IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN, Petitioner-Appellant, v. RICKY BELL, Warden, Respondent-Appellee.	No. 96-6652

RESPONSE OF RESPONDENT-APPELLEE TO PETITIONER'S MOTION TO REOPEN

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INTRODUCTION

More than three years after entry of the district court's judgment in this matter denying the petition for habeas corpus relief, and more than one year after the Court's affirmance of that denial, petitioner seeks to reopen his case, alleging that a fraud has been perpetrated on the court. Because petitioner does not, and cannot, demonstrate even a colorable claim of fraud on the court, the motion should be denied.

ARGUMENT

I. THERE HAS BEEN NO FRAUD PERPETRATED ON THE COURT.

A. Petitioner Has Not Demonstrated Fraud

In support of his position that the Court has the authority to take the action that he seeks, petitioner invokes the inherent authority of the Court, 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 the inherent power of a

court "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*, at 44, they 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.

Furthermore, as this Court has previously stated, the type of fraud that would warrant invocation of this inherent power involves only those "actions that interfere with [the] administration of justice." *Demjanjuk v. Petrovsky*, *supra*, at 351. "[T]hus, only actions that actually subvert the judicial process can be the basis for upsetting otherwise settled decrees." *Id.* Indeed, each of the three cases on which petitioner principally relies involved rather egregious circumstances. *See Chambers v. Nasco, Inc.*, *supra*, 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*, at 245 (court of appeals' decision reversed due to a litigant's "deliberately planned and carefully executed scheme to defraud" the

court of appeals).

In *Demjanjuk v. Petrovsky, supra*, contrary to the impression left by petitioner, this Court was confronted with a case that "involve[d] more than discovery obligations." *Id.*, at 348. The Court determined that, in addition to deliberately withholding information, attorneys for the Department of Justice displayed "reckless disregard for the truth" by "recklessly assuming Demjanjuk's guilt." *Id.*, at 353-354. As a result, they "failed to observe their obligation to provide exculpatory materials," in violation of *Brady*. *Id.*, at 354. Based on all of this, the Court concluded that the judgments against Demjanjuk "were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the Court." *Id.*, at 356.

In stark contrast to the circumstances described above lies the support offered by petitioner for his allegation that fraud was perpetrated on the court in this case. He merely offers proof that he caused a subpoena for records to be issued to the Shelby County Medical Examiner's Office in 1995 that included a request for an autopsy x-ray, and that an x-ray was not included in the materials produced in response thereto no less than 10 days later. He also presented proof that such an x-ray exists, which it does. He presents no proof, however, of fraudulent conduct. He offers no evidence to even 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. Petitioner certainly has not demonstrated fraud; nor has he made out a prime facie case of fraud, or even a colorable claim of fraud. Instead, petitioner asserts that simply because the x-ray was not produced, it must have been the result of fraud. Respondent further submits that petitioner lacks even a good-faith basis for making such an allegation. *See* Fed.R.Civ.P. 11.

Moreover, irrespective of the adequacy of the response of the medical examiner's office to his subpoena, petitioner fails to demonstrate the type of fraud perpetrated on a court sufficient to warrant invocation of the court's inherent power. Petitioner makes no showing that the response to the subpoena involved any litigant or party to, or attorney in, this action. As this Court has previously noted, "[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. *Demjanjuk v. Petrovsky*, *supra*, at 352.[1] *See Chambers v. Nasco, Inc.*, *supra*, at 35-38 (fraudulent conduct of

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[1] Although in *Demjanjuk*, the Court considered this distinction meaningless because the party was the United States, acting through the Department of Justice, which "acts only through its attorneys," *id.*, at 352, and whose attorneys were the subject of the misconduct claim.

