

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

**JOHN G. SPIRKO, JR.,**

**Petitioner,**

**v.**

**MARGARET BRADSHAW, WARDEN,**

**Respondent.**

**CASE NO.: 3:95-cv-7209**

**JUDGE JAMES G. CARR**

**Death Penalty Case**

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**THE WARDEN'S MEMORANDUM IN OPPOSITION TO SPIRKO'S "MOTION  
FOR LEAVE TO CONDUCT SUPPLEMENTAL DISCOVERY"**

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Respondent Margaret Bradshaw (hereinafter "Respondent" or "the Warden"), respectfully opposes Spirko's motion as described above. The Warden's memorandum in opposition follows.

**Respectfully submitted,**

**JIM PETRO (0022096)  
Attorney General of Ohio**

**s/Charles L. Wille**

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**s/Timothy D. Prichard**

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**COUNSEL FOR THE WARDEN**

**MEMORANDUM IN RESPONSE AND OPPOSITION**

**I. Introduction**

The Petitioner, John G. Spirko, Jr. (hereinafter "Spirko"), is presently before the Court on a motion to reopen the Court's September 6, 2005 order denying relief under Civil Rule 60(b) and to permit additional discovery. Spirko bases these requests on a letter written by postal investigator Gregory Duerr in August of 2005, in which Duerr attacks the integrity of investigator Paul Hartman and accuses the postal service of failing to respond appropriately in the wake of Spirko's claims of innocence. On September 30, 2005, per the Court's order, Spirko filed a supplemental memorandum describing the nature and extent of the requested additional discovery. Spirko proposes a wide-range of discovery, including the production "of all documents concerning or relating to any investigation of Paul Hartman, including, but not limited to, the 1998 investigation of Hartman referred to in Mr. Duerr's letter;" all documents relating to "any other alleged improper conduct by Inspector Hartman;" and "any information shared by the U.S. Postal Inspection Service with the State concerning or relating to Inspector Duerr, Inspector Hartman or the Mottinger case." Spirko further proposes depositions of Duerr and Inspector Guy Cottrell, who, according to Spirko, has "threatened" Duerr.

Spirko fails to present good cause for the discovery he seeks. There are no specific allegations before the Court that if proven would entitle Spirko to reopen the Court's previous judgment. Mr. Duerr does not claim to have personal knowledge concerning the robbery of the post office in Elgin, Ohio and the abduction and murder of Mrs. Mottinger, or Spirko's subsequent prosecution for these crimes. Spirko's proposed fishing expedition for derogatory information about Paul Hartman is wholly unjustified. As this Court has already found, Spirko's post-trial attacks on Hartman's character are irrelevant to Spirko's claim of "fraud on the court" or any matter presently at issue. Finally, even if Duerr's allegations are accepted at face value,

there is no need for further factual investigation by this Court. Spirko's attorneys have already been provided all information in the Warden's possession concerning the Duerr letter, and the Postal Service has voluntarily made Duerr available, on October 7, 2007, for questioning by Spirko's attorneys.<sup>1</sup>

Accordingly, the Warden again respectfully asks that the Court deny discovery and deny Spirko's motion to reopen the case.

## **II. Spirko fails to present good cause for the discovery he proposes.**

A petitioner in a federal habeas corpus proceeding has no absolute right to discovery. *Harris v. Nelson*, 394 U.S. 286 (1969). A court should allow discovery "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief..." *Id.* at 300. And, a petitioner must offer more than speculation; rather, the petitioner must demonstrate the existence of some evidence to support his specific allegations. *Bracy v. Gramley*, 520 U.S. 899, 909 (1997). "Simply put, Rule 6 does not authorize fishing expeditions." *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000), citing *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994). "[E]ven in a death penalty case, bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or to require an evidentiary hearing." *Williams v. Bagley*, 380 F.3d 932, 977 (6th Cir. 2004), citing *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003).

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<sup>1</sup> Consistent with the Court's request during the September 28, 2005 status conference, counsel for the Warden contacted officials of the United States Postal Service with respect to what information, if any, the Postal Service may choose to release outside the scope of discovery ordered by this Court or other legal proceedings, either to the parties or directly to the Court for *in camera* inspection. On October 4, 2005, the Postal Service informed counsel for Spirko and counsel for the Warden that Mr. Duerr will be made available for questioning on October 7, 2005, at the Cleveland, Ohio Office of the Ohio Attorney General.

