IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re:	)	
	)	
PHILIP R. WORKMAN,	)	
	)	No. 00-
Movant.	)	
	)	
	)	

RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE A SECOND HABEAS CORPUS PETITION, IN OPPOSITION TO MOTION FOR DECLARATION THAT 28 U.S.C. §2244 DOES NOT APPLY TO SPECIFIED CLAIMS, AND IN OPPOSITION TO MOTION FOR STAY OF EXECUTION.

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INTRODUCTION

Workman filed a first petition for writ of habeas corpus on July 18, 1994.[1] On October 28, 1996, the district court denied relief on all of petitioner's claims. On October 30, 1998, this Court affirmed the judgment of the district court. *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998). A petition for rehearing en banc was denied. With no more than 14 days remaining before his scheduled execution, Workman filed the instant motion with this Court, pursuant to 28 U.S.C. §2244(3)(A), for permission to file a second petition for writ of habeas corpus. He also filed a motion seeking a declaration that the prohibitions against such successive petitions, contained in 28 U.S.C. §2244, are not applicable to his claims, and a motion for stay of execution. Because Workman cannot meet the stringent §2244(b) requirements for authorization of a successive habeas petition applicable to his claims, and because he fails to show a strong and significant likelihood of success on the merits of the instant motions or any other motion pending before this Court,[2] all of Workman's motions should be

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

[2] Petitioner also bases his motion for a stay of execution on his pending motion to reopen his first habeas corpus petition.

denied.

ARGUMENT

I. WORKMAN FAILS TO MEET THE REQUIREMENTS OF 28 U.S.C. §2244(b)(1) & (2) FOR FILING A SECOND HABEAS PETITION.

Assuming the Court considers Workman's motion sufficient to allow it to proceed to make a determination under §2244(b)(3)(C),[3] Workman's application fails to satisfy the requirements of the statute. The provisions of §2244 regarding second or successive petitions brought under 28 U.S.C. §2254 require the dismissal of any claim that was presented in a prior habeas corpus petition. 28 U.S.C. §2244(b)(1). They also require the dismissal of claims that were left out of a prior petition, unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review, 28 U.S.C. §2244(b)(2)(A), or that:

> the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and,
>
> the facts underlying the claim, if proven and viewed in light of the

[3] Workman's motion merely describes the claims that he would file if so authorized. He has not included the successive petition itself. Without such a petition, the Court cannot determine whether it would meet the statutory requirements for its filing.

> evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2244(b)(2)(B)(i) & (ii); *In re Siggers*, *supra*, at 336.

This is a "stringent" standard that "erects a high hurdle. This is as it should be: in formulating the AEDPA's amendments, Congress intended 'to curb the abuse of the statutory writ of habeas corpus.'" *Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270, 273, 276 (1st Cir. 1998), *quoting* H.R. Conf. Rep. No. 104-518, at 111 (1996). The potential for abuse of the writ is of particular concern where, as here, the effort to file a successive petition comes within days of the petitioner's scheduled execution. Workman fails to show that the claims he purports to bring in a successive petition meet the requirements of the statute. Moreover, Workman's proposed claims constitute exactly the kind of abuse of the writ that the AEDPA was designed to prohibit.

A. Claim That Witness Harold Davis Was Coerced

Workman purports to bring a claim based on the alleged factual predicate that the State "coerce[ed] Harold Davis prior to Workman's trial to testify that he saw Workman shoot the victim." Motion for Leave to File, at 1. In his prior habeas corpus petition, however, Workman similarly, yet unsuccessfully,

claimed that the State "knowingly presented false evidence," including "Harold Davis' false testimony that no person other than Mr. Workman and Lieutenant Oliver fired weapons." Petition for Writ of Habeas Corpus, at ¶117(c) (J.A., I. 45-46). He also claimed that the State "knowingly presented false evidence," including "1) knowledge police officials gained as they convinced Harold Davis to testify that he saw Mr. Workman shoot Lieutenant Oliver although he did not witness such an event; and 2) Harold Davis' false testimony that he saw Mr. Workman shoot Lieutenant Oliver." *Id.*, at ¶117(d) (J.A., I. 46). Workman further claimed that "the State manipulated evidence as recounted in paragraph 117." *Id.*, at ¶119(a) (J.A., I. 48). Workman's proposed claim that the State coerced Harold Davis is indistinguishable from, and nothing more than a repackaging of, these prior claims. Because it was presented in his prior petition, it is barred by §2244(b)(1). *See In re Siggers*, *supra*, at 337.

The fact that Workman purports to have "newly discovered evidence" in support of such a claim does not alter this conclusion. "A claim that has been presented in the first petition cannot be presented in a second. Period." *Felder v. McVicar*, 113 F.3d 696, 697 (11th Cir. 1997). "The fact that [Workman] may have new evidence ... does not change the claim." *Id.* As set out by Congress in §2244(b), and as the Eleventh Circuit Court of Appeals went on to note in *Felder*

v. McVicar, *supra*, while a newly discovered factual basis may permit filing a successive petition raising a new claim, "it does not permit filing a successive petition raising the same claim that was presented in a previous petition." *Id.*, at 697.

