false testimony, a petitioner must show that 1) the evidence the prosecution presented was actually false; 2) that the prosecution knew it was false; and 3) that the false evidence was material. *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998), *cert. denied*, 524 U.S. 933 (1998); *United States v. Hawkins*, 969 F.2d 169, 175 (6th Cir. 1992). Falsity in the context of federal habeas review requires more than a mere inconsistency between evidence presented at trial and evidence presented on review; rather, falsity requires a "palpable testimonial contradiction or untruth." *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1387 (7th Cir. 1994).

With respect to Workman's false evidence claim, the district court concluded that none of the evidence presented by Workman, including the affidavit of Dr. Sperry,

"shows the falsity of any of the challenged testimony."[24] The district court noted that the affidavit, which stated only that Lt. Oliver's wounds "were inconsistent with every wound I have seen created by a .45 silvertip bullet,"[25] did not state that Lt. Oliver's wounds *could not have been caused* by Workman's weapon. The district court also concluded that Dr. Sperry's opinion "simply represents a view arguably different from that given by the state's expert witness at trial." Granting summary judgment to respondent, the district court concluded that Workman "[could not] show the existence of testimony that is knowingly false and material." (J.A., III. 1328)

On appeal, and reviewing the district court's summary judgment order *de novo*, *Hartley v. McNeilab, Inc.*, 83 F.3d 767, 774 (6th Cir. 1996), this Court affirmed the district court's conclusions with respect to Dr. Sperry's opinion:

> [t]he district court correctly found that Dr. Sperry's testimony did not 'state that Oliver's wound could not have been caused by petitioner's weapon, nor does it offer an opinion that the wound was caused by the weapons of Stoddard or Parker or that it was consistent with wounds created by such weapons.'

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[24] While Workman here reiterates other evidence he offered to establish the alleged factual predicate that Davis was not present at the scene of the murder, the district court separately addressed that claim and concluded that Workman's argument that Davis was not present to witness the incident was "implausible," and that Workman "[could not] successfully attack the veracity of Davis' testimony by alleging his absence from the scene." (J.A. , III. 1324) On appeal, this Court affirmed the district court's ruling on this issue, *Workman v. Bell*, 178 F.3d 759, 767 (6th Cir. 1998), and the discovery of the x-ray has no bearing on this aspect of the Court's decision.

[25] Dr. Sperry's affidavit indicated that he had seen 30 to 40 instances of wounds created by such ammunition. (J.A., II. 1076, ¶ 4)

> Furthermore, Dr. Sperry's testimony simply 'represents a view arguably different from that given by the state's expert witness at trial.'... Workman has presented no evidence that the prosecution knowingly presented false evidence in this regard. He has simply shown that there may be different interpretations of the physical evidence. As Workman cannot demonstrate falsity, he cannot prevail on this argument. *See Hawkins*, 969 F.2d at 175.

Workman v. Bell, supra, 178 F.3d at 768.

The appearance of the x-ray evidence does nothing to alter either the district court's judgment that Workman's evidence was insufficient to escape summary judgment or this Court's decision affirming that judgment. The autopsy x-ray simply would not have enhanced the state of Workman's evidence on summary judgment. While Workman makes extravagant assertions regarding the x-ray evidence, *see, e.g.*, Motion to Reopen, p. 1 ("[t]he x-ray establishes, beyond any doubt, that [ ] Workman did not fire the bullet that killed Lieutenant Oliver"), according to the affidavit of Workman's own expert, the same Dr. Sperry, the x-ray has no independent significance beyond what the autopsy report establishes. After reviewing the x-ray, Dr. Sperry merely proffers the same opinion that he has always had: that "*the autopsy report and photographs* establish that a projectile created a wound track across the victim's chest" (emphasis added), and that it "emerged from his body intact."[26]

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[26] Memorandum in Support of Motion to Reopen, App. at 33. In fact, it appears that, by the way in which his affidavit was originally drafted, Dr. Sperry was invited to state that this is what the *x-ray* establishes. Dr. Sperry, however, declined to make such a statement, instead editing his affidavit to remove any reference to the x-ray's significance.

