No. 19-1115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAMON BENTLEY,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
CONNIE HORTON, Warden,)
)
Respondent-Appellee.)

Damon Bentley, a pro se Michigan prisoner, appeals the district court's order denying his motion for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure. Bentley moves the court for a certificate of appealability (COA) and to proceed in forma pauperis on appeal.

Bentley was convicted of second-degree murder and firearms offenses in 2002, and the trial court sentenced him to a total term of forty-six years and ten months to eighty-two years of imprisonment. The Michigan Court of Appeals denied Bentley's delayed application for leave to appeal, *People v. Bentley*, No. 250788 (Mich. Ct. App. Feb. 11, 2004) (order), and the Michigan Supreme Court denied leave to appeal, *People v. Bentley*, 683 N.W.2d 671 (Mich. 2004) (table).

Bentley then filed a motion for relief from judgment in the trial court, which the court denied. The Michigan Court of Appeals denied Bentley's delayed application for leave to appeal, *People v. Bentley*, No. 278296 (Mich. Ct. App. Dec. 14, 2007), and the Michigan Supreme Court denied leave to appeal, *People v. Bentley*, 750 N.W.2d 227 (Mich. 2008) (mem.).

In July 2008, Bentley filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the district court. The district court concluded that Bentley's petition was barred by the one-year statute of limitations in 28 U.S.C. § 2244(d) and that he failed to establish grounds for

equitable tolling. This court denied Bentley's application for a COA, finding that reasonable jurists would not debate the district court's procedural rulings. *Bentley v. Rapelje*, No. 09-1743 (6th Cir. Nov. 24, 2009) (order).

Nine years later, Bentley filed a motion for relief from judgment under Rule 60(b) and (d) in the district court, arguing that fraud had been committed on the court and his original habeas petition was timely. The district court denied Bentley's motion, finding that it was untimely under Rule 60(b) because he filed it more than one year after the judgment was entered and that he was not entitled to relief under Rule 60(d) because he failed to demonstrate fraud on the court or actual innocence. The district court denied Bentley a COA.

To obtain a COA, Bentley must show that reasonable jurists would debate whether the district court should have resolved his Rule 60 motion differently. *See United States v. Hardin*, 481 F.3d 924, 926 & n.1 (6th Cir. 2007).

First, Bentley's request under Rule 60(b)(3) fails because it is time-barred. Pursuant to Rule 60(b)(3), a party can obtain relief from judgment by showing "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party," but the motion must be filed "no more than a year after the entry of the judgment or order or the date of the proceeding," Fed. R. Civ. P. 60(c)(1). Here, Bentley filed his Rule 60(b)(3) motion nine years after the district court entered its judgment denying his habeas petition, and thus reasonable jurists would not debate the district court's conclusion that the motion was untimely.

Second, Bentley's request under Rule 60(d) fails because he does not demonstrate actual innocence. Pursuant to Rule 60(d), which can be filed at any time after judgment, a party can obtain relief from judgment by establishing a "grave miscarriage of justice." *Mitchell v. Rees*, 651 F.3d 593, 595 (6th Cir. 2011). The "indisputable elements" of a Rule 60(d) motion are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Id. In a habeas case, the petitioner must make a "strong showing of actual innocence" to demonstrate that relief is necessary to avoid a grave miscarriage of justice. *Mitchell*, 651 F.3d at 596. The evidence Bentley submits to show actual innocence is a two-sentence affidavit from his girlfriend, which he posits establishes an alibi. In the affidavit, the declarant states that she was with Bentley during the commission of the crime at their residence, and that she was never contacted by an attorney or subpoenaed to a court. This lone affidavit—which is dated five years after Bentley's conviction and would have been available to Bentley at the time of trial had he and his girlfriend actually been together during the commission of the crime—does not make it more likely than not that no reasonable juror could have found Bentley guilty. *See Chavis-Tucker v. Hudson*, 348 F. App'x 125, 134 (6th Cir. 2009) (stating that the affidavits of family members "should be viewed with caution" because they "have a personal stake in [the petitioner's] exoneration"). Reasonable jurists could not disagree.

Accordingly, the court **DENIES** Bentley's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAMON BENTLEY,

Petitioner,

v.

CASE NO. 08-cv-13102
HONORABLE STEPHEN J. MURPHY, III

LLOYD RAPELJE,

Respondent.
_____/

OPINION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, DENYING PETITIONER'S MOTIONS TO AMEND RECORD, TO DENY RESPONDENT'S MOTION, AND TO STAY PROCEEDINGS, DISMISSING PETITION FOR WRIT OF HABEAS CORPUS, AND DENYING A CERTIFICATE OF APPEALABILITY AND LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

I. Introduction

Damon Bentley ("Petitioner"), a Michigan prisoner, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting that he is being held in violation of his constitutional rights. Petitioner was convicted of second-degree murder, felon in possession of a firearm, and possession of firearm during the commission of a felony following a jury trial in the Wayne County Circuit Court. He was sentenced as a third habitual offender to 46 years 10 months to 80 years imprisonment on the murder conviction, a concurrent term of three years four months to 10 years imprisonment on the felon in possession conviction, and a consecutive term of two years imprisonment on the felony firearm conviction in 2002. In his pleadings, he raises claims concerning the sufficiency of the evidence, prosecutorial misconduct, his right of confrontation, the jury

instructions, the admission of hearsay evidence, the effectiveness of counsel, the denial of his motion for relief from judgment, and actual innocence.

This matter is before the Court's on Respondent's motion for summary judgment seeking dismissal of the petition as untimely, as well as Petitioner's motions to amend the record, to deny the motion to dismiss, and to stay the proceedings. For the reasons set forth, the Court grants Respondent's motion, denies Petitioner's motions, and dismisses the petition for failure to comply with the one-year statute of limitations set forth at 28 U.S.C. § 2244(d). The Court also denies a certificate of appealability and leave to proceed *in forma pauperis* on appeal.