a party and his attorney); *Hazel-Atlas Glass Company v. Hartford-Empire Company, supra*, at 247 (fraudulent conduct of a party and its attorney). Here, petitioner bases his motion on the alleged conduct of a non-party agency, on whom he directly served a subpoena for records, and from whom he received records in short order — a response with which petitioner was apparently satisfied at the time. He appears to have made no further inquiries with respect to the lack of an x-ray, or photographs, which he had also requested.[2] Moreover, there is no indication of any involvement in this transaction by the respondent, or any of respondent's attorneys. Whatever response petitioner received to his subpoena, it cannot be imputed to any party or any attorney in this habeas corpus action, nor can it be imputed to the prosecution. Accordingly, it can in no way be construed as fraud upon the court, as that term is defined:

> 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)

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[2] It had been clear since petitioner's trial in 1982 that the medical examiner's file included autopsy photographs, as the State's pathologist revealed during his testimony at trial. *See* App. A.

7 Moore's Federal Practice and Procedure, ¶ 60.33, *quoted in Demjanjuk v. Petrovsky*, *supra*, at 352.

B. Petitioner Cannot Demonstrate Fraud

Not only has petitioner failed to show fraud, particularly fraud sufficient to warrant the court's invocation of its inherent power to reopen and vacate a prior judgment or decision, but he *cannot* show it. Respondent would be warranted in resting on petitioner's failure to make a sufficient factual showing to support his motion. *See Hazel-Atlass Glass Company v. Hartford-Empire Company*, *supra*, at 248 (proceedings on a petition to impeach a judgment based on fraud are "not just a ceremonial gesture," and the petition "must contain the necessary averments, supported by affidavits or other acceptable evidence"). Nevertheless, respondent seeks to assure the court of the providence of its decision to affirm the judgment of the district court, and to remove any cloud that may have been unfairly cast by petitioner's claim.

Assuming that the x-ray was not produced in response to petitioner's 1995 subpoena -- and respondent concedes that it 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 inability to locate it. The death in 1987 of the doctor that conducted the autopsy also appears to have been a contributing factor. *See* Appendix B. In any event, there is absolutely no indication that the x-ray was deliberately "withheld" or "suppressed," as petitioner alleges; nor is there any evidence of bad-faith, or even reckless conduct, on the part of the medical examiner's office. Instead, there is every indication that the medical examiner's office dutifully responded to the subpoena in a short period of time,[3] and that it acted at all times in good faith. While petitioner was certainly entitled to have received the x-ray, any failure to produce it cannot, under any interpretation of the available evidence, be considered to have been fraudulent. Against such evidence, petitioner's claim of a "miscarriage of justice born of fraud" is mere hyperbole.

II. PETITIONER WAS NOT PREJUDICED BY THE LACK OF THE X-RAY.

In addition to petitioner having failed to demonstrate bad-faith in his not having previously been provided with the x-ray evidence in this case, petitioner

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[3] Petitioner's own evidence reflects that counsel received the records from co-counsel on or about June 12, 1995 — 10 days after service of the subpoena.

also fails to show how this evidence is material or how he was otherwise prejudiced by its non-production. Implicit in the concept of perpetrating a fraud on the court, and to warrant invocation of the court's inherent authority to vacate a prior judgment, petitioner must present proof that the evidence or information not provided had a material effect on the court's judgment. *See Demjanjuk v. Petrovsky, supra*, at 349-351, 353 (the information deliberately withheld went to the ultimate issue of guilt or innocence). Here, not only does the x-ray evidence fail to support petitioner's claims of innocence, but he presents no proof that it even supports the proposition that he advances. Moreover, the existence or absence of the x-ray evidence has no impact on either the district court's denial of relief in this case, or on this Court's affirmance of that denial.

A. The X-Ray Is of No Consequence to Petitioner's Claim

In his motion and memorandum, petitioner makes extravagant assertions regarding the x-ray evidence. *See, e.g.*, Petitioner's Motion to Reopen, p. 1 ("[t]he x-ray establishes, beyond any doubt, that [petitioner] did not fire the bullet that killed Lieutenant Oliver"). While petitioner might be justified in making such claims if he posited any evidence to support them, an examination of petitioner's proof regarding the significance of the x-ray reveals that such

statements are wholly without basis.