Prior to reviewing the x-ray, Dr. Sperry had already come to the same conclusion. In 1995, he stated that "Exhibits C [the autopsy protocol] and D [photographs of wounds] indicate that the bullet that created the illustrated bullet wounds exited the decedent's body." (J.A., II. 1077, ¶ 5) In 1998, when Workman petitioned for rehearing and rehearing en banc in his original appeal, Dr. Sperry emphasized the point by stating that "[t]he Autopsy Protocol states that a 'through and through' shot killed Oliver, that shot entering Oliver's left chest and exiting Oliver's right back." Since the availability of the x-ray did not produce any change in Dr. Sperry's testimony, either to the district court or to this Court, then it must follow that the x-ray would not have made a difference had it been available during the prior habeas proceedings.

(1) *The X-Ray Does Not Demonstrate That Any of the Evidence Presented at Workman's Trial Was Actually False.*

Even if Sperry's affidavit were to be liberally interpreted to mean that the x-ray is consistent with the autopsy report and shows that the bullet made one wound track and exited Lt. Oliver's body, it still does nothing to alter the courts' determinations that Workman's evidence on summary judgment was insufficient. First, it should come as little surprise to learn that the x-ray is consistent with the autopsy report, since the author of the report, Dr. James Bell, also would have ordered the x-ray as part of his

autopsy procedure.[27] In fact, taken in this light the x-ray would be consistent with Dr. Bell's own trial testimony, as Workman himself has previously emphasized to this Court.[28] Second, the x-ray would represent nothing more than additional support for a conclusion that had already been drawn from other evidence, namely, the autopsy report itself. While the x-ray may be regarded as new evidence, it offers no new facts.

Third, the x-ray would merely represent additional support for a proposition already assumed to have been true for purposes of assessing the sufficiency of the evidence presented on Workman's false evidence claim. As noted above, Dr. Sperry's 1995 affidavit asserted that "the bullet that created [Lt. Oliver's] bullet wounds exited the decedent's body." (J.A., II. 1077, ¶ 5) For purposes of summary judgment, this assertion was accepted as true. *See Bass v. Johnson*, 167 F.3d 1041, 1046 (6th Cir. 1999), *citing Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (on summary judgment, the evidence of the non-movant

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[27] Response to Motion to Reopen, App. B, ¶ 13.

[28] *See* November 12, 1998, Petition for Rehearing and Suggestion for Rehearing En Banc, at 5-6, where Workman states: "The prosecution based its assertion [that the bullet that entered Officer Oliver and eventually killed Officer Oliver exited as well] on the uncontroverted opinion of Dr. James Spencer Bell, M.D., who testified for the prosecution that the bullet exited the body." Workman went on to state that "[i]t is undisputed ... that there is only one exit wound, and Dr. Bell testified to only one bullet path," and that "it is undisputed that Dr. Bell testified [that] the bullet left the body." *See* Joint Appendix, Vol. III, pp. 1399-1400.

is to be believed).[29] Because the sufficiency of Workman's 1995 evidence had already been assessed under the assumption that the bullet that created Lt. Oliver's fatal wounds also exited his body, the sudden appearance of an autopsy x-ray that, according to Workman, shows the same thing must be regarded as inconsequential.

Indeed, even considering Dr. Sperry's 1995 (pre-x-ray) and 2000 (post-x-ray) affidavits together,[30] Workman's evidence still does not have any tendency to establish that Oliver's wounds could not have been caused by Workman's weapon. Consequently, his evidence, including the x-ray, remains insufficient to prove that any witness — Davis, Stoddard or Parker—testified falsely when they testified consistent with the fact that the wounds were so caused. "As Workman cannot demonstrate falsity, he cannot prevail on this argument." *Workman v. Bell, supra*, 178 F.3d at 768. The district court's denial of this claim by summary judgment, and this Court's affirmance of that denial, simply could not have been affected by the appearance of the x-ray.