II. FACTS AND PROCEDURAL HISTORY

Petitioner's convictions arise from the shooting death of Jermaine Burley on August 14, 2000 in Detroit, Michigan. Following his convictions, Petitioner filed a delayed application for leave to appeal with the Michigan Court of Appeals, which was denied for lack of merit in the grounds presented. *People v. Bentley*, No. 250788 (Mich. Ct. App. Feb. 11, 2004) (unpublished). Petitioner then filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. Bentley*, 471 Mich. 868, 683 N.W.2d 671 (July 29, 2004).

On November 10, 2005, Petitioner filed a motion for relief from judgment with the state trial court pursuant to Michigan Court Rule 6.500 *et seq.* which was denied. *People v. Bentley*, No. 02-002282 (Wayne Co. Cir. Ct. June 19, 2006) (unpublished). Petitioner filed an application for leave to appeal this decision with the Michigan Court of Appeals, which was denied "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Bentley*, No. 278296 (Mich. Ct. App. Dec. 14, 2007)

(unpublished). Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was similarly denied. *People v. Bentley*, 481 Mich. 914, 750 N.W.2d 227 (June 23, 2008).

Petitioner filed his present federal petition for writ of habeas corpus on July 18, 2008. Respondent thereafter moved for summary judgment contending that the petition was not filed within the one-year statute of limitations applicable to federal habeas actions and should be dismissed. Petitioner has filed a reply to that motion asserting that his petition is timely because his state court motion for relief from judgment, which would toll the one-year period, was filed in August, 2005 rather than November, 2005 and that he should be allowed to proceed on his habeas claims because he is actually innocent. Petitioner has also moved to amend the record, to deny the motion to dismiss, and to stay the proceedings. Respondent has since filed a responsive pleading, asserting that the state court record confirms that Petitioner's motion for relief from judgment was not filed with the state trial court until November, 2005, thereby rendering his habeas petition untimely.

III. SUMMARY JUDGMENT STANDARD

Under the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Sanders v. Freeman*, 221 F.3d 846, 851 (6th Cir. 2000). The moving party bears "the burden of showing the absence of a genuine issue as to any material fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "To defeat a motion for summary judgment, the non-moving party must set forth

specific facts sufficient to show that a reasonable fact finder could return a verdict in his or her favor." *Sanders*, 221 F.3d at 851. The summary judgment rule applies to habeas proceedings. *See, e.g., Redmond v. Jackson*, 295 F. Supp. 2d 767, 770 (E.D. Mich. 2003).

IV. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, became effective on April 24, 1996. The AEDPA governs the filing date for this action because Petitioner filed his petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA establishes a one-year period of limitations for habeas petitions brought by state prisoners. The statute provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

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Petitioner's convictions became final after the AEDPA's April 24, 1996 effective date. The Michigan Supreme Court denied Petitioner leave to appeal on July 29, 2004. Petitioner then had 90 days in which to seek a writ of certiorari with the United States Supreme Court. *See Lawrence v. Florida*, 549 U.S. 327, 333 (2007); S. Ct. Rule 13(1). He did not do so. Accordingly, his convictions became final on October 27, 2004. Petitioner was therefore required to file his federal habeas petition on or before October 27, 2005, excluding any time during which a properly filed application for state post-conviction or collateral review was pending in accordance with 28 U.S.C. § 2244(d)(2).

Petitioner did not file his motion for relief from judgment with the state trial court until November 10, 2005. Thus, the one-year limitations period expired before he sought state post-conviction or collateral review. The AEDPA's limitations period is only tolled while a prisoner has a properly filed post-conviction motion under consideration. *See* 28 U.S.C. § 2244(d)(2); *Hudson v. Jones*, 35 F. Supp. 2d 986, 988 (E.D. Mich. 1999). The AEDPA's limitations period does not begin to run anew after the completion of state post-conviction proceedings. *See Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001). Petitioner does not allege that the State created an impediment to the filing his habeas petition or that his claims are based upon newly-created rights or newly-discovered facts.

In reply to Respondent's summary judgment motion, Petitioner asserts that his state court motion for relief from judgment was filed on August 26, 2005, not November 10, 2005. In support of this assertion, he submits a Praecipe for Motion indicating that his motion for relief from judgment and praecipe were served upon the Wayne County Prosecutor on August 26, 2005. The Wayne County Circuit Court's docket sheet and the trial court's order denying Petitioner's motion for relief from judgment, however, both clearly indicate

that the motion was filed with the trial court on November 10, 2005. The Praecipe for Motion does not indicate that Petitioner's counsel filed the motion for relief from judgment with the trial court on August 26, 2005 – and Petitioner has presented no other evidence to contradict the trial court's docket sheet or order. Petitioner has failed to demonstrate that he filed his motion for relief from judgment before the expiration of the one-year period. His petition is therefore untimely.

The United States Court of Appeals for the Sixth Circuit has determined that the one-year limitations period is not a jurisdictional bar and is subject to equitable tolling. In *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001), the Sixth Circuit ruled that the test to determine whether equitable tolling of the habeas limitations period is appropriate is the five-part test set forth in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). The five parts of this test are:

> (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Dunlap, 250 F.3d at 1008. A petitioner has the burden of demonstrating that he is entitled to equitable tolling. *See Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002). "Typically, equitable tolling applied only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003) (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir. 2000)).