B. Claim That the Lt. Oliver X-Ray Was Withheld

Workman's claim that the State withheld exculpatory evidence in the form of an autopsy x-ray of Lt. Oliver's body was not included in his first habeas petition. Accordingly, it must be dismissed unless Workman can make a showing that the requirements of §2244(b)(2)(B)(i) and (ii) have been met. While Workman must satisfy both of these prongs, he can satisfy neither.

(1) *Newly Discovered Evidence Prong*

In order to satisfy the first prong, Workman must show that the x-ray evidence was "previously unavailable through the exercise of due diligence, as required by §2244(b)(2)(B)(i)." *In re Magwood*, 113 F.3d 1544, 1548 (11th Cir. 1997). An applicant seeking permission to file a second habeas petition "must show some good reason why he or she was unable to discover the facts supporting the motion before filing the first habeas motion." *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997). Workman's focus on the efforts he made in 1995 to obtain the x-ray, in support of his claim of due diligence, 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)

Dr. James Bell, who conducted the autopsy on Lt. Oliver, and who would have ordered the x-ray, was alive until 1987. Response of Respondent-Appellee to Petitioner's Motion to Reopen (hereafter, Response to Motion to Reopen), App. B, at 4. In the course of discovery prior to Workman's 1982 trial, Workman's attorneys received a copy of Dr. Bell's autopsy report. (J.A., II. 1023) Nevertheless, there is no indication in the record that Workman ever interviewed, spoke to, telephoned or otherwise contacted Dr. Bell. Nor is there any indication that Workman made any direct request of, or contact with, the medical examiner's office for the x-ray, or any other record or item of evidence. He certainly fails to explain why he could not have caused process to issue for this x-ray in 1982, as was done in 1995.

Furthermore, during his trial in 1982, Workman had Dr. Bell immediately available to him when the doctor testified. Again, no request was made or question asked regarding the x-ray, or any other item of evidence, including autopsy photographs, the latter of which Dr. Bell literally had in his lap while he testified. (J.A., III. 1397-1398). The record clearly demonstrates that Workman's attorney had an opportunity to question Dr. Bell about his involvement in the case and any examination he may have performed and, had Workman truly been interested in whether an x-ray existed, and what it might show, a few simple questions should have elicited the very facts Workman claims are "newly discovered." *See In re Bosheers*, 110 F.3d at 1541.

Workman, however, points to two pre-trial motions that he filed to support his assertion that he exercised due diligence to obtain the x-ray. His reliance on a motion and order for exculpatory evidence, however, which includes no specific reference to the medical examiner or the x-ray, is misplaced. Workman was aware that an autopsy had been conducted and by whom. Even if the x ray could somehow be considered exculpatory, which it is not, and even if Workman had shown that the x-ray had actually been in the prosecutor's possession, which he has not, it would not have been subject to the State's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), because it was equally available to both Workman and the prosecution. *See United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) (no *Brady* violation where defendant knew essential facts that would allow him to take advantage of any potentially exculpatory information). *See also Wooden v. State*, 898 S.W.2d 752, 755 (Tenn.Crim.App. 1994)(duty to disclose does not extend to information that the accused is able to obtain).

The pre-trial motion for discovery that Workman filed, which likewise contains no specific reference to the x-ray or the medical examiner's office, is equally unavailing to Workman's argument. *See In re Boshears, supra,* at 1540-1541 (despite petitioner's pre-trial discovery motion, he failed to show how a reasonable investigation would not have uncovered factual predicate for successive habeas petition). Aside from the fact that Workman's motion was directed to materials that were "within the possession, custody and/or control of the State of Tennessee," while the x-ray was a record of the *county* medical examiner, *see* Tenn. Code Ann. §38-7-104, both the terms of the motion and Rule 16 of the Tennessee Rules of Criminal Procedure required production only of test results that were "material to the preparation of the defendant's defense and/or are intended for use as evidence." Tenn.R.Crim.P. 16(1)(D). The autopsy x-ray could not have been considered material to Workman's trial defense: that he had robbed the restaurant and shot the officer while attempting to surrender, but that he was a drug addict and under the influence of drugs. *See State v. Workman,* 667 S.W.2d 44, 47 (Tenn. 1984). The total lack of interest that Workman's attorneys displayed for the autopsy evidence and the expected testimony of Dr. Bell demonstrates that they did not consider this evidence material. Workman's entire cross examination of Dr. Bell, in fact, consisted of 3

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questions. (J.A., III. 1404-1405) This is not surprising, given that Workman was soon to testify and admit to shooting Lt. Oliver. (J.A., III. 1515, 1541)

Furthermore, the State responded to Workman's discovery motion by providing materials on both October 13, 1981, and on March 11, 1982. (Appendix, at 1-13),[4] and Workman's attorneys would subsequently represent that they had been provided with full discovery from the State. (J.A., I. 240) Had Workman truly been relying upon either the exculpatory evidence motion or the discovery motion to produce the autopsy x-ray, he could have, and should have, made further inquiry. That he did not strongly suggests that the motion was never intended to elicit this information. For Workman to point to it now as a demonstration of his due diligence is disingenuous.