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[29] In its order on motions for summary judgment, the district court noted, prior to addressing the merits of Workman's false evidence claim, that "respondent states that even if everything petitioner claims is true, he would still not be entitled to relief." (J.A., III. 1316)

[30] After a panel of this Court denied Workman's Motion to Reopen, he submitted yet another affidavit from Dr. Sperry, dated April 1, 2000, along with a motion for the court to consider it. This Court should deny the motion and strike the affidavit, as it directly contradicts both the first affidavit and other statements contemporaneously made by Dr. Sperry. *See* Respondent's Motion to Strike Second Declaration from Dr. Kris Sperry.

In support of his argument, however, Workman points to a portion of this Court's 1998 opinion in which it discusses, in what must be regarded as dictum, the possibility that the bullet that killed Lt. Oliver fragmented before exiting his body. Workman contends that the x-ray refutes such a theory.[31] The context and content of this portion of the panel's opinion, though, reveal it to be nothing more than a collateral discussion of a theory posited by the Court, itself based on a flawed premise due to a misapprehension of the record evidence. The Court's speculation that the bullet may have fragmented was wholly immaterial to its decision to affirm the district court's denial of habeas relief by summary judgment.

After the panel issued its original opinion on appeal, *see Workman v. Bell*, 160 F.3d 276 (6th Cir. 1998), *republished at* 178 F.3d 759 (6th Cir. 1998), Workman petitioned for rehearing and challenged the Court's theory that the bullet fragmented before exiting Lt. Oliver's body.[32] In response, the Court appropriately amended its original opinion and noted that the ballistic information that was discussed therein *had no dispositive*

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[31] While respondent has not relied on this fragmentation theory, the panel's observation that "the record in no way compels the conclusion that the bullet which killed the officer emerged from his body in one piece" remains valid, in the absence of some affirmative proof that the x-ray would reveal both the lead *and* aluminum components of a .45 caliber aluminum-jacketed bullet, *see* Joint Appendix, vol. III, p. 1499Y, and that it was taken at a time when such fragments would still be expected to remain in the body.

[32] November 12, 1998, Petition for Rehearing and Suggestion for Rehearing En Banc.

effect upon the decision of the Court.[33] In the original version of its opinion, however, after discussing the possibility that the bullet may have fragmented, the Court stated: "Therefore, there is no reason *to conclude that Workman was actually innocent* of causing Lt. Oliver's mortal wound, just as there is no reason to conclude that the prosecution knowingly presented false evidence in this connection." *Workman v. Bell*, *supra*, 160 F.3d at 284-285. The Court then immediately proceeded to examine the district court's basis for awarding summary judgment on Workman's false evidence claim, as detailed above.

The theory that the bullet fragmented was not advanced by respondent, either in the district court, or on appeal.[34] Nor was it the basis for, or even mentioned in the course of, the district court's grant of summary judgment. Instead, as discussed above, and for purposes of summary judgment, Workman's assertion that the bullet exited Lt. Oliver's body was assumed to have been the case. This Court, likewise, agreed with, and separately upheld, the summary judgment rulings of the district court, stating: "*[a]ssuming that Dr. Sperry's observations are credited*, Workman has presented no evidence that the prosecution knowingly presented false evidence in this regard." (emphasis

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[33] May 10, 1999, order denying petition for rehearing and suggestion for rehearing en banc. *See* Response to Motion to Reopen, App. C.

[34] Respondent was not required to present any evidence to "negate" Workman's claims. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 788 (6th Cir. 2000), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

added) *Workman v. Bell, supra*, 178 F.3d at 768. Only for purposes of examining the collateral issue of actual innocence did the Court speculate that the bullet may have instead fragmented. Whether or not the Court ought to have engaged in this speculation regarding the details of Lt. Oliver's murder, and even assuming that the x-ray refutes it, it does not alter the conclusion that the evidence before the district court was, and remains, insufficient to establish that false testimony was introduced at Workman's trial.