Petitioner has not set forth sufficient circumstances which caused him to file his federal habeas petition after the expiration of the one-year period. To the extent that he

asserts that post-conviction counsel was negligent or ineffective in representing him, he is not entitled to equitable tolling. It is well-settled that there is no constitutional right to counsel in state post-conviction proceedings such that a habeas petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See Lawrence*, 549 U.S. at 336-37 ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel."); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Abdus-Samad v. Bell*, 420 F.3d 614, 632 (6th Cir. 2005) (alleged ineffective assistance of counsel could not establish cause to excuse procedural default in post-conviction proceedings because there is no right to counsel in such proceedings); *Harris v. McAdory*, 334 F.3d 665, 668 (7th Cir. 2003) (citing cases). Consequently, defense counsel's alleged deficiency does not warrant equitable tolling of the limitations period.

Furthermore, the fact that Petitioner is untrained in the law, was proceeding without a lawyer for some proceedings, or may have been unaware of the statute of limitations for a certain period of time does not warrant tolling. *See Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004) (ignorance of the law does not justify tolling); *Holloway v. Jones*, 166 F. Supp. 2d 1185, 1189 (E.D. Mich. 2001) (lack of professional legal assistance does not justify tolling); *Sperling v. White*, 30 F. Supp. 2d 1246, 1254 (C.D. Cal. 1998) (citing cases establishing that ignorance of the law, illiteracy, and lack of legal assistance do not justify tolling). Petitioner has not shown that he is entitled to equitable tolling under *Dunlap, supra*.

The Sixth Circuit has also held that a credible claim of actual innocence may equitably toll the one-year statute of limitations set forth at 28 U.S.C. § 2244(d)(1). *See Souter v. Jones*, 395 F.3d 577, 588-90 (6th Cir. 2005); *see also Knickerbocker v.*

Wolfenbarger, 212 Fed. Appx. 426 (6th Cir. 2007). As explained in *Souter*, to support a claim of actual innocence, a petitioner in a collateral proceeding "must demonstrate that, 'in light of all the evidence,' it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)); *see also House v. Bell*, 547 U.S. 518, 537-39 (2006). A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence – that was not presented at trial." *Schlup*, 513 U.S. at 324. "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt – or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. Moreover, actual innocence means "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. The Sixth Circuit has recognized that the actual innocence exception should "remain rare" and only be applied in the "extraordinary case." *Souter*, 395 F.3d at 590 (quoting *Schlup*, 513 U.S. at 321).

Although Petitioner asserts that he is entitled to equitable tolling based upon actual innocence, he has made no such showing. Petitioner presents a sworn statement by Krystal Hall, made in 2001, which he claims provides him with an alibi that was not presented at trial. Hall's testimony, however, is not particularly reliable given that she is the mother of Petitioner's son and was his live-in girlfriend at the time of the crime. Moreover, the prosecution presented other evidence at trial which supported the jury's verdict, including testimony indicating that Petitioner and the victim had a drug dispute, that

Petitioner believed the victim was a snitch, that Stephen Williams had left his relative Craig Green's car with Petitioner (outside Hall's home) for an insurance scam, that the victim's body with three gunshot wounds was found at the scene of a nearby accident involving that car, that Petitioner subsequently told Williams that he had messed up and instructed Williams to report that he had been carjacked, and that Petitioner's fingerprints were found inside and outside of Green's car. Additionally, Petitioner's own self-serving assertions of innocence are insufficient to support an actual innocence claim. "A reasonable juror surely could discount [a petitioner's] own testimony in support of his own cause." *McCray v. Vasbinder*, 499 F.3d 568, 573 (6th Cir. 2007) (citing cases). Petitioner has not shown that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. He has thus failed to demonstrate that he is entitled to equitable tolling of the one-year period. His petition is untimely and must be dismissed.

V. CONCLUSION

Based on the foregoing analysis, the Court concludes that Petitioner failed to file his petition within the one-year limitations period established by 28 U.S.C. § 2244(d), that he is not entitled to statutory or equitable tolling of the one-year period, and that the statute of limitations precludes review of the petition. Accordingly, the Court **GRANTS** Respondent's motion for summary judgment and **DISMISSES** the petition for writ of habeas corpus. Given this determination, the Court **DENIES** Petitioner's motions to amend, to deny Respondent's motion, and to stay the proceedings.

Before Petitioner may appeal this Court's decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability

may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court denies a habeas claim on procedural grounds without addressing the claim's merits, a certificate of appealability should issue if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed. In such a case, no appeal is warranted. *Id.*

After conducting the required inquiry and for the reasons stated herein, the Court is satisfied that jurists of reason would not find the Court's procedural ruling debatable. No certificate of appealability is warranted in this case and any appeal would be frivolous. *See* Fed. R. App. P. 24(a). Accordingly, the Court **DENIES** a certificate of appealability and **DENIES** Petitioner leave to proceed *in forma pauperis* on appeal.

IT IS SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: April 20, 2009

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I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on April 20, 2009, by electronic and/or ordinary mail.

s/Alissa Greer
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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DAMON BENTLEY,

Petitioner,

v.

CASE NO. 08-CV-13102
HONORABLE STEPHEN J. MURPHY, III

LLOYD RAPELJE,

Respondent.
_____/

JUDGMENT

The above-entitled matter having come before the Court, the Honorable Stephen J. Murphy, III, United States District Judge, presiding, and in accordance with the Opinion and Order entered on this date;

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254, is **DISMISSED WITH PREJUDICE.**

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: April 20, 2009

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on April 20, 2009, by electronic and/or ordinary mail.

s/Alissa Greer
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAMON BENTLEY,

Plaintiff,

Case No. 2:08-cv-13102

v.

HONORABLE STEPHEN J. MURPHY, III

LLOYD RAPELJE,

Defendant.