There are no specific allegations before the Court that if proven would entitle Spirko to reopen the Court's previous judgment. Mr. Duerr does not claim in his letter to have personal knowledge concerning the robbery of the post office in Elgin, Ohio and the abduction and murder of Mrs. Mottinger, or Spirko's subsequent prosecution for these crimes. Indeed, Duerr has stated to investigators that he does *not* have such personal knowledge. Spirko cites Duerr's statement that "most if not all inspectors in Cleveland have concerns" about Spirko's execution. Spirko's Memorandum at page 5. Spirko ignores Duerr's statements to investigators that based on his discussions with Daniel Bonda -- the only investigator mentioned by Duerr with any connection to the investigation of Spirko's crimes -- "he [Duerr] knew of no specific evidence from the case that was in question." And, Spirko neglects to mention Duerr's inability when questioned by investigators to recall *any* details in his discussions with the other investigators who supposedly share his concerns. *See* Memorandum of Interview.

Spirko's proposed fishing expedition for derogatory information about Paul Hartman is wholly unjustified. This Court has found in no uncertain terms that Spirko's post-trial attacks on Hartman's character are irrelevant to Spirko's claim of "fraud on the court" or any matter presently at issue. Again, the Warden respectfully notes the Court's salient finding:

As previously discussed, [Spirko's] 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 Court's reasoning is all the more appropriate and compelling, in view of Spirko's far-reaching demand for "all information" relating to "any investigation of Paul Hartman," including the investigation of Hartman that Duerr claims was undertaken in 1998, and "any other alleged improper conduct by Inspector Hartman." Spirko's requests by their own terms are overbroad and improper.

The law and common sense require a petitioner to show the existence of some relevant evidence before obtaining discovery, *Bracy v. Gramley*, 520 U.S. at 909 (1997), otherwise every petitioner could argue that he or she cannot be expected to justify discovery until after discovery is allowed. In truth, Spirko does not present any reasonable legal or factual grounds upon which this Court could possibly find that Duerr's allegations are relevant. Spirko simply offers more argument that the Court erred in denying his motion under Rule 60(b). Spirko's new arguments are procedurally improper and factually irrelevant. Spirko may not now challenge the Court's previous rulings regarding the scope of actionable fraud. *Jinks v. Allied Signal, Inc.*, 250 F.3d 381, 386 (6th Cir. 2001) (Rule 60(b) motion cannot be used as a substitute for an appeal). And the correctness of the Court's prior holdings is irrelevant with respect to the factual issues presently before the Court. Spirko does not claim that the Warden or the county prosecutors concealed Duerr's letter, nor is any such claim at all plausible. There is no indication that the Warden or the county prosecutors could have known of Duerr's allegations, and it would seem impossible that this Court's judgment denying Spirko's petition could in any way have been affected by a letter written years after the fact by someone totally unconnected to the case.

Even if Duerr's allegations are accepted at face value, there is no need for this Court to order the Warden or the Postal Service to provide discovery under the civil rules. Spirko's attorneys have already been provided all information in the Warden's possession directly concerning the Duerr letter, e.g., the letter itself and the memorandum summarizing Duerr's subsequent statements to postal service investigators. The Postal Service has voluntarily made Duerr available, on October 7, 2007, for questioning by Spirko's attorneys. It should go without saying that the Postal Service voluntarily provided to the Warden a copy of Duerr's letter in the first place, that the Warden voluntarily provided a copy of the letter to Spirko's attorneys, and

that the Warden did not oppose a remand to this Court. Further, the Warden cannot be faulted for taking steps to verify the authenticity of Duerr's letter and the source of his allegations. Presumably, any attorney at law, media person or other responsible professional would have taken such steps before disseminating Duerr's allegations.

In sum, the Warden respectfully submits that there is no good cause for the discovery requested by Spirko.

Respectfully submitted,

**JIM PETRO**  
**Ohio Attorney General**

s/Charles L. Wille

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**COUNSEL FOR THE WARDEN**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was sent electronically and via regular U.S. mail this 5th day of October, 2005, to John J. Callahan, Esquire, 608 Madison Avenue, Suite 1400, Toledo, Ohio, 43604-1121; **and** Thomas C. Hill, Esquire, 2300 N Street, N.W., Washington, D.C., 20037-1128; Counsel for Petitioner Spirko.

s/Charles L. Wille

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**CHARLES L. WILLE (0056444)**

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