IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN,	)	
	)	
Petitioner-Appellant,	)	No. 96-6656
	)	
v.	)	Death Penalty Habeas Corpus Case
	)	
RICKY BELL, Warden,	)	Execution Date: 4/6/2000
	)	
Respondent-Appellee.	)	

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

I THE OLIVER X-RAY LEAVES THIS COURT NO DOUBT - PHILIP WORKMAN DID NOT SHOOT LIEUTENANT OLIVER

Respondent suggests that Dr. Sperry's Declaration fails to demonstrate the significance of the Oliver x-ray. In that report, however, Dr. Sperry specifically states that after reviewing the Oliver x ray he believes, to a reasonable degree of medical certainty, that the bullet that killed Lieutenant Oliver did not fragment. Rather it emerged from his body intact.[1] While Dr. Sperry modified his report because the x-ray did not establish the wound track the fatal bullet created, that modification does nothing to detract from what Dr. Sperry reports in his declaration and what is obvious to anyone who looks at the Oliver x-ray: there is no bullet, and there are no bullet fragments, in Lieutenant Oliver's chest.

Respondent suggests that Workman "resurrects" a fragmenting bullet theory that he claims was struck from this Court's opinion on rehearing. To be sure, this Court struck from its opinion its discussion of Dr. Martin Fackler and its conjecture that perhaps a metal jacket

[1] Appendix attached to Memorandum In Support Of Motion To Reopen ("App.") at 33.

from one of Workman's bullets caused the exit wound. This Court's order on rehearing, however, did nothing to affect its recognition that if the bullet emerged from Lieutenant Oliver intact, there is no doubt that the exit wound would be larger than the entry wound *if the fatal bullet came from Workman's gun.* See Workman v. Bell, 178 F.3d 759, 767 (6th Cir. 1998). The x-ray now establishes that the fatal bullet did, in fact, emerge from Lieutenant Oliver intact. There is no dispute that the exit wound is smaller than the entry wound. The significance of the Oliver x-ray could not be clearer. It removes all doubt from this Court's mind - the bullet that killed Lieutenant Oliver could not have come from Workman's gun.

II IF THIS COURT IS HESITANT TO REOPEN THIS CASE ON THE BASIS OF THE RECORD, IT SHOULD APPOINT A SPECIAL MASTER TO INVESTIGATE WHY THE MEDICAL EXAMINER'S OFFICE FAILED TO PRODUCE THE OLIVER X-RAY

This Court has long recognized that whether one has engaged in fraudulent conduct is a question of fact. See Eaton Corp. v. Easton Associates, Inc., 728 F.2d 285, 292 (6th Cir. 1984); Trice v. Commercial Union Assurance Co., 334 F.2d 673, 677 (6th Cir. 1964); Rooks v. American Brass Co., 263 F.2d 166, 169 (6th Cir. 1959). Under the fraud upon the Court doctrine, a reckless non-disclosure of evidence under subpoena supports a finding of fraud. See Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993). This Court has the inherent power to appoint a Special Master to ascertain whether the Medical Examiner's failure to comply with the District Court's order to produce the Oliver x-ray amounted to reckless conduct. Fed.R.Civ.P. 53(c); see Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946); Demjanjuk, 10 F.3d at 339. While Respondent suggests that such an investigate could not produce any evidence of recklessness,

he offers nothing which supports any such suggestion.

Respondent asks this Court to consider the Affidavit of Tami Ruth. In her affidavit, however, Ms. Ruth acknowledges that she has no present memory of seeing the subpoena Workman served for the Oliver x-ray or any actions she or anyone else took as a result of it.[2] She states only that various events generally occur when she receives a subpoena, and there may have been "justifiable" reasons explaining why the x-ray was not produced.[3] These assertions do little, if anything, to preclude the possibility that the Medical Examiner's failure to produce a document under subpoena constituted reckless conduct.

Respondent contends that the actions of the Medical Examiner's Office cannot be imputed to him, any attorney working for him, or the District Attorney's Office. The actions of any investigative officer, however, are imputed to the State. See U.S. v. Buchanan, 891 F.2d 1436, 1442 (10th Cir. 1989)(citing cases); Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984); Boone v. Paderick, 541 F.2d 447, 450-51 (4th Cir. 1976). The Medical Examiner's Office investigates causes of death. T.C.A. ¶ ¶ 38-7-106 (a). Indeed, it performs such an integral role in assisting the District Attorney's Office that a District Attorney General can order the Medical Examiner to perform an autopsy. Id. In addition, federal courts have held habeas respondent's responsible for producing, and for failing to produce, documents and things requested in discovery that were in the custody of State agencies other than the Department of Corrections. See In re Warden, Kentucky State Penitentiary, 865 F.2d 786 (6th

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[2] Exhibit B to Response at ¶ 11.

[3] Exhibit B to Response at ¶ 13.

Cir. 1988)(ordering habeas respondent to provide petitioner access to trial exhibits); U.S. ex rel. Zembowski v. DeRobertis, 771 F.2d 1057, 1065 (7th Cir. 1985)(holding habeas respondent liable for recalcitrance in providing documents possessed by the District Attorney). Just because Warden Bell did not have possession of the Oliver x-ray does not exonerate the State from repercussions flowing from the failure of the Medical Examiner's Officer to produce it.

III CONCLUSION

Workman subpoenaed the Oliver x-ray. It was not produced. It compels the conclusion that the bullet that killed Lieutenant Oliver emerged from his body intact. This fact leaves this Court "no doubt" - the bullet that killed Lieutenant Oliver could not have come from Workman's gun. If this Court is not willing on these facts to reopen Workman's appeal, it should appoint a Special Master to ascertain why the Oliver x-ray was not produced.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 8, 2000, I hand-delivered a copy of the foregoing to:

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