_____/

ORDER REOPENING THE HABEAS CASE, DENYING THE MOTION FOR RELIEF FROM JUDGMENT AND INDEPENDENT ACTION, AND DENYING A CERTIFICATE OF APPEALABILITY

On November 19, 2018, Michigan prisoner Damon Bentley ("Petitioner") filed a motion for relief from judgment and independent action pursuant to Civil Rule 60(b), (d). ECF 32. The motion concerns the Court's April 20, 2009 opinion and order dismissing his federal habeas petition as untimely under the applicable one-year statute of limitations, ECF 18. The United States Court of Appeals for the Sixth Circuit denied a certificate of appealability on November 24, 2009. ECF 29. Petitioner asserts that the Court was misled by the State's attorney and erred in dismissing his petition. *See* ECF 32, PgID 1068. Petitioner challenges the Court's finding that he filed his state court motion for relief from judgment on November 10, 2005 and insists that he filed it on August 26, 2005. *Id.* at 1069. The Court will now reopen the case for the limited purpose of resolving Bentley's motion. *See, e.g., Heximer v. Woods*, No. 2:08-CV-14170, 2016 WL 183629, at *1 (E.D. Mich. Jan. 15, 2016) (reopening case for consideration of Rule 60(b) motion).

A federal district court will grant relief from a final judgment or order under Civil Rule 60(b) only upon a showing that certain grounds exist, including "fraud, . . . misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b). If based on fraud, misrepresentation, or misconduct by an opposing party, a party must move for relief under Civil Rule 60(b) within "a year after the entry of the judgment or order." Fed. R. Civ. P. 60(c)(1); *Conner v. Attorney Gen.*, 96 F. App'x 990, 992–93 (6th Cir. 2004). Petitioner did not file his motion for relief from judgment within one year. The Court dismissed his habeas petition in 2009 and he filed his Civil Rule 60(b) motion in 2018. *See* ECF 19, 32. Petitioner fails to provide an explanation for the nine-year delay in filing his motion. He knew or could have known of his arguments when he originally pursued federal habeas review. In fact, he previously argued his theory about the filing date of his state court motion in his initial motion to alter or amend the Court's April 20, 2019 order and judgment. ECF 26. The motion is therefore untimely. The Court will therefore deny Petitioner's Rule 60(b) motion.

Petitioner also continues to contest the Court's decision and seeks relief under Civil Rule 60(d), which clarifies that Civil Rule 60 does not limit a court's power to entertain an independent action to relieve a party from judgment. Fed. R. Civ. P. 60(d). An independent action under Civil Rule 60(d) is an equitable action, which has no time limitation. *Mitchell v. Rees*, 651 F.3d 593, 594–95 (6th Cir. 2011). Its elements are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Id. at 595 (citing *Barrett v. Sec'y of Health & Human Servs.*, 840 F.2d 1259, 1263 (6th Cir. 1987)). An independent action under Rule 60(d) is "available only to prevent a grave miscarriage of justice." *Id.* (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)). This is a "'stringent' and 'demanding' standard," and, because Petitioner seeks relief from judgment in a habeas case, he must make a strong showing of actual innocence to establish that relief is required. *Id.* at 595–96 (quoting *Gottlieb v. S.E.C.*, 310 F. App'x 424, 425 (2d Cir. 2009)).

Petitioner makes no such showing. Rather, he re-argues issues previously addressed by the Court and raises issues which could have been presented in his initial habeas proceeding. Moreover, the Court independently reviewed the state court record and the state court rulings. There was no fraud upon the Court. Petitioner's allegations do not warrant the extraordinary remedy he seeks. He fails to demonstrate that the Court erred in dismissing his habeas petition, that he is actually innocent, or that he is otherwise entitled to relief under Civil Rule 60(d). Accordingly, the Court will deny his motion.

A certificate of appealability is necessary to appeal the denial of a Rule 60 motion. *See, e.g., Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010) (citing *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007)). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies relief on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists could debate the court's assessment of the claim. *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). When a court denies relief on procedural grounds without addressing the merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable

whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the court was correct in its procedural ruling. *Id.*

With *Slack v. McDaniel* in mind, judges in the District have adopted the following standard for determining whether a certificate of appealability should issue in the context of the denial of a Rule 60(b) motion:

> A COA should issue only if the petitioner shows that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the 60(b) motion, states a valid claim of the denial of a constitutional right.

Missouri v. Birkett, No. 2:08-cv-11660, 2012 WL 882727, at *2 (E.D. Mich. Mar. 15, 2012) (quoting *Carr v. Warren*, 05-cv-73763, 2010 WL 2868421, at *2 (E.D. Mich. July 21, 2010)). Petitioner is not entitled to a certificate of appealability because he fails to demonstrate that jurists of reason would find it debatable that the Court abused its discretion in denying his motion. Accordingly, the Court will deny a certificate of appealability.

WHEREFORE, it is hereby **ORDERED** that the **CLERK** of the Court shall **REOPEN** the case for the limited purpose of resolving Petitioner's motion for relief from judgment.

IT IS FURTHER ORDERED that Petitioner's motion for relief from judgment and independent action [32] is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: December 12, 2018

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on December 12, 2018, by electronic and/or ordinary mail.

s/David P. Parker
Case Manager

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

DAMON BENTLEY,

Defendant.

Case No. 02-002282

Hon. Michael F. Sapala

OPINION

This criminal action is before the Court on a motion for relief from judgment filed by defendant Damon Bentley. For the reasons stated below, the Court will deny the motion.

1. Procedural History

On August 7, 2002, following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and felony firearm, MCL 750.227b. He was sentenced on August 22, 2002 to forty-six years, ten months to eighty years imprisonment for the murder conviction and three years, four months to five years for the felon in possession conviction, to run consecutively to a term of two years for the felony firearm conviction. Defendant then filed a delayed application for leave to appeal with the Michigan Court of Appeals. In an order dated February 11, 2004, the Court of Appeals denied defendant's delayed application for leave to appeal. Defendant

then filed with the Michigan Supreme Court an application for leave to appeal, which was denied in an order dated July 29, 2004. The instant motion followed on November 10, 2005.