Despite the filing of state post-conviction petitions in both 1985 and 1992 (J.A. I. 203, 345), as well as a 1987 federal habeas petition, Workman apparently waited 14 years before finally making a specific request of, or to issue process to, the medical examiner's office for the x-ray evidence. Even then, though, he failed to exercise due diligence to secure the x-ray. First, Workman's public

[4] These documents are contained in Ex. B, Trial Counsel's File, to Petitioner's Response to Respondent's Motion for Summary Judgment. (J.A., R. 67), but were not included in the Joint Appendix.

records request in November of 1995 cannot have been reasonably calculated to produce the x-ray, because the x ray is not considered a public record. Response to Motion to Reopen, App. B, at 2. *See* Tenn.Code Ann. §38 7 110 (public documents limited to county medical examiner *reports*, toxicological *reports*, and autopsy *reports*). Furthermore, even if it had been so calculated, again Workman could have, and should have, made further inquiry for the x ray when he did not receive it. Motion for Leave to File, App., at 20.

Second, even Workman's 1995 subpoena to the medical examiner's office for autopsy records, including any x ray or photograph, does not demonstrate due diligence on his part. According to Workman, he not only did not receive the x-ray in response to his subpoena, but he also did not receive any autopsy photographs. Memorandum in Support of Petitioner's Motion to Reopen (hereafter, Motion to Reopen), App., 5 32. As Dr. Bell's trial testimony demonstrates, however, it had been eminently clear since 1982 that the medical examiner's records included photographs. Workman, then, knew, or should have known, that he had not received the complete records of the medical examiner's office in response to his subpoena. This should have at least prompted further inquiry with respect to the photographs and the x ray. Workman makes no showing, however, that he conducted any follow-up to the

medical examiner's response to his subpoena, nor did he file a motion to compel production.[5] Instead, he acquiesced in the response and assumed that an x-ray did not exist. His willingness to draw such an assumption, without making any further inquiry or investigation, suggests that he considered an autopsy x ray to be largely immaterial. Certainly, more diligence than this was due both in 1995 and for the previous 14 years for a piece of evidence that Workman now claims to be so vital to his claim of innocence.

(2) *'Actual Innocence' Prong*

Because Workman cannot satisfy the first prong of the statutory requirement for filing a second habeas petition, this Court need not consider the second. *In re Magwood, supra*, at 1548. Respondent will nevertheless address Workman's failure to satisfy the second prong for "the sake of completeness." *Id.* In order to file a second petition, a petitioner must show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole," show clearly and convincingly that, "*but for constitutional error*, no reasonable factfinder would have found the applicant guilty." (emphasis added) 28 U.S.C. §2244(b)(2)(B)(ii). Workman, then, even assuming nondisclosure of the x-ray,

[5] Workman did file a motion to order compliance with at least one other subpoena he issued at about this same time period. *See* Doc. No. 52 (J.A., I. 6).

must show that this nondisclosure establishes a constitutional error. *In re Magwood, supra*, at 1548; *In re Boshears, supra*, at 1541. Workman cannot satisfy this second prong because he cannot show a *Brady* violation. *See In re Smith*, 142 F.3d 832, 835 (5th Cir. 1998)(leave to file successive application denied because alleged facts failed to establish a *Brady* claim).

The x-ray evidence was equally available to Workman prior to trial as it was to the State — he need only have asked for it. "[I]f a defendant, using reasonable diligence, could have obtained the information, a *Brady* claim does not arise." *In re Smith, supra*, at 835. *See United States v. Clark, supra*. Furthermore, in order to make out a *Brady* claim, a defendant must also show that the evidence was material. Evidence is material only if a reasonable probability exists that, had it been disclosed, the result of the trial would have been different. *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995). A "reasonable probability" must be one "sufficient to undermine confidence in the outcome" of the trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Here, there is no probability, reasonable or otherwise, that, had the x-ray been produced to Workman's attorneys, the result of his trial would have been any different. Indeed, the record suggests that even if the x-ray had been in Workman's possession, he would not even have introduced it at trial.

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First, there has been no proof offered by Workman as to what the x-ray in question shows or does not show. While Workman has made conclusory allegations about what the x-ray shows, *see e.g.*, Motion for Leave to File, at 3; Reply to Response to Motion to Reopen, at 1, he should not be engaged in the business of reading x rays; nor should this Court be asked to enter that business. The only person arguably qualified to read the x ray and who has been asked to do so, Dr. Kris Sperry, has declined to state what it establishes. Dr. Sperry's March 4, 2000, affidavit,[6] on which Workman solely relies, says nothing about what the x ray establishes;[7] it says only what Dr. Sperry concludes other evidence establishes after his having reviewed the x-ray. This other evidence, of course, does not provide any of the facts underlying Workman's *Brady* claim, and neither does Sperry's opinion as to that evidence. Nor is there anything "newly discovered" about this evidence or Dr. Sperry's opinion about what it establishes.[8] Workman's effort here represents nothing more than a

[6] *See* Petitioner's Motion to Reopen, App., at 33.