Workman's reliance on the Court's discussion of the possibility of fragmentation is also misplaced, because the theory itself was based initially on a misapprehension of the record evidence regarding the actual relative sizes of the entrance and exit wounds on Lt. Oliver's body. In the paragraph immediately preceding the Court's discussion of the possibility for fragmentation, the Court noted that the autopsy report reflects both an entrance and an exit wound; it went on to relate Dr. Bell's testimony:

> Dr. James Bell, the medical examiner who performed the autopsy, testified at trial that the entry wound ... was half an inch in diameter and was 'sort of rounded ...' The exit wound, in contrast, was a 'sort of slit-like tear in the skin' *less than a quarter of an inch* in length.(emphasis added)

Id., at 768. The transcript of Dr. Bell's testimony does reflect that he testified to an exit wound measurement of "twenty-one one hundredths by twenty-four one hundredths of an inch." (J.A., III. 1401) Dr. Bell's own autopsy report, however, reveals that this

statement regarding his measurement of the exit wound was incorrect.[35] In his report, Dr. Bell made a handwritten entry of the size of the exit wound as measuring twenty-one one hundredths (.21) of an inch by *sixty-four* one hundredths (.64) of an inch. (J.A., II. 1031, 1152) This exit wound measurement is verified in another section of the report. (J.A., II. 1023)[36] Such an exit wound would be more than ample to accommodate the exit of a .45 caliber bullet— a fact that is completely consistent with Dr. Bell's trial testimony that Lt. Oliver's wounds were indicative of a high caliber bullet.[37]

(2) *The X-Ray Does Not Demonstrate That Any False Evidence Was Knowingly Presented at Workman's Trial*

Workman was required to present evidence on summary judgment to establish each essential element of his false evidence claim, *Williams v. Mehra*, *supra*, 186 F.3d at 689, including that such testimony was *knowingly* presented by the state. With respect

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[35] It is also possible that the discrepancy was due to transcriber error in preparation of the transcript.

[36] Respondent concedes that, here, in the "final pathological diagnosis" section of his report, the exit wound is described as a "21/100 x 64"" wound, but an exit wound 64 inches in length (i.e., 5 feet, 4 inches long!) is obviously not right, particularly in light of the handwritten diagram of the wound. The measurement does, however, confirm that the length was 64 one-hundredths, rather than 24 one-hundredths. *See also* R. 67, Petitioner's Response to Respondent's Motion for Partial Summary Judgment, Exhibit I, p. 1 (Report of Investigation by County Medical Examiner showing exit wound measurement to be .21 by .64 inches).

[37] J.A., III. 1401.

to the testimony of Harold Davis, the district court ruled that "even if the court were to conclude that Davis' testimony was false — which it does not — petitioner still would not be entitled to relief because he has offered absolutely no evidence that the prosecution knew of the falsity of Davis' testimony." (J.A., III. 1324)[38] Affirming the district court's conclusions with respect to Davis' testimony, this Court similarly concluded: "Workman presents no evidence that, assuming Davis presented false testimony, the prosecution had knowledge of its falsity." *Workman v. Bell, supra*, 178 F.3d at 768.[39] The appearance of the x-ray has absolutely no impact on this element of Workman's false evidence claim, nor does he even argue that it does. He merely reargues the same evidence that was previously before this Court, the same evidence on the basis of which this Court has already concluded that respondent was entitled to summary judgment. Because the x-ray does not, and cannot, alter the correctness of either the district court's grant of summary judgment on this claim due to the lack of evidence that false evidence was *knowingly* presented, or this Court's affirmance thereof,

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[38] With respect to Officers Stoddard and Parker, the district court likewise concluded "that petitioner cannot show the existence of testimony that is knowingly false and material." (J.A., III. 1328) On appeal, this Court held, with the respect to the same issue, that "Workman has presented no evidence that the prosecution knowingly presented false evidence in this regard." *Workman v. Bell, supra*, 178 F.3d at 768.

[39] The Court also correctly observed that "Davis' testimony merely corroborated Workman's own trial testimony that he shot Lt. Oliver," apparently addressing the materiality element of Workman's false evidence claim. *Id.*

Workman's Motion to Reopen must be denied on this basis alone.

