

Prior to summary judgment proceedings, Philip Workman served the Office of the Shelby County Medical Examiner (Medical Examiner's Office) a subpoena requesting production of, among other things, any x ray taken of Memphis Police Lieutenant Ronald Oliver's corpse. In responding to the subpoena, the Medical Examiner's Office suppressed an x-ray establishing that Workman did not fire the bullet that killed Lieutenant Oliver. To prevent a miscarriage of justice, this Court must reopen this case and either (1) grant Mr. Workman a conditional writ of habeas corpus; or (2) remand this case to the District Court for further proceedings at which Mr. Workman can present the Oliver X-Ray.

I IN VIOLATION OF THE DISTRICT COURT'S DULY ISSUED SUBPOENA, THE STATE SUPPRESSED THE OLIVER X-RAY DURING THE HABEAS PROCEEDINGS

A District Court Proceedings

On July 18, 1994, Workman filed in the District Court a habeas corpus petition challenging the constitutional validity of his first-degree murder conviction and resulting death sentence.¹ Workman asserted, among other things, that constitutional violations prevented his jury from hearing evidence that the bullet that killed Lieutenant Oliver did not come from his gun, and he was therefore innocent of capital murder.² See State v. Severn, 759 S.W.2d 935, 938 (Tenn.Crim.App. 1988). The State answered,³ and the District Court set deadlines for

On June 1, 1995, the District Court entered pursuant to Rule 6 of the Rules Governing Section 2254 Cases an Agreed Order authorizing Workman to serve Fed.R.Civ.P. 45 subpoenas for documents and things.⁴ Pursuant to this Order, on June 2, 1995, Workman served a subpoena on the Medical Examiner's Office requesting production of, among other things, any x-ray taken of Lieutenant Oliver's corpse.⁵ After serving the subpoena, Workman filed proof of service in the District Court.⁶ While the Medical Examiner's Office produced documents responsive to Workman's Rule 45 subpoena, it did not produce the Oliver x-ray.⁷

Workman forwarded the material he received from the Medical Examiner's Office to Dr. Kris Sperry, a pathologist the District Court authorized Workman to hire. Dr. Sperry reported to counsel that Workman's gun contained .45 caliber silver-tip hollow-point bullets, and these bullets expand upon entering a human body. Because they expand they rarely exit, and if they do they leave an exit wound significantly larger than the entry wound. Dr. Sperry noted that Lieutenant Oliver's corpse had an exit wound that was slightly smaller than the entry wound. He therefore reported that Lieutenant Oliver's mortal wound was inconsistent with a wound that would have been caused by one of Workman's bullets.⁸

¹ 6/1/95 Agreed Order, Appendix attached to 3/6/00 Memorandum In Support Of Motion To Reopen ("App.") at 1.

² Exhibit A to Subpoena In A Civil Case, App. at 4.

could not prove his allegation that the bullet that killed Lieutenant Oliver did not come from his gun." Workman responded by, among other things, filing Dr. Sperry's Report. The District Court faulted the Sperry Report because it does not state that Oliver's wound could not have been caused by one of Workman's bullets,¹⁰ and it granted the State summary judgment.¹¹

B Sixth Circuit Proceedings

On appeal, Workman argued that the Sperry Report created a genuine issue respecting whether Workman shot Lieutenant Oliver, and the District Court's grant of summary judgment to the State was therefore improper.¹² At oral argument, Judge Nelson specifically asked Workman's counsel, "Was the body x-rayed?" Based on the subpoena response of the Medical Examiner's Office, counsel responded "Not that I am aware of", and counsel agreed with Judge Nelson's statement that there was no indication in the record that an x-ray was taken. Thereafter, the following exchange occurred between Judge Nelson and counsel for Workman.

Judge Nelson: I should disclose to you that I've been reading with interest a couple of articles by one Martin L. Fackler And he says as you say and as everyone agrees that upon entering the body these bullets expand. And if they do exit they leave a wound substantially larger than the entrance wound. He also says,

² See J.A. at 835.

fragments of the bullet going off in different directions. Here as I recall the bullet apparently struck a rib at least the autopsy report discloses a fractured rib. And I wonder if you're in a position to comment on the suspect likelihood that what happened here was that the bullet fragmented and that what exited the body was not the entire bullet but a little piece of bullet.

Mr. Minton: Your Honor, I'm not able right now to answer that question.

