

CASE NO. 05-4130

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DEATH PENALTY CASE

JOHN G. SPIRKO, JR.

Petitioner-Appellant,

v.

MARGARET BRADSHAW, WARDEN

Respondent-Appellee.

On Appeal From the United States District Court
For the Northern District Of Ohio

**APPELLEE'S MEMORANDUM IN RESPONSE TO SPIRKO'S
"REQUEST FOR EXPEDITED REMAND TO DISTRICT COURT"**

Respectfully submitted,

JIM PETRO

Attorney General of Ohio



CHARLES L. WILLE (0056444)

Principal Assistant Attorney General

Capital Crimes Section

30 East Broad Street, 23rd Floor

Columbus, Ohio 43215-3428

(614) 728-7055; (614) 728-8600 (fax)

COUNSEL FOR RESPONDENT-APPELLEE

I. INTRODUCTION

Spirko asks the Court to remand to the district court, based on a letter by Gregory Duerr, a former co-worker of postal inspector Paul Hartman, in which Duerr questions Hartman's abilities as a supervisor as well as the postal service's actions in relation to Spirko's pending execution. The district court has ruled that aspersions or doubts concerning Hartman's credibility, based on his conduct or statements subsequent to Spirko's trial, cannot be a basis for relief from the district court's judgment in 2000. Moreover, Mr. Duerr has stated that he has no personal knowledge concerning Spirko's case. Nevertheless, in the interests of a full and fair determination of Spirko's recent federal action, the Warden does not oppose a limited remand to the district court to permit the filing by Spirko of a motion to alter or amend the district court's September 6, 2005 judgment, based on Mr. Duerr's letter. Such a motion, which the Warden will oppose, will ensure that Mr. Duerr's letter and his subsequent statements to investigators are made a part of the record.

II. STATEMENT OF THE CASE AND FACTS

Petitioner-Appellant John G. Spirko, Jr. (hereinafter "Spirko") is under a sentence of death. On July 18, 2000, the United States District Court for the Northern District of Ohio issued an opinion and order pursuant to which it denied

Spirko's petition for a writ of habeas corpus. On September 25, 2000, the district court denied Spirko's motion for reconsideration of its judgment. On May 17, 2004, this Court affirmed the judgment of the district court. On August 19, 2004, the Court denied Spirko's petition for rehearing and suggestion for rehearing en banc. On March 28, 2005, the Supreme Court of the United States denied Spirko's petition for a writ of certiorari.

On April 27, 2005, Spirko filed with the district court a motion for relief from the district court's judgment denying habeas corpus relief. Spirko claimed, among other things, that post-trial statements by investigator Paul Hartman call into question the integrity of previous federal proceedings and therefore mandated relief from the district court's judgment. On Tuesday, September 6, 2005, following discovery which the Warden did not oppose, and which included the deposition of Hartman, the trial prosecutors, and others, the district court denied Spirko's motion. Spirko subsequently filed a notice of appeal, and, on September 16, 2005, the Court issued a briefing schedule.

In the meantime, on the afternoon of Friday, September 2, 2005, at about 2:41 p.m., counsel for the Warden received from counsel for the United States Postal Service a copy of a letter written by Gregory Duerr, an investigator for the postal service, to Mr. Leroy Heath, Chief Inspector for the United States Postal Service. In the letter, Mr. Duerr expressed his concerns specifically with respect to

Hartman's competency as a supervisor and generally as to the postal service's actions in relation to the impending execution of Spirko for the abduction and murder of Betty Jane Mottinger. After receipt of a copy of Mr. Duerr's letter, counsel for the Warden requested that postal service officials verify the authenticity of the letter and that postal service investigators interview Mr. Duerr to determine, what, if any, personal knowledge Mr. Duerr had concerning the investigation of the robbery of the Elgin post office, the abduction and murder of Mrs. Mottinger, or the prosecution of Spirko for these crimes. On September 12, 2005, postal inspectors interviewed Mr. Duerr.

On September 14, 2005, after learning from postal service officials the results of the interview of Mr. Duerr, counsel for the Warden provided Spirko's attorneys with a copy of Mr. Duerr's letter. On September 16, 2005, counsel for the Warden provided Spirko's attorneys with a memorandum of interview which summarizes the results of Mr. Duerr's interview by postal inspectors on September 12, 2005. According to the memorandum, Mr. Duerr stated that he had "no first hand knowledge [concerning Spirko] and that the information he had was from articles from the newspapers," and that "he knew of no specific evidence from the case that was in question." *See Attached Memorandum of Interview.*

On or about September 19, 2005, Spirko filed with this Court a request to remand the case to the district court, for its consideration of the matters set forth in Mr. Duerr's letter.