III. THE PROVISIONS OF 28 U.S.C. § 2244(b), AS AMENDED BY THE AEDPA, ARE APPLICABLE TO WORKMAN'S CLAIMS.

In his motion seeking to declare § 2244 inapplicable, Workman purports to add two additional claims, both based on recent statements regarding Harold Davis' trial testimony, to the three that he included in his Motion for Leave to File a Second Habeas Petition.[40] One of these two, his "perjured testimony" claim, is the same claim he brought in his first petition and is indistinguishable from the "coercion claim" that was part of his second habeas application.[41] The second, his so-called "*Jones* claim," is based on the decision in *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938). That decision, though, has since been limited to its unique facts; as a general matter, such claims are not cognizable on federal habeas review. *Burks v. Egeler*, 512 F.2d 221, 229 (6th Cir. 1975); *see Roddy v. Black*, 516 F.2d 1380, 1383 (6th Cir. 1975). In any event, the introduction of such claims does not alter the conclusion that the provisions of the AEDPA are properly applied so as to bar Workman's successive claims.

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[40] The panel denied Workman permission to bring his "coercion claim," his "x-ray claim" and his "*Herrera* claim." *See* Petitioner's Motion for Leave to File a Second Habeas Corpus Petition.

[41] *See* Response in Opposition to Petitioner's Motion for Leave to File Second Habeas Corpus Petition, *et. al,* Sec. I.A., pp. 3-5.

As a general matter, the AEDPA's restrictions against second or successive habeas petitions apply to second petitions filed after the Act's effective date, even where the first petition was filed before that date. *Pratt v. United States*, 129 F.3d 54, 58 (1st Cir. 1997); *In re Medina*, 109 F.3d 1556, 1561-62 (11th Cir. 1997). *See In re Siggers*, 132 F.3d 333 (6th Cir. 1997) (AEDPA applied to bar second habeas petition where first petition filed in 1989); *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997) (§ 1983 action barred as successive habeas petition although initial petition filed in 1987).[42] In *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997), though, this Court declined to apply the Act's restrictions to bar a federal prisoner's second motion under 28 U.S.C. § 2255. There, in the wake of a United States Supreme Court decision declaring the conduct for which the prisoner was incarcerated not to be criminal,[43] he was seemingly deprived of his only means of obtaining his freedom by the AEDPA's bar against successive § 2255 motions. Under these circumstances, and applying the retroactivity analysis of *Landgraf v. USI Film*

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[42] Respondent is aware of the recent decision in *Slack v. McDaniel*, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __, No. 98-6322, 2000 WL 478879 (2000), where the Supreme Court held that the subsequent petition at issue did *not* constitute a second or successive petition. In that case, however, unlike the cases cited herein, *Slack's* initial petition was dismissed without reaching the merits. In Workman's case, as in *Pratt, Medina, Siggers* and *Sapp*, the initial petition was denied on the merits. Further, in *Slack*, the Court found that where appellate review of a pre-AEDPA petition was sought post-AEDPA, the provisions of the *new* §2253(c) governed the handling of that appeal. *Slack, supra* at *1.

[43] *Bailey v. United States*, 516 U.S. 137 (1995), in which the Supreme Court interpreted the meaning of "use" of a firearm during a drug offense under 18 U.S.C. § 924(c). *See In re Hanserd, supra*, at 926-928.

Products, 511 U.S. 244, 280 (1994), this Court held that application of the AEDPA to prohibit the prisoner's second § 2255 motion would have an "impermissible retroactive effect." *Id.* at 930.

Less than four months later, however, in *In re Sonshine*, 132 F.3d 1133 (6th Cir. 1997), this Court emphasized the limited effect of its holding in *Hanserd*:

> Because the *Hanserd* court's [ ] analysis was based upon the retroactive effect that AEDPA had on the movant's particular claim, the *Hanserd* holding must be similarly circumscribed. Consequently, while *Hanserd* is not strictly limited to claims arising under *Bailey*, apart from that class of claims, there will be few other cases 'in which the difference matters,' [citation omitted], and on which the gatekeeping requirements of the AEDPA will thus have an impermissibly retroactive effect.