According to the affidavit of petitioner's own expert, Dr. Kris Sperry, the x-ray establishes nothing. 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."[4] 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, he edited his affidavit to remove any reference to the x-ray's significance. As a result, petitioner's proof not only fails to support his protestations of innocence, but it also fails to support the proposition for which he offers it. It simply is not the "vital evidence" of innocence that petitioner claims it to be, and therefore cannot properly form the basis of a motion to reopen his habeas corpus action.

B. The X-Ray Has No Impact on the Decision of This Court or the Judgment of the District Court.

The x-ray evidence does nothing that would cause this court to believe, much less conclude, that omission of the x-ray in prior proceedings "resulted in

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[4] This opinion is also consistent with the trial testimony of the State's pathologist, as petitioner has previously argued to this Court. (J.A., at 1399-1400)

the district court and this court improvidently approving" the denial of petitioner's writ of habeas corpus. *Demjanjuk v. Petrovsky, supra*, at 356. Petitioner mischaracterizes the relevant claims presented in his habeas corpus petition. In pertinent part, both the district court and this court considered petitioner's claim that the prosecution presented false evidence. *Workman v. Bell*, 178 F.3d 759, 766. Addressing that claim, this Court held that:

> [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.' 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.... As Workman cannot demonstrate falsity, he cannot prevail on this argument.

Id., at 768. The affidavit of Dr. Sperry that is attached to petitioner's Motion to Reopen clearly demonstrates that the existence of the x-ray would not have altered, or enhanced, the opinion he rendered before the district court. Accordingly, it would have had no bearing on the district court's denial of this claim, or on this Court's affirmance of that denial.

Petitioner, however, in his motion, resurrects a "fragmentation theory" regarding Lt. Oliver's fatal wounds — a theory not advanced by respondent, and one that petitioner sought to challenge in his Petition for Rehearing before this

Court. While the Court's mentions that theory in its opinion, its discussion must be regarded as dicta. *See Workman v. Bell, supra*, at 768. It did not form the basis for the district court's grant of summary judgment on this issue, nor did it form the basis of this Court's affirmance of that judgment. In many ways, in fact, petitioner is now engaged in exactly the same exercise in this Motion to Reopen, as when he filed his Petition for Rehearing. There, petitioner presented a similar affidavit of Dr. Sperry, in which he rendered the same specific opinion that he now presents, albeit without any reference to having reviewed the x-ray. *See* Appendix 4 to Petition for Rehearing. As the State argued in response to that petition, while the Court's discussion of fragmentation, and petitioner's most recent rejoinder, may be interesting, they do not alter the conclusion that the evidence before the district court did not create a genuine issue of material fact on petitioner's claim. By again raising this fragmentation theory, petitioner has essentially re-erected a straw house so that he may attempt to use the x-ray evidence to knock it down again. This effort, however, entirely misses the point.

Ruling on petitioner's Petition for Rehearing, the Court appropriately amended its original opinion. The court declined to consider Dr. Sperry's new affidavit, but it noted that the ballistic information that was discussed in the

original opinion had no dispositive effect upon the decision of the court. (App. C) Furthermore, the Court went on to state that, while it expressed no opinion as to whether petitioner was actually innocent, it noted that under Tennessee law petitioner could present such evidence to the governor in an application for clemency.

Petitioner has filed such an application, and a hearing thereon had been scheduled for March 9, 2000. There, petitioner would have had the opportunity to argue his claims of innocence. That hearing, however, was also expected to feature the testimony of the current Shelby County Medical Examiner, who has already stated his opinion, after reviewing the autopsy records, including the x-ray, that Lieutenant Ronald Oliver's fatal wounds are not inconsistent with the ammunition used by petitioner. *See* Appendix D. At approximately 11:30 a.m., CST, on March 8, 2000, petitioner gave notice of his intention to seek to withdraw his application for commutation. (App. E)

CONCLUSION

Petitioner has failed to show any evidence that a fraud has been perpetrated on the court. His motion to reopen his habeas corpus case should be denied.

Respectfully submitted,

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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 3rd day of March, 2000, to:

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