[7] Furthermore, in the absence of some affirmative proof that both the lead and aluminum components of a .45 caliber aluminum-jacketed bullet, *see* J.A., III. 1499Y, would be visible on an x ray, Workman has shown nothing.

[8] As respondent noted in its response to petitioner's Motion to Reopen, this opinion is essentially the same opinion of Dr. Sperry that Workman proffered to this Court in 1998, in support of his petition to rehear.

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disingenuous attempt to use the discovery of an inconsequential autopsy x-ray to reassert an actual innocence argument by couching it in *Brady* terms. *See Herrera v. Collins*, 506 U.S. 390, 397 (1993).

Moreover, even if, as Workman contends, Sperry's affidavit does provide some proof as to what the x-ray shows, it does not support the conclusion that the x-ray would have made any difference at Workman's trial. As Sperry's affidavit clearly demonstrates, the x-ray is consistent with the autopsy report -- a report that Workman clearly had been provided with prior to trial. It is also consistent with the trial testimony of Dr. Bell, the State's pathologist, as Workman himself has previously pointed out to this Court.[9] As previously discussed,[10] Workman's defense did not challenge the autopsy findings or the cause of death in any respect. Given this fact, there is simply no basis on which to believe, much less conclude, that a reasonable probability exists that the

[9] *See* Petition for Rehearing, 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."

[10] *See* discussion at Section I.B(1), *supra*.

outcome of Workman's trial would have been any different had he obtained the autopsy x-ray.

C. Claim of 'Actual Innocence'

Workman relies on the United States Supreme Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), to support his contention that he may bring a freestanding actual innocence claim as part of a second federal habeas corpus petition. The Court's holding in *Herrera*, however, stands for exactly the opposite proposition. The Court succinctly answered the question in the first paragraph of its opinion:

> [Petitioner] urged in a second federal habeas petition that he was 'actually innocent' of the murder for which he was sentenced to death, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime. Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not.

Id., at 393. The Court went on to state:

> *Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief* absent an independent constitutional violation occurring in the underlying state criminal proceeding ... This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution -- not to correct errors of fact ... Few rulings would be more disruptive of our federal system than to provide for federal habeas review

of freestanding claims of actual innocence. (emphasis added)

Id., at 400-401. A claim of actual innocence is not itself a constitutional claim cognizable on federal habeas review; it is, rather, a "gateway" through which a habeas petitioner must pass in order for an otherwise barred constitutional claim to be considered. *Id.*, at 404; *Lucas v. Johnson*, 132 F.3d 1069, 1074 (5th Cir. 1998), *cert. dismissed*, 524 U.S. 965 (1998); *Stafford v. Saffle*, 34 F.3d 1557, 1561 (10th Cir. 1994). Furthermore, even if the 1993 *Herrera* decision left any room for doubt, enactment of the AEDPA in 1996 removed it, at least in the context of second or successive petitions. 28 U.S.C. §2244(b)(2)(B)(ii), as so amended, specifically provides that new claims must be based on newly discovered evidence that would establish clearly and convincingly that, *but for constitutional error*, the petitioner would not have been found guilty.

Workman's reliance on dicta in the *Herrera* decision, where the Court assumed, for the sake of argument, that petitioner had such a right, is misplaced. *See Robinson v. Johnson*, 151 F.3d 256, 267 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1578 (1999) ("[c]ontrary to [petitioner's] reliance on the often-quoted 'actual innocence' dicta in" *Herrera*, the opinion does not alter the entrenched principle that newly discovered evidence as to guilt is not a ground for habeas relief). In *Herrera*, the Court specifically stated that, in addition to the "extraordinarily

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high" threshold showing that such an assumed right would necessarily have, habeas relief would only be warranted "if there were no state avenue open to process such a claim." *Herrera v. Collins*, *supra*, at 417. As this Court has observed, "the Court in *Herrera* explicitly relied on the existence of executive clemency in denying habeas relief to a petitioner claiming 'actual innocence'". *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1170, 1187 (6th Cir. 1997), *rev'd on other grounds*, 523 U.S. 272 (1998). *See also Stafford v. Saffle*, *supra*, at 1561 (absent an underlying constitutional error in the trial, prisoner must resort to executive power of pardon).

This case, then, has now come full circle — executive clemency is the very remedy that this Court commended to Workman nearly a year ago, and clearly so.[11] Workman had availed himself of that remedy, only to abandon it at the last minute[12] in favor of this round of habeas litigation. He also apparently intends to pursue it anew should these proceedings prove unsuccessful. (Appendix, at 14)

[11] *See* May 10, 1999, Order on Petition for Rehearing (Response to Motion to Reopen, App. C).