2. Standards for Determining Motions for Relief From Judgment

MCR 6.508(D) limits a defendant's entitlement to relief from judgment. If the defendant raises grounds for relief other than jurisdictional defects, relief may not be granted unless a defendant demonstrates both (a) good cause for failure to raise the ground for relief on appeal or in the prior motion and (b) actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(a) and (b). Moreover, it is the defendant who bears the burden of establishing entitlement to the relief requested. MCR 6.508(D). In order to demonstrate actual prejudice when challenging a conviction following a trial, a defendant must show that, "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i). A defendant may also demonstrate actual prejudice by showing an irregularity "so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(iii).

3. Defendant's Arguments

A. Hearsay Statements

Defendant argues that he was deprived of due process, a fair

trial, and his right of confrontation when the Court admitted inadmissible hearsay statements. At trial, witness Shantel Currie, who was the deceased victim's best friend, testified concerning statements of the victim that the victim and defendant had a disagreement over a drug deal that caused the victim to lose money. Also, witness Orlando Bryant testified that the victim had told him that he and defendant were planning on going out of town together. Bryant further testified that defendant never showed up to leave with the victim at the planned time, and that the victim told him that defendant would probably pick him up the next day.

First, defendant argues that admission of this testimony was a violation of his constitutional right to confront witnesses against him. US Const Am VI, Const 1963, art 1, §20. In support of this argument, defendant cites Crawford v Washington, 541 US 36; 124 S Ct 1354; L Ed 2d 177 (2004). Crawford held that the Confrontation Clause bars admission of testimonial statements against the defendant where the declarant is unavailable to testify at trial and where the defendant is denied an opportunity to cross examine the declarant. Id at 53-54. However, the victim's statements to Currie and Bryant were not testimonial in nature, and were therefore not inadmissible under the Confrontation Clause.

While the Court in Crawford declined to comprehensively define what may encompass a "testimonial statement," the Court stated that, "[w]hatever else the term covers, it applies at a

minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id at 68. In addition, the Court suggested that testimonial statements may include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id at 52, quoting Brief For National Association of Criminal Defense Lawyers, et al as *Amicus Curiae* 3. Further, the Crawford Court indicated that statements similar to those at issue here were not "testimonial" when the Court noted that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id at 51. Here, the victim's statements to Currie and Bryant were not formal statements made to government officers, but casual remarks to friends and were not made under circumstances which would have led the victim to reasonably believe that they would be available for use at a later trial. Therefore, admission of this testimony was not a violation of defendant's right to confront the witnesses.

Defendant next asserts that the victim's statements concerning the drug dispute fail to meet the admissibility requirements of MRE 404(b). MRE 404(b) governs the admission of evidence of prior bad acts. The rule provides in pertinent part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> MRE 404(b).

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. People v Knox, 469 Mich 502, 509 (2004).

In this case, the victim's statements met the admissibility requirements of MRE 404(b). First, there is no evidence that the prosecutor offered the evidence for the improper purpose of demonstrating that defendant's bad character showed that he had the propensity to commit crimes. Rather, the prosecutor offered the evidence for the proper purpose of showing defendant's motive for committing the crime. Second, the fact that defendant and the victim were not getting along prior to the victim's death is relevant to defendant's motive for killing the victim. Finally, while the other acts evidence may have been prejudicial, it was not

unfairly prejudicial. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the trier of fact. People v McGuffey, 251 Mich App 155, 163 (2002). Evidence regarding defendant's alleged drug dealing is not so inflammatory that the jury would give it preemptive or undue weight; therefore, the evidence cannot be characterized as unfairly prejudicial. See People v Starr, 457 Mich 490, 500 (1988).

Defendant also argues that Currie's testimony was inadmissible hearsay because the statements did not fall under MRE 803(3). MRE 801(c) defines hearsay as a declarant's out of court statement offered to prove the truth of the matter asserted. People v Tanner, 222 Mich App 626, 629 (1997). Hearsay is inadmissible as substantive evidence unless one of the exceptions in the rules of evidence applies. MRE 802; People v Poole, 444 Mich 151, 159 (1993). MRE 803(3) provides an exception to the hearsay rule for statements made concerning a then existing state of mental, emotional, or physical condition. Specifically, the rule states:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
>
> MRE 803(3).

The Michigan Supreme Court has held that evidence that

"demonstrates an individual's state of mind will not be precluded by the hearsay rule," and that statements of murder victims as to plans or feelings are admissible where relevant to material issues, including motive. People v Fisher, 449 Mich 441, 449-450 (1995). Statements showing the state of mind of the declarant are admissible when the state of mind is pertinent to the matters at issue. People v Ortiz, 249 Mich App 297, 310 (2001). In the instant case, evidence of the victim's state of mind regarding his relationship with defendant was relevant to the material issue of defendant's motive for murdering the victim, i.e. that the victim and defendant had been fighting over lost drug money. In any event, even if it was error to admit this testimony, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. MCL 769.26; People v Smith, 243 Mich App 657, 680 (2000). Here, considering the other evidence presented concerning defendant's guilt, defendant has not established that it was more probable than not that, had the victim's statements not been admitted, a different outcome would have resulted.

In any event, even if the Court did err in admitting evidence of the drug dispute between defendant and the victim, defendant still has not met his burden, under MCR 6.508(D)(3)(b)(i), of establishing that, but for the alleged error, he would have had a

reasonably likely chance of acquittal. There was overwhelming circumstantial evidence of defendant's guilt presented at trial. First, the victim's mother testified that defendant had called and spoke with the victim the night of his death. Stephen Williams testified that he left a car, which was to be used in an insurance scam, with defendant on the night in question. The car was then involved in an accident on the night of the victim's death. The victim was found lying just outside the passenger side of the car with three gunshot wounds to his head. Defendant's fingerprints were found inside and outside of the car. Williams further testified that defendant called him 4 or 5 times that night, indicating that he had messed up and that Williams should report that he had been carjacked. Defendant also told Williams that the victim was a snitch and had to go. In addition, and as defendant points out here, the prosecutor only made passing reference to the drug dispute in arguing his case. Instead, the prosecutor focused on the claim that the victim was seen as a snitch, and that was why defendant killed him. Given the amount of circumstantial evidence against defendant, defendant has failed to demonstrate that had statements concerning the drug dispute not been admitted, he would have had a reasonably likely chance of acquittal.