On October 30, 1998, this Court issued its opinion. Based on its understanding that no x-ray was taken of the Oliver corpse, this Court wrote

If a .45 caliber hollow point bullet had gone all the way through Lt. Oliver's chest and emerged in one piece, we have no doubt that the exit wound would have been larger than the entry wound. It hardly follows, however, that Lt. Oliver could not have been shot with the type of ammunition Workman was firing - because the record in no way compels the conclusion that the bullet which killed the officer emerged from his body in one piece.

Workman v. Bell, 178 F.3d 759, 767 (6th Cir. 1998)(emphasis added).

C Discovery Of The Oliver X-Ray

On January 29, 2000, Workman filed with the Tennessee Board of Probation and Parole an Application For Commutation of his death sentence. On February 28, 2000, the District Attorney's Office for the 30th Judicial District filed its opposition. That opposition contains a report from the Medical Examiner's Office in which Dr. O. C. Smith states that prior to drafting the report he examined a chest x-ray of Lieutenant Oliver. Counsel immediately contacted the Medical Examiner's Office, and on March 2, 2000, counsel obtained a copy of the Oliver x-ray.

LIEUTENANT OLIVER

During oral argument, Judge Nelson correctly noted that "everyone agrees that upon entering the body (Workman's) bullets expand." This Court therefore recognized in its Workman opinion that if the fatal bullet emerged from Lieutenant Oliver's body whole, it could not have come from Workman's gun. This Court ruled against Workman because the record did not compel a conclusion that the bullet emerged from Lieutenant Oliver's body intact. At that time, the record did not compel such a conclusion because it did not contain the Oliver x-ray. That x-ray was absent from the record for one reason: the Medical Examiner's Office suppressed it.

On March 4, 2000, counsel showed Dr. Sperry the Oliver x-ray. Dr. Sperry reported that it establishes that the fatal bullet emerged from Oliver's body whole - it did not fragment.¹³ As this Court recognizes, this fact establishes that Workman did not shoot Lieutenant Oliver.

III THE COURT POSSESSES AUTHORITY TO REOPEN THIS CASE

This Court possesses authority to vacate a judgment under circumstances such as those presented here. See Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), this Court exercised its power to reopen a habeas case on facts similar to those presented here.

In Demjanjuk, the District Court issued denaturalization, deportation, and extradition of war crimes and sentenced to death.

Six and a half years after this Court affirmed the District Court's orders, it learned that the Government had failed to produce documents the petitioner had requested during discovery. The documents contained a significant amount of information indicating that petitioner was not, as the District Court had found, "Ivan the Terrible." Pursuant to Fed. R. Civ. P. 60(b)(6), the All Writs Act, and its inherent power to protect the integrity of the judicial process, this Court reopened the petitioner's appeal. Finding that the Government recklessly deprived the petitioner and the federal courts of vital information indicating that the petitioner was not "Ivan the Terrible", this Court vacated its previous judgment and that of the District Court. Demjanjuk, 10 F.3d at 356.

IV THIS COURT SHOULD REOPEN THIS CASE AND EITHER (1) ORDER THAT WORKMAN IS ENTITLED TO A CONDITIONAL WRIT OF HABEAS CORPUS, OR (2) REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS

As in Demjanjuk, Workman requested through discovery a specific document which a government record custodian had in its custody, but which the custodian withheld. As in Demjanjuk, the failure to comply with the discovery request deprived Workman, the District Court, and this Court of vital evidence that he is innocent of the charges that were brought against him. As in Demjanjuk, this Court should reopen this case.

Upon reopening a case, a court has wide discretion in choosing the relief it will order.

LaVallee, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968)

This Court has two alternatives. It can (1) grant Mr. Workman a conditional writ of habeas corpus ordering the State to retry him within a specified time period or set him free; or (2) remand this case to the District Court for summary judgment proceedings during which Mr. Workman can present the Oliver X-Ray. Mr. Workman requests that this Court do either.

WHEREFORE, Mr. Workman respectfully requests that this Court:

1. Grant him a conditional writ of habeas corpus ordering the State to retry him within a specified time period or set him free; or
2. Remand this case to the District Court for summary judgment proceedings during which he can present the Oliver X-Ray; and
3. Order any and all such other relief to which this Court believes Mr. Workman is entitled.

Respectfully submitted,

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I certify that on March 31, 2000, I hand-delivered a copy of the foregoing to:

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