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

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II. WORKMAN CANNOT PROVE "ACTUAL INNOCENCE"

While federal courts do not sit "to correct errors of fact," *Herrera v. Collins, supra*, at 400, Respondent seeks to assure this Court that there is, nevertheless, no error of fact to correct in this case.[13] The "new evidence" presented by Workman fails to prove his innocence by any standard. It certainly does not provide the "truly persuasive demonstration" of innocence that the United States Supreme Court assumed to apply in *Herrera*; nor does it establish by "clear and convincing evidence" that "no reasonable factfinder would have found Workman guilty of felony murder." *See* 28 U.S.C. §2244(b)(2)(B)(ii).

A. The X-Ray Evidence Does Not Prove Workman's Innocence

As proof of his "actual innocence," Workman contends 1) that the x-ray and autopsy evidence "demonstrates that the bullet that killed Lieutenant Oliver emerged from his body intact," Motion for Leave to File, at 3; and 2) that this fact proves that the fatal bullet could not have come from his gun. *Id.*, at 11. Assuming that Workman is to be afforded the benefit of the 2000 Sperry

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[13] In so doing, Respondent recognizes that he becomes a contributor, albeit an unwilling one, to the unfortunate consequence of the dicta in the *Herrera* decision, as foreseen by Justice Scalia:"imposing upon [federal courts] the burden of regularly analyzing newly-discovered-evidence-of-innocence claims in capital cases." *Id.*, at 428 (Scalia, J., with whom Thomas, J. joins, concurring).

affidavit to support his innocence claim, *see* discussion at Section I.B(2), *supra*, and therefore has proof in support of the first proposition, this fact does not, contrary to Workman's insistence, prove the second proposition. In fact, it should come as little surprise to Workman that the autopsy and x-ray would establish that the bullet emerged from Lt. Oliver's body intact, for this is consistent with the opinion presented by Dr. Bell when he testified for the prosecution at trial. In any event, that fact does not prove that Workman is innocent because it simply does not prove that the bullet could not have come from his gun.

As support for his insistence that proof of the bullet emerging from Lt. Oliver's body intact further proves that the bullet could not have come from his gun, Workman no longer points to actual evidence; rather, he seizes on an observation made by this Court, in dicta included in its opinion affirming the denial of habeas relief in this case, regarding the significance of the relative sizes of the entrance and exit wounds on Lt. Oliver's body. *See Workman v. Bell*, 178 F.3d 759, 768 (6th Cir. 1998). While it is true that the Court related its belief that if a .45 caliber hollow point bullet had emerged from Lt. Oliver's body in one piece it would have left an exit wound larger than the entrance wound, it is clearly apparent that when the Court drew that conclusion it was operating

under a misapprehension as to the actual relative sizes of Lt. Oliver's wounds. This misapprehension was due to a reliance on a misstatement in Dr. Bell's trial testimony regarding the size of the exit wound.

In the paragraph immediately preceding the statement in question, 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 the exit wound measuring "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.[14] In his report, Dr. Bell makes a handwritten entry of the size of the exit wound as 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

[14] It is also possible that the discrepancy was due to transcriber error in preparation of the transcript, which would account for why Workman's attorneys did not follow up on it.

is verified in another section of the report. (J.A., II. 1023)[15] *See also* Response to Motion to Reopen, Appendix D. Such an exit wound would be more than ample to accommodate the exit of a .45 caliber bullet.[16] 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 upon impact fails to account for the fact that, in practice, such ammunition can, and often does, fail to expand upon impact. *See* February 21, 2000, Report of Shelby County Medical Examiner (Response to Motion to Reopen, Appendix D) ("Hollowpoint bullets may fail to expand appreciably even under laboratory conditions. Autopsy experience shows the design fails even more frequently." *See also* J.A., III. 1499K, N-0, AD-AE, AI-AL.

B. Harold Davis' Statements Do Not Prove Workman's Innocence

Workman relies on the 1999 statements of witness Harold Davis as

[15] 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 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.

[16] *See* Response to Motion to Reopen, Appendix D. ("The exit wound is larger than one-quarter of an inch, measuring 64/100 by 21/100 of an inch in dimension. Given the dynamics under which a bullet exits the body, this wound is of ample size to allow this bullet to exit.")

support for his contention that the State coerced Davis to testify falsely at Workman's trial. Workman maintains that this evidence proves that he is innocent. It does not. Davis' trial testimony merely corroborated other evidence in the case, including the eyewitness accounts of two police officers, and, as this Court has already observed, "Workman's own trial testimony that he shot Lt. Oliver." *Workman v. Bell*, 178 F.3d 759, 768 (6th Cir. 1998). The repudiation of Davis' testimony, therefore, does nothing to prove that Workman did not shoot Lt. Oliver. Furthermore, assuming that the statements of a trial witness, contradicting his own trial testimony, qualify as "newly discovered" evidence,[17] when viewed in light of the evidence as a whole, "[this] new evidence is bereft of credibility." *Herrera v. Collins*, 506 U.S. 390, 421 (1993)(O'Connor, J., with whom Kennedy, J., joins, concurring). *See Schlup v. Delo*, 513 U.S. 298, 331 (1995) (court may consider how the likely credibility of the affiant bears on the reliability of the new evidence).