Id., at 1135. Concluding that the AEDPA had no impermissible retroactive effect on Sonshine's case, this Court went on to hold that his request to reopen his case and file a second § 2255 motion, despite the fact that his first motion was filed prior to enactment of the AEDPA, was barred by the AEDPA's restrictions against successive motions. *See Coe v. Bell*, No. 00-5419, __ F.3d __, 2000 WL 365278 (6th Cir. April 11, 2000), *cert. denied*, __ S.Ct. __, 2000 WL 391466 (April 18, 2000)(No. 91-9127, 99A859) ("[t]his court subsequently limited its holding in *Hanserd* to the particular claim in that case). *See also In re Green*, 144 F.3d 384, 387-388 (6th Cir. 1998)(AEDPA properly applied to bar prisoner's third § 2255 motion although first two filed pre-AEDPA)

A. Application of 28 U.S.C. § 2244(b) to Bar Workman's Claims Does Not Have An Impermissible Retroactive Effect

When applying the *Landgraf* retroactivity analysis, a court must consider "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf, supra*, 511 U.S. at 280. If the statute "genuinely" has a retroactive effect, the "traditional presumption" against retroactive application will apply. *Id.* at 277-79. This presumption is based upon the axiom that "fairness dictate[s] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.*, at 265. If the statute does not have a retroactive effect, then the court must "'apply the law in effect at the time it renders its decision,' even though that law was enacted after the events that gave rise to the suit." *Id.* at 273; *see also, In Re Resolution Trust Corp.*, 888 F.2d 57, 58 (8th Cir. 1989).

As the *Landgraf* court recognized, "even absent specific legislative authorizations, application of new statutes passed after the events in suit, is unquestionably proper in many situations." *Landgraf, supra*, 511 U.S. at 273. The Supreme Court stressed that a statute is not retroactive "merely because it is applied in a case antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269 (citation omitted). In many instances, "even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct." *Id.*, at 269 n. 24. Instead, the test of retroactivity calls for a judgment "concerning the nature and extent of the change in the

law and the degree of connection between the operation of the new rule and a relevant past event." Id. at 270. This judgment involves "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*

As an initial matter, Workman's claims would have fared no better under the pre-AEDPA standards than they do under the current law. *See In re Hanserd, supra*, 123 F.3d at 932 ("[w]here the old and the new law lead to an identical result, there is no need to conduct a retroactivity analysis"). The restrictions imposed by §2244(b)(2) represent little more than the codification of the old "abuse of the writ" standard, *see McCleskey v. Zant*, 499 U.S. 467, 494 (1991); *Schlup v. Delo*, 513 U.S. 298, 324 (1995), and the provisions of §2244(b)(1) harken back to the successive petition standard under pre-AEDPA jurisprudence. *Jacks v. Duckworth*, 857 F.2d 394, 399 (7th Cir. 1988). To the extent that Workman complains of the lack of an "ends of justice" exception under §2244(b)(1), his complaint is immaterial because "there is no basis for concluding that the 'ends of justice' would require [a decision on Workman's claim] on the merits." *In re Siggers, supra*, at 338.[44] For the same reasons, then, that Workman is unable to present

[44] §2244(b)(1) operates to bar only Workman's claim based on Harold Davis' recent statements. This evidence fails to "demonstrate by clear and convincing evidence that the constitutional errors he alleges probably resulted in the conviction of an innocent person," *In re Siggers, supra*, at 338, because Davis' statements, as well as Vivian Porter's, are bereft of credibility. *See* Response in Opposition to Petitioner's Motion for Leave to File a Second Habeas Corpus Petition, *et. al,* Sec. II.B., pp. 21-27.

his claims under the AEDPA's restrictions,[45] he similarly would have been unable to proceed under the old law.