B. Prosecutorial Misconduct

Defendant next argues that the prosecution engaged in misconduct when the prosecution did not rely on the drug dispute as

the reason why defendant shot the victim, but that, instead, the prosecutor elicited testimony that demonstrated defendant had shot the victim because the victim was a "snitch." Defendant asserts that in doing so, the prosecution misled the Court.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial because of the actions of the prosecutor. People v Watson, 245 Mich App 572, 586 (2001). Review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. People v Callon, 256 Mich App 312, 329 (2003). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. Watson, supra. Here, defendant did not object to the prosecution's presentation of motive evidence based on the prosecutor's misleading of the Court, and has not demonstrated that he was denied a fair and impartial trial based on the alleged, improper actions of the prosecutor.

C. Limiting Instruction

Defendant also contends that he is entitled to a new trial based on the Court's failure to give a limiting instruction regarding the use of evidence of the alleged drug activity of defendant. In the absence of a request for, or objection to provide, a limiting instruction, a trial court has no duty to sua

sponte provide such an instruction. People v Rice (On Remand), 235 Mich App 429, 444 (1999). In the instant case, no limiting instruction was requested, and defendant has not shown that the jury used the evidence as improper character evidence, rather than as evidence bearing on defendant's motive. Therefore, defendant is not entitled to relief based on the Court's failure to give a limiting instruction.

D. Anonymous Tip

Defendant argues that he was deprived of his right to confrontation and a fair trial when the prosecutor elicited testimony from a police officer that the police became aware of defendant's possible involvement through an anonymous tip. However, given the other evidence linking defendant to the crime, defendant has not shown that he would have had a reasonably likely chance of acquittal had the prosecutor not elicited the anonymous tip testimony. MCR 6.508(D)(3)(b)(i).

E. Jury Instruction

Defendant next argues that he was deprived of a fair and impartial jury when the Court gave a coercive deadlocked jury instruction. During deliberations, the jury sent a note indicating that after two votes, they were unable to reach a unanimous decision. The Court then gave a deadlocked jury instruction, to which defense counsel raised no objection. Defendant argues that the Court's deadlocked jury instruction was a substantial departure

from the standard jury instruction, CJI 2d 3.12. Whether a deviation is "substantial in the sense that reversal is required depends upon whether the deviation renders the instruction unfair because it might have been unduly coercive." People v Hardin, 421 Mich 296, 316 (1984). The instruction must not have caused a juror to abandon his or her conscientious opinion and defer to the majority opinion solely for the sake of reaching agreement. Id at 314. A review of the given deadlock instruction reveals that any additional language in the instructions contained no pressure, threats, embarrassing assertions, or other wording that would constitute coercion. Id at 315. In addition, it is a "rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." People v Kelly, 423 Mich 261, 272 (1985), quoting Henderson v Kibbe, 431 US 145, 154; 97 S Ct 1730, 1736; 52 L Ed 2d 203 (1976).

F. Ineffective Assistance of Trial Counsel

Finally, defendant asserts that he was denied his constitutional right to effective assistance of counsel. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. People v Harris, 185 Mich App 100, 104 (1990). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) there is a reasonable

probability that, but for counsel's errors, the result of the proceedings would have been different. People v Toma, 462 Mich 281, 302-303 (2000). To show that counsel's performance was deficient, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. Id at 302. Counsel's performance must not be judged with the benefit of hindsight. People v LaVearn, 448 Mich 207, 216 (1995).

First, defendant asserts that trial counsel was ineffective for failing to call an alibi witness. Defendant claims that Krystal Hall would have testified that he was with her at their apartment at the time the shooting took place, that defendant gave her name and number to trial counsel, and that counsel never contacted her or produced her at trial. Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and the court will not substitute its judgment for that of counsel regarding matters of trial strategy. People v Rockey, 237 Mich App 74, 76 (1999). Given the other evidence that defendant was not with Hall on the night in question, this Court finds that defendant has failed to overcome the presumption that the decision not to call Hall was trial strategy.

Defendant next argues that trial counsel was ineffective for failing to excuse two jurors, which led to a partial jury. An

attorney's decisions with regard to the selection of jurors involve matters of trial strategy, which the court will not evaluate with the benefit of hindsight. People v Johnson, 245 Mich App 243, 259 (2001). It is rare, if ever, that a court will find that counsel was ineffective for failing to challenge a juror. People v Robinson, 154 Mich App 92, 95 (1986).

Defendant first asserts that counsel should have excused juror 13, who initially indicated that his friendships with Detroit police officers would interfere with his ability to be fair when hearing police officers testify. However, juror 13 ultimately indicated that he would be a fair juror. Defendant also asserts that counsel was ineffective for failing to excuse juror 1, who indicated that his experience as a paramedic might make him somewhat biased. Like juror 13, however, juror 1 indicated that he could set aside his experiences and be fair and impartial. Accordingly, defendant has failed to overcome the presumption that trial counsel's decision not to excuse jurors 1 and 13 was trial strategy. Based on the jurors' assurances, and the Court's acceptance of the assurances, defendant has also failed to establish that, but for counsel's failure to excuse these jurors, the outcome of the proceeding would have been different.