The statements on which Workman relies to support his claim of innocence were made more than 18 years after Davis first called the Memphis

[17] Respondent submits that it cannot qualify as "newly discovered evidence." If it could, the pressures and influences to which trial witnesses might one day be subjected by prisoners facing imminent executions are not difficult to imagine.

Police Department within 14 hours of Lt. Oliver's murder to report that he had been at the Wendy's restaurant the night before and had "observed the male white shoot the police officer," (J.A., II. 972); more than 18 years after Davis identified Workman's photograph from a photo array 2 hours after his phone call as the person he had seen shooting Lt. Oliver; more than 18 years after Davis gave police a statement in that regard, (J.A., II. 972); and more than 17 years after Davis flew from his home in Tacoma, Washington, to testify at Workman's trial. (J.A., III. 1410)[18] After some 10 years of silence thereafter, Davis was apparently contacted by one of Workman's investigators, who specifically asked him whether "authorities had pressured him to obtain his testimony" at trial. Davis told him they had not. Motion for Leave to File, App., at 22. These circumstances alone engender great skepticism for the veracity of Davis' most recent statements.

But there is more. In addition to the fact that neither of Davis' two 1999 statements were made under oath, Workman's evidence with regard to Davis is also internally inconsistent. *See Herrera v. Collins, supra*, at 418 (affidavits

[18] Respondent notes that, at trial, while Davis affirmed his previous photo identification, he did not make a courtroom identification of Workman, whose appearance had changed (J.A., III. 1444-1446). This circumstance flies in the face of an allegation that his testimony was coerced or otherwise coached.

presented in support of actual innocence claim contain inconsistencies, "and therefore fail to provide a convincing account of what took place on the night of the murder"). In his November 20, 1999, statement, for example, Davis makes dramatic claims of how the police "told [him] what happened, how it happened, when it happened," and that "this is what you're going to say...you're going to be the eyewitness." He also claims that a "big white guy" threatened both him and his family if he "changed his testimony in any way," although he later offered that "the guy said that they probably wouldn't kill me." (Movant's Ex. 1).[19] Just seven weeks prior, however, Davis made no unsolicited mention of any

[19] Respondent bases the observations in this section on the videotape submitted as Exhibit 1 to Workman's Motion for Leave to File. While Workman subsequently filed a Motion to Supplement the Record, to which he attached purported transcripts of these statements. Respondent has noted that there are substantial inaccuracies in the transcripts, particularly with regard to the second statement. Some of these discrepancies are material. For example, the proffered transcript of the October 1, 1999, statement reports Davis stating that, when the State contacted him to return for Workman's trial, he told them he did not want to be involved and then asked "what I have to say?" Petitioner's Transcript of October 1, 1999 Interview, at 3, line 22. The videotape, however, shows that, after saying he did not want to be involved, Davis actually said: "I said what I had to say and I was through with the thing ..." While these words are similar, by omitting a portion of his statement a different impression is clearly left by the transcript. In addition, the proffered transcript of the November 20, 1999, statement indicates that when the detective picked Davis up after he had called to report what he had seen, he took Davis to the police station and "shoved [Davis] in the car." Petitioner's Transcript of November 20, 1999, Interview, at 1, line 10. At this same juncture in the corresponding

effort on the part of the police or the prosecution to influence his statement or testimony. The only such references came in response to two leading questions from Workman's attorneys: the first asked Davis whether the police had helped him with his statement, to which Davis answered only, "Pretty much ... they corrected it ...;" the second asked him whether the prosecution suggested what he should say at trial, to which Davis replied, "Sure." When asked what they had suggested, however, Davis' immediate response was, "I don't remember exactly." Davis certainly made no mention of any threats of bodily harm during this first interview.

Davis' two statements also lack credibility with respect to his account of the circumstances of his photo identification of Workman. In November, Davis claims that he was shown "a photo," and that he told police, "Well, I didn't see it or anything." The month before, however, Davis clearly recalled having been presented with an "array of pictures," and that he selected one of the photographs. Davis went on to say, though, that he was able to identify Workman's photograph only because he had seen his picture in the newspaper that morning. The problem with this explanation, however, lies in the fact that

videotape, however, Davis says only that the detective "showed me a photo." Respondent submits that the transcripts should be stricken.