III. ARGUMENT IN RESPONSE

In denying Spirko's motion for relief from judgment, the district court ruled, in pertinent part:

To the extent that Spirko seeks in this proceeding to obtain relief on the basis that Hartman testified falsely at his trial, he cannot do so. As previously discussed, his present challenge can reach only so far as the proceedings leading to denial of his habeas petition. That challenge cannot extend beyond those limits and become a free-wheeling inquiry into the constitutionality of his underlying conviction -- which is what his claim about Hartman's veracity attempts to become.

Order (R.222), page 16 (legal citation omitted).

The Warden does not oppose a limited remand. However, the Warden in no way concedes that Mr. Duerr's letter is relevant to Spirko's motion for relief from judgment, or that further discovery or an evidentiary hearing is warranted. Indeed, for the reasons previously found by the district court, Mr. Duerr's letter is patently irrelevant. Nevertheless, given the seriousness of Mr. Duerr's allegations, the Warden submits that the interests of justice require that Mr. Duerr's letter, as well as the memorandum summarizing the results of his interview by postal inspectors, be made a part of the record of this case. *See Inland Bulk Transfer Co.*

v. Cummins Engine Co., 332 F.3d 1007, 1012-1014 (6th Cir. 2003) (new evidence may not generally be presented for the first time on appeal); *Smith v. Anderson*, 402 F.3d 718 (6th Cir. 2005).

Respectfully submitted,

JIM PETRO
Attorney General of Ohio



CHARLES L. WILLE (0056444)
Principal Assistant Attorney General
Capital Crimes Section
30 East Broad Street, 23rd Floor
Columbus, Ohio 43215-3428
(614) 728-7055; (614) 728-8600 (fax)

COUNSEL FOR RESPONDENT-APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent by e-mail and via first-class u.s. mail this date, September 20, 2005, to John J. Callahan, Esquire, 5580 Monroe Street, Suite 200, Sylvania, Ohio 43560-2538; and Thomas C. Hill, Esquire, 2300 N Street, N.W., Washington, D.C., 20037-1128; counsel for appellant.



CHARLES L. WILLE (0056444)
Principal Assistant Attorney General

MEMORANDUM OF INTERVIEW

PERSON INTERVIEWED: Inspector Gregory Duerr

PLACE OF INTERVIEW: Cleveland Field Office
2400 Orange Avenue
Cleveland, OH 44101

DATE OF INTERVIEW: September 12, 2005

TIME OF INTERVIEW: 10:00 AM

INTERVIEWED BY: AIC Dugan Wong
Team Leader Dale Kamps

On Monday, September 12, 2005, Inspector Dale B. Kamps and I interviewed Inspector Gregory A. Duerr regarding the letter he sent to Chief Postal Inspector Heath on August 31, 2005. Questions were posed to Inspector Duerr regarding his knowledge of the Elgin, OH investigation.

Inspector Duerr was asked if he had first hand knowledge that the wrong person is being executed based on what he stated in his letter. Duerr stated that he had no first hand knowledge and that the information he had was from articles from the newspaper.

Inspector Duerr was asked about his conversations with inspectors that he had personally talked to about the case and if they had ever referred to specific evidence about the case. Duerr stated he had spoken to Inspector Daniel N. Bonda about the case and that he knew of no specific evidence from the case that was in question. Duerr stated he and Bonda had concerns about the general handling of the case and issues regarding retired Inspector Paul M. Hartman. Duerr also mentioned that he had conversations in the past about the case with Inspectors Joseph C. Long, Emerson L. Samuels and John M. Wascak, but did not remember the details.

Inspector Duerr stated he had no specific evidence regarding his concerns about the case and that he only had "hearsay" information. Duerr stated his issue with the case came from his past dealings with Paul Hartman and Hartman's unprofessional conduct which he felt was bordering on criminal. Duerr asserted Hartman had demonstrated his propensity to lie based upon a statement he had made in a sworn deposition where he stated he had been the subject of one Internal Affairs investigation during his career. Duerr stated he knew there was another investigation regarding Hartman since he was involved in it, but did not know if there was ever an official Internal Affairs investigation.