Finally, defendant argues that he was denied effective assistance of trial counsel when counsel failed to object to anonymous tip testimony, failed to object to testimony regarding

the drug dispute between defendant and the victim and the victim's plans to go out of town with defendant on Confrontation Clause grounds, failed to object to the coercive jury instruction, and failed to request a limiting instruction on defendant's alleged drug dealings. With regard to the failure of counsel to object to the victim's statements on Confrontation Clause grounds, and his failure to object to the jury instructions, the Court finds that trial counsel was not ineffective for failing to make them, because an attorney is not required to make meritless arguments. People v Riley, 468 Mich 135, 142 (2003). With regard to the remaining ineffective assistance of counsel arguments, defendant has failed to meet his burden of proving that, but for counsel's alleged errors, the outcome of the proceedings would have been different.

4. Conclusion

Defendant has failed to make any meritorious arguments which establish that but for the alleged errors he would not have been convicted, or that a miscarriage of justice occurred. MCR 6.508(D)(3)(b)(i) and (iii). Therefore, defendant has failed to prove actual prejudice which would require reversal of his conviction.

For the foregoing reasons, defendant's motion for relief from judgment is denied.

DATED:

HON. MICHAEL F. SAPALA
Circuit Judge

Def. Copy = Send

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

DAMON BENTLEY,

Defendant.

Case No. 02-002282

Hon. Michael F. Sapala

O R D E R

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this:

JUN 19 2006

PRESENT: HON. MICHAEL F. SAPALA
Circuit Judge

The Court being advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS ORDERED that defendant's motion for relief from judgment is DENIED.

HON. MICHAEL F. SAPALA
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

File No. 02-2282-01

Hon. Michael F. Sapala

DAMON BENTLEY,

Defendant.

CRAIG A. DALY, P.C. (P27539)
Attorney for Defendant
28 W. Adams, Suite 900
Detroit, Michigan 48226
(313) 963-1455

MOTION FOR RELIEF OF JUDGMENT, FOR AN EVIDENTIARY HEARING AND ORAL ARGUMENT

NOW COMES Defendant-Appellant DAMON BENTLEY, by and through his attorney, CRAIG A. DALY, P.C., and moves this Honorable Court for relief from judgment pursuant to MCR 6.500 et seq. for the following reasons:

1. Defendant-Appellant, DAMON BENTLEY, was convicted of Second Degree Murder, MCL 750.317, MSA 28.549; Felon in Possession of a Firearm, MCL 750.227f, MSA 28.421(6); and Felony Firearm, MCL 750.227b, MSA 28.424(2), after a jury trial in Wayne County Circuit Court.

2. On August 22, 2002, the Honorable Michael F. Sapala, presiding, imposed sentences of forty-six (46) years and ten (10) months to eighty (80) years, three (3) years and four (4) months to five (5) years, and a mandatory consecutive term of two (2) year term, respectively.

3. The attorney at trial was Thaddeus Dean.

4. In his application for delayed appeal in the Michigan Court of Appeals, Defendant Bentley raised the following two (2) claims:

I. THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. BENTLEY WAS THE PERPETRATOR OF THE MURDER, BY WHOLLY FAILING TO PROVE MR. BENTLEY WAS EVEN PRESENT AT THE TIME OF THE SHOOTING, AND THE RESULTING CONVICTION IS THEREFORE A VIOLATION OF MR. BENTLEY'S STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS PROTECTIONS; FURTHER, THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE DEFENSE MOTION FOR DIRECTED VERDICT.

II. MR. BENTLEY WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL THROUGH THE PROSECUTOR'S MISCONDUCT, WHERE THE PROSECUTOR ELICITED FROM A WITNESS THAT HE HAD PASSED A POLYGRAPH AND THEN "COME CLEAN," AND BY ARGUING TO THE JURY IN CLOSING, CONTRARY TO THE EVIDENCE OF RECORD, THAT THE ONLY WITNESS WHO SAW THE KILLER SAW A PERSON WITH A GOATEE AND MUSTACHE, THEREBY IMPROPERLY SUGGESTING A LINK TO OR IDENTIFICATION OF MR. BENTLEY WHICH DID NOT EXIST.

5. On February 11, 2004, the Court of Appeals entered an order denying the application for lack of merit in the grounds presented (Docket No. 250788).

6. The attorney on appeal was Neil Leithauser.

7. On July 29, 2004, the Michigan Supreme Court denied a Pro Per Application for Leave (Docket No. 125870).

8. There have been no further state or federal post-conviction proceedings.

9. Defendant is currently represented by Craig A. Daly, P.C., (P27539) as retained counsel. Therefore, Defendant is not requesting appointment of counsel.

10. Defendant is entitled to relief from the judgment of his convictions for the following reasons:

I. **DEFENDANT BENTLEY WAS DEPRIVED OF DUE PROCESS, A FUNDAMENTALLY FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION WHEN THE TRIAL COURT AL-**

LOWED INADMISSIBLE HEARSAY STATEMENTS OF THE DECEASED, THAT THE DECEASED HAD LOST MONEY IN A DRUG DEAL ALLEGEDLY TO SHOW MOTIVE FOR THE DEFENDANT TO KILL THE DECEASED, WITHOUT A CAUTIONARY INSTRUCTION TO THE JURY.

II. DEFENDANT BENTLEY WAS DENIED A FAIR TRIAL AND HIS RIGHT OF CONFRONTATION WHEN THE TRIAL COURT ALLOWED HEARSAY STATEMENTS OF THE DECEASED THAT HE PLANNED TO TRAVEL OUT OF STATE THREE DAYS BEFORE HIS DEMISE.

III. DEFENDANT BENTLEY WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR ELICITED TESTIMONY FROM THE POLICE THAT THEY HAD AN ANONYMOUS TIP THAT DEFENDANT WAS IDENTIFIED AS A SUSPECT.

IV. DEFENDANT BENTLEY WAS DEPRIVED OF A FAIR AND IMPARTIAL JURY WHEN THE TRIAL JUDGE GAVE A COERCIVE DEADLOCKED JURY INSTRUCTION.