Workman's photograph apparently did not appear in any of the Memphis area newspapers that day. His photograph first appears on August 7, 1981 — the day *after* Davis identified Workman's photo as that of the man who shot Lt. Oliver. (Appendix, at 15-27)

Davis also claims in his November statement that, on the night of the shooting, he was simply driving down the road behind a police cruiser, when he saw it "dr[i]ve up in there," suggesting the restaurant driveway. He says that he then took a turn to return to his friend's house when he "heard all the shots and all the sirens and everything."[20] In October, however, Davis had a clear memory that he saw a police officer "struggling with the guy," of another officer driving up, of one officer "kinda pulling the guy's hand," and that he "saw the other cop fall back and pull his gun." (Movant's Ex. 1) This description of events is markedly consistent with his trial testimony of some 17 years previous. (J.A., III. 1411-1412) Davis went on to say, though, that he did not see Workman shoot Lt. Oliver, but that he "took off" while other officers were coming, with sirens sounding, and only then did he hear shots. Other officers, however, did not

[20] Had this been all that Davis witnessed that night, it is unclear why he would have felt compelled to call the police the following day to merely report that, "I didn't see it or anything." (Movant's Ex. 1)

respond to the scene until *after* Lt. Oliver had been shot. (J.A., III. 1433, 1443-1444).

To be credible, a claim of actual innocence must be supported by "new reliable evidence" not presented at trial, such as "trustworthy eyewitness accounts." *Schlup v. Delo, supra,* at 323. There is nothing reliable or trustworthy about Davis' 1999 statements.[21] Respondent submits that they are unworthy of this Court's consideration. They certainly do not support Workman's claim of innocence.

Lastly, Workman's "actual innocence" claim also fails to account for the strength of the evidence that convicted him, irrespective of Harold Davis' testimony:

> [Workman's] 'new evidence' must be considered in light of the proof of the respondent's guilt at trial, proof that included the eyewitness testimony of Officers Stoddard and Parker. The recantation of witness Harold Davis notwithstanding, the evidence of [Workman's] guilt is overwhelming. Officer Stoddard was in close proximity to the victim, Officer Oliver, and [Workman], at the time the victim was shot. Not only did Officer Stoddard hear the shots fired and see the victim lying on the

[21] While not presented as the factual predicate for his claim of actual innocence, Workman also presents a 1999 affidavit from Vivian Porter, who claims to have been with Davis the night of the murder. This affidavit also suffers from inconsistency with Davis' statements. Moreover, but for a reference to speaking with an "old girlfriend" the day after the shooting, Davis never mentions being with a Porter, or any other woman that night. (Movant's Ex. 1)

> ground, but he was also fired upon and wounded by the respondent. Although not in close proximity when the victim was shot, Officer Parker came around the corner after hearing shots fired and saw Officer Oliver fall to the ground. There is no evidence that either of these witnesses fired a weapon during the struggle between the victim and [Workman]. Furthermore, the evidence includes testimony by [Workman], who admits to pulling the trigger and firing all the bullets from his gun. This testimony combined with all the other evidence leaves no doubt that [Workman] killed Officer Oliver.

Workman v. State, Order on Motion to Set Execution Date, S.Ct. No. M1999 01334-SC-DPE-PD (Tenn. filed January 3, 2000)(Drowota, J., concurring, at 4)(Appendix, at 31).

Workman's claim that newly discovered evidence proves that he is actually innocent is wholly without merit. By initiating an effort to seek federal habeas review of this claim and its progeny, he has already "forced [this Court] to sort through the insubstantial and the incredible as well," *Herrera v. Collins, supra,* at 427 (O'Connor, J., with whom Kennedy, J., joins, concurring) — a fair characterization of the x-ray evidence and Harold Davis evidence, respectively. The AEDPA was designed to ensure that non-meritorious and previously determined claims go no further, and these claims of Workman's should be treated accordingly.

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

Relying upon this Court's decision in *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997), Workman contends that the rules regulating second and successive habeas petitions in 28 U.S.C. §2244(b), as amended by the AEDPA, should not apply to his claims. *Hanserd*, however, does not support his position. *Hanserd* involved a federal prisoner who, in the wake of a United States Supreme Court decision declaring the conduct for which he was incarcerated not to be criminal,[22] was seemingly deprived of his only means of obtaining his freedom by the AEDPA's bar against successive § 2255 motions. Under these circumstances, and noting that *Hanserd would have been entitled to raise his claim under the* "old abuse-of-the-writ" standard, this Court held that application of the AEDPA to prohibit his 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

[22] *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.

> 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 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. Workman's Claims Are Unlike the Unique Claim Involved In *Hanserd*

The claims that Workman now seeks to assert[23] are not within the class of claims to which the holding in *In re Hanserd* might apply — there is no case declaring the conduct for which Workman was convicted and sentenced to death

[23] Respondent notes that Workman purports to add an additional two claims to the three for which he seeks leave to file a second petition under §2244(b). One of these claims is the same as his coercion claim. In any event, these additional claims do not alter the conclusion that application of the AEDPA to bar Workman's claims would not have any impermissible retroactive effect.

not to be criminal. In addition, failure to apply the AEDPA's restrictions in Workman's case would compromise the State's interest in finality and result in the delay of his execution. *Cf., In re Hanserd, supra*, at 934 n. 21 (allowing federal prisoners a post-AEDPA opportunity to file a successive § 2255 motion on the basis of *Bailey* "seem[s] unlikely to result in the delay of any executions").