Nevertheless, while determining whether a petitioner would have prevailed on a second or successive petition under pre-AEDPA law may often be an "easy way" to test retroactivity, *Libby v. Magnusson*, 177 F.3d 43, 51 (1st Cir. 1999), it is not the sole question;[46] nor is it necessary to make such a determination in this case. As this Court acknowledged in *In re Hanserd, supra*, 123 F.3d 922, for application of the AEDPA's standards to have an impermissible retroactive effect, there must be evidence that the petitioner detrimentally relied on pre-AEDPA law:

> Had Hanserd known that the AEDPA would change [his right to file a subsequent motion], and that his initial § 2255 motion would bar a later motion based on a new Supreme Court interpretation of § 924 (c), *he might well have waited to file that initial motion.* Where applying a new statute would attach a serious new adverse legal consequence to pre-enactment conduct *such that the party affected might have acted differently in light of the new law, Landgraf* instructs us not to apply the new law. (emphasis added)

Id. at 931-32. *See Graham v. Johnson*, 168 F.3d 762, 783-786 (5th Cir. 1999), *petition for cert. filed* (June 21, 1999)(U.S. No. 98-10002), and cases cited therein (focus of retroactivity

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[45] *See* Response in Opposition to Petitioner's Motion for Leave to File a Second Habeas Corpus Petition, *et. al*, Sec. I, pp. 1-17; March 31, 2000, order denying petitioner's Motion for Leave to File Second Habeas Corpus Petition.

[46] Indeed, if a petitioner's ability to bring a second petition were to be solely determined by resort to pre-AEDPA standards, the successive petition provisions of the AEDPA would be rendered a nullity in cases where the first petition was filed before the Act's effective date.

inquiry should be on the detrimental reliance petitioner placed on pre-AEDPA law and the extent to which the statutory changes upset his settled expectations); *see also, Mueller v. Angelone*, 181 F.3d 557, 569-570 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 37 (1999) (petitioner must establish attachment of "new legal consequences such that the party affected might have acted differently"); *but cf., In re Minarik*, 166 F.3d 591, 602 (3rd Cir. 1999) (in absence of showing that petitioner would have been entitled to pursue second petition under pre-AEDPA law, the AEDPA standard must be applied). "[I]f a litigant in no way relies on existing law, then a change in that law cannot fairly be said to harm him." *Graham v. Johnson, supra*, 168 F.3d at 784.

In contrast to the situation in *Hanserd*, there is absolutely no reason to believe that Workman might have acted any differently with respect to the filing of his first habeas petition in light of the new law.[47] As his claims purport to be based on "newly discovered evidence," the factual predicates for those claims were, by definition, unknown to him before passage of the new act. In this regard, the observations of the Eleventh Circuit Court of Appeals are apt:

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[47] While Workman cannot meet even this standard, respondent submits that, because this case does not involve the type of claim at issue in *Hanserd*, the standard should be whether Workman has shown that he actually relied on pre-AEDPA law to his detriment, and that such reliance was objectively reasonable. *See Mueller v. Angelone*, 181 F.3d 557, 568 n. 5 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 37 (1999), and cases cited; *Graham v. Johnson*, 168 F.3d 762, 784-786 (5th Cir. 1999), *petition for cert. filed* (June 21, 1999)(U.S. No. 98-10002), and cases cited.

> Petitioner has not relied to his detriment on pre-AEDPA law. We know that Petitioner did not deliberately refrain from including those claims predicated upon 'newly discovered evidence' in his first federal habeas petition based on any expectation regarding pre-AEDPA law because he has represented that the bases for these claims were not known to him at that time.

In re Magwood, 113 F.3d 1544, 1552 (11th Cir. 1997). *See In re Medina, supra*, 109 F.3d at 1562 (no possible detrimental reliance where petitioner could not have included new claims in first petition). Workman represents that he had already made contact with Harold Davis prior to filing his first habeas petition and Davis denied that his testimony was coerced (Supplemental Brief of Appellant, p. 33);[48] Workman did not even make a specific request for the autopsy x-ray until *after* he had already filed his first petition. Consequently, Workman "cannot even plausibly claim that he might have acted differently had he known that AEDPA later would bar his claims." *Graham v. Johnson, supra*, 168 F.3d at 786. Accordingly, even assuming that Workman could have brought his claims under pre-AEDPA law, because he has not shown, and cannot show, detrimental reliance thereon, application of the AEDPA-amended provisions of 28 U.S.C. § 2244(b) to bar his claims does not have an impermissible retroactive effect.