V. DEFENDANT BENTLEY WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY (1) FAILED TO CALL A KNOWN ALIBI WITNESS; (2) FAILED TO OBJECT TO EVIDENCE OF AN ANONYMOUS TIP IDENTIFYING DEFENDANT AS A SUSPECT; (3) FAILED TO OBJECT TO INADMISSIBLE HEARSAY ON CONFRONTATION GROUNDS; (4) FAILED TO OBJECT TO A COERCIVE DEADLOCK JURY INSTRUCTION; (5) FAILED TO EXCUSE JURORS WHO EXPRESSED PARTIALITY; AND (6) FAILED TO REQUEST A LIMITING INSTRUCTION REGARDING DEFENDANTS ALLEGED DRUG DEALING.

VI. DEFENDANT BENTLEY HAS ESTABLISHED AN ENTITLEMENT TO RELIEF FROM THE JUDGMENT OF HIS CONVICTION AND SENTENCE BY DEMONSTRATING GOOD CAUSE FOR THE FAILURE TO RAISE HIS PRESENT CLAIMS ON DIRECT APPEAL OR IN A PRIOR MOTION AND, ACTUAL PREJUDICE FROM THE ALLEGED IRREGULARITIES IN THIS CRIMINAL PROCESS.

11. None of the grounds raised in this Motion for Relief of Judgment have been previously decided.

STATE OF MICHIGAN ☐ Third Judicial Circuit Court Criminal Division	**PRAECIPE FOR MOTION**	CASE NO. **02-2282-01**

THE PEOPLE OF THE STATE OF MICHIGAN,

-VS-

DAMON BENTLEY
Defendant

05 AUG 26 AM 11:14

TO THE ASSIGNMENT CLERK:

Please place a Motion for (here state nature of motion in brief Form) **Motion for Relief of Judgment, for an Evidentiary Hearing and Oral Argument**.

on the Motion Docket for **To Be Set** before Judge **Michael Sapala**

Date: **August 26, 2005**.

Craig A. Daly, P.C. **P27539**
Attorney for Defendant Michigan State Bar #

28 W. Adams, Suite 900
Address

Detroit, MI 48226 **(313) 963-1455**
City/State/Zip Telephone #

NOTE: UNDER MCR 2.107(c)(1) or (2)

PROOF OF SERVICE
(7 Days notice required)

I swear that on **August 26, 2005** I served a copy of the attached motion and praecipe upon the Wayne County Prosecutor, Criminal Division by ~~(mail)~~ (personal) service. (Cross out one)

Sworn and subscribed before me
on: **August 26, 2005**

Notary Public

Melinda D. Zawal, Notary Public
State of Michigan, County of Macomb
My Commission Expires 6/18/2010
Acting in the County of

County

My Commission Expires

Attorney for Defendant

PROSECUTOR'S OFFICE
AUG 26 2005
RESEARCH TRAINING & APPEALS

7 Day Notice waived _____
Date

Prosecuting Official Michigan State Bar #

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT

THE PEOPLE OF THE STATE OF MICHIGAN

V

CASE #02-2282-01
HON. MICHAEL F. SAPALA

DAMON BENTLEY

ORDER REQUIRING PROSECUTOR'S RESPONSE

At a session of Said Court held in the Coleman A. Young Municipal Center at Detroit in Wayne County on October 31, 2005
PRESENT: HON. MICHAEL F. SAPALA

Pursuant to MCR 6.504(B)(4), the Court orders the Wayne County Prosecutor to file a response under MCR 6.506(A) and (B) to Defendant/Appellant's Motion For Relief From Judgment. The response shall be filed no later than February 1, 2006.

HON. MICHAEL F. SAPALA

HON. MICHAEL F. SAPALA

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY C. Patterson
DEPUTY CLERK

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

DAMON BENTLEY,

Defendant.

File No. 02-2282-01

Hon. Michael F. Sapala

AFFIDAVIT OF CRAIG A. DALY

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

CRAIG A. DALY, being duly sworn, deposes and says, that the following is true, to the best of his knowledge, information, and belief:

1. I was the retained attorney for Damon Bentley in Case No. 02-2282-01 to file a Motion for Relief from Judgment in the Wayne County Circuit Court.

2. On August 26, 2005, I personally filed the original Motion for Relief from Judgment with the Clerk of the Court on the 9th Floor of the Frank Murphy Hall of Justice, 1441 St. Antoine, Detroit, Michigan 48226 and with the Appellate Division of the Wayne County Prosecutor's Office on the 12th floor of the same address.

3. I time stamped both the Praecipe and the first page of the Motion for Relief of Judgment, for an Evidentiary hearing and Oral Argument (copies of which are attached).

4. The time stamp from the clerk's office reads "05 AUG 26 AM 11:15."

5. The prosecutor's stamp states "PROSECUTOR'S OFFICE AUG 26 2005 RESEARCH TRAINING & APPEALS."

6. My sworn Proof of Service on the Praecipe is dated August 26, 2005.

7. Page four (4) of the motion is dated August 26, 2005.

8. Page forty-nine (49) of the Memorandum in Support is dated August 26, 2005.

9. The trial court's opinion and order of June 19, 2006 indicating that the Motion for Relief "followed on November 10, 2005" is in error. As further evidence of this error, the trial court entered an Order Requiring Prosecutor's Response on October 31, 2005 (copy attached).

FURTHER DEPONENT SAYETH NOT.

CRAIG A. DALY, P.C. (P27539)
Attorney at Law
28 W. Adams, Suite 900
Detroit, Michigan 48226
(313) 963-1455

Subscribed and sworn to before me
this 11th day of May 2009.

Melinda D. Zawal, Notary Public
State of Michigan, County of Macomb
My Commission Expires 6/18/2010
Acting in the County of Wayne