Furthermore, Workman's case involves a habeas petition under § 2254, not a motion to vacate sentence under § 2255. "[A]lthough similar in many ways ... a § 2255 motion is not a petition for a writ of habeas corpus." *In re Hanserd, supra*, at 925. Section 2244(b) of the AEDPA, which provides the restrictions on second or successive § 2254 petitions, "is grounded in respect for the finality of criminal judgments." *Calderon v. Thompson, supra*, 523 U.S. at 558. The AEDPA merely codified some of the pre-AEDPA limits on successive petitions, and, contrary to Workman's contention, the added restrictions that the Act places on second habeas petitions under §2254 do not amount to an unconstitutional suspension of the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

In *Felker v. Turpin, supra*, at 663, the United States Supreme Court applied the second and successive petition provisions of the AEDPA to a case in which the initial habeas petition had been filed pre AEDPA. *See In re Medina*, 109 F.3d

1556, 1561-1562 (11th Cir. 1997) (*Felker* decision "is at least implicit authority for the proposition that the AEDPA amendments relating to second or successive applications do apply to cases in which the first application was filed before the effective date of that statute"). This Court, as well, has applied the AEDPA's restrictions against successive § 2254 petitions to cases in which the initial habeas petition was filed prior to enactment of the AEDPA. *See In re Siggers, supra*, at 338 (first habeas petition filed in 1989). *See also, In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997) (§ 1983 action barred as successive habeas petition under AEDPA although initial petition filed in 1987). This Court's application of the AEDPA to bar successive § 2254 petitions in such cases is also consistent with the decisions of other circuits. *See In re Medina, supra*, at 1562 (AEDPA applies to second or successive habeas petition even though first petition filed pre-AEDPA); *Hatch v. State of Oklahoma*, 92 F.3d 1012, 1014 (10th Cir. 1996)(application of AEDPA to petitioner's second habeas petition filed after date of Act's enactment is not retroactive, though first petition pre dated the Act). *Cf., Moran v. Stalder*, 121 F.3d 210, 211 (5th Cir. 1997)(second or successive §2254 petition not subject to AEDPA's restrictions unless filed after the AEDPA's effective date).

B. Application of the AEDPA to Bar Workman's Claims Would Not Have An Impermissible Retroactive Effect

When applying a 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 v. USI Film Products*, 511 U.S. 244, 280 (1994). 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).

In *Landgraf*, the Supreme Court recognized that "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). The Court recognized that in many instances, "even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct." *Id.*, at 269 n. 24.

In *In re Hanserd, supra*, at 926, this Court concluded that if relief under § 2255 was unavailable, there would be an impermissible retroactive effect:

> 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.

Id. at 931-32.

In contrast to the situation in *Hanserd*, there is absolutely no reason to believe that Workman would not have filed his first habeas petition in light of the new law, or that he fares any worse under it. As his claims purport to be based on "newly discovered evidence," they 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:

> 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, supra, at 1552.

Furthermore, 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), 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 claims] on the merits." *In re Siggers, supra*, at 338. §2244(b)(1) operates to bar only Workman's claim based on Harold Davis' statements. As previously discussed, *see* discussion at Section II.B., *supra*, 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.

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As this Court has made abundantly clear, the holding of *Hanserd* is one of extremely narrow application. If §2244(b)'s restrictions against second or successive petitions do not apply to Workman's claims, then they will never apply where the previous petition was filed pre AEDPA. This cannot be what Congress intended, and such a conclusion would be directly contrary to prior decisions of this Court, the United States Supreme Court, and other federal appellate courts.

IV. WORKMAN HAS FAILED TO MAKE A SUFFICIENT SHOWING FOR ISSUANCE OF A STAY OF EXECUTION.

Workman seeks a stay of execution on the basis of his instant Motion for Leave to File a Second Habeas Corpus Petition and on the basis of his currently pending Motion to Reopen his first habeas petition. Based on the foregoing, Respondent submits that Workman has failed to demonstrate, as he must, a "strong and significant likelihood of success on the merits" of his Motion for Leave to File. *See In re Sapp*, supra, at 465. On the basis of Respondent's previously filed response to Workman's Motion to Reopen, Respondent further submits that Workman has failed to demonstrate any likelihood of success on the merits of his Motion to Reopen. That motion, as well as the accompanying

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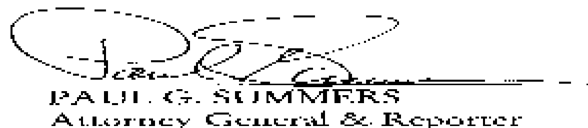
memorandum, patently lacks any evidence of the perpetration of a fraud on this Court sufficient to warrant reopening his habeas case.

CONCLUSION

As of the filing of this response to Workman's sundry motions, 10 days remain until Workman's scheduled date of execution. His effort to file a successive habeas petition represents the very abuse of the writ that the AEDPA sought to foreclose. For the reasons advanced herein, Workman's 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 Motion for Stay of Execution should all be denied.

Respectfully submitted,



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