B. Application of 28 U.S.C. § 2244(b) to Bar Workman's Claims Is Not Unconstitutional

In support of his contention that applying 28 U.S.C. § 2244(b) to bar his claims

[48] He also admits that he did not have the statement from Vivian Porter until 1999. (Supplemental Brief of Appellant, pp. 35-36)

would be unconstitutional, Workman appears to argue that application of the statute's procedures violates the "fundamental" interest in not convicting an innocent person — although he fails to refer to any specific constitutional guarantee. Workman's citation to *Medina v. California*, 505 U.S. 437, 445 (1992), fails to support, or even clarify, the basis for his argument. *Medina* dealt with the constitutionality, in terms of procedural due process, of a state's procedures for allocating the burden of proof in proceedings for determining a criminal defendant's competency to be tried. Holding that the state's procedures were constitutional, the Court observed that, while the rule that an incompetent defendant should not stand trial has "deep roots in our common-law heritage," there was no "settled tradition" on the proper allocation of the burden of proof in competency proceedings. Accordingly, the Court stated that it could not say that procedures for allocating that burden "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445-446.

The Court's distinction in *Medina* is useful for disposing of Workman's argument, at least to the extent that argument can be discerned. The AEDPA's second or successive petition provisions regulate proceedings for seeking a writ of habeas corpus; more specifically, they seek to restrict the abuse thereof. They do not regulate proceedings for determining guilt or innocence. The Supreme Court has, of course, already held that the AEDPA's second or successive provisions do not amount to a

suspension of the writ, *see Felker v. Turpin*, 518 U.S. 651, 663-664 (1996), which may explain Workman's obfuscation on this issue. *See also Graham v. Johnson, supra*, 168 F.3d at 787-788 (AEDPA's provisions do not violate suspension clause, nor the Fifth, Eighth or Fourteenth Amendments).

Furthermore, Workman's purported federal habeas claims ought not be framed to contest his guilt; instead, habeas relief is reserved for alleging some constitutional infirmity in the process that led to a prisoner's conviction. *See Herrera v. Collins*, 506 U.S. 390, 400-401 (1993), and cases cited therein. Moreover, even if Workman could claim "actual innocence," he cannot establish it.[49] The provisions of 28 U.S.C. § 2244(b) have not been applied unconstitutionally so as to bar Workman's claims.

CONCLUSION

Based on the foregoing, Workman's Motion to Reopen and Motion for Declaration That 28 U.S.C. § 2244 Does Not Apply to Specified Claims should be

[49] Again, the recanting statements of Davis, and that of Porter, are without credibility. And Workman's argument that he could not have fired the shot that killed Lt. Oliver because .45 caliber hollow point bullets are designed to expand fails to account for the fact that, in practice, such ammunition can, and often does, fail to expand upon impact. *See* Response to Motion to Reopen, App. D ("Hollow point bullets may fail to expand appreciably even under laboratory conditions. Autopsy experience shows the design fails even more frequently.") *See generally* Response in Opposition to Petitioner's Motion for Leave to File Second Habeas Corpus Petition, *et. alI,* Sec. II, pp. 18-28.

denied; the panel's order denying Workman's Motion for Leave to File a Second Habeas Corpus Petition should be reinstated; and the previously issued stay of execution should be lifted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I hereby certify that the foregoing Supplemental Brief of Respondent-Appellee contains 11,350 words and thereby complies with the type-volume limitation specified in F.R.A.P. 32(a)(7)(B)(i).

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Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded to counsel for the petitioner by delivering same, in hand, on this the ____ day of May, 2000, to:

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_____
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