

Appendix A

Approved, SCAO

White - Court
Blue - Corrections
Green - Corrections (for return)Canary - State Police
Pink - Defendant
Goldenrod - ProsecutorSTATE OF MICHIGAN
THIRD JUDICIAL COURT
CRIMINAL DIVISIONJUDGMENT OF SENTENCE
COMMITMENT TO
CORRECTIONS DEPARTMENT

CASE NO.

01-014257-01

ORI
MI-
Police Report No.Court address
1441 ST. ANTOINE #602 DETROIT, MICHIGAN 48226Court telephone #
313-224-5440

THE PEOPLE OF THE STATE OF MICHIGAN

v

Defendant's name, address, and telephone no.

KENNETH JOHN UNCAPHER

CTN 82-01125679-01 SID 2197015 DOB 02/27/1977

Prosecuting attorney name
MICHAEL E. DUGGAN Bar no.
P#35893Defendant attorney name
MARC HART Bar no.
P#36686

AMENDED

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 09/12/2002 of the crimes stated below.

Date

*Plea: use "G" for guilty plea; "NC" for nolo contendere; "MI" for guilty but mentally ill.

Count	CONVICTED BY Plea	Court	Jury	CRIME	CHARGE CODE(S) MCL citation/PACC Code
1			G	MURDER 1ST	750316-A
2			G	MURDER 2ND	750317

 2. The conviction is reportable to the Secretary of State under MCL 257.732 or MCL 281.1040.

The defendant's driver license number is: _____

 3. HIV testing was ordered on _____ Date _____ Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	Mos.	MAXIMUM Years	Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
1	10/03/02	NATURAL	LIFE						
2	10/03/02	25	0	0	50	0	10/03/2002	0	329

 Defendant shall pay restitution of \$ _____. If a cash bond/bail was personally posted by the defendant, Payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL 775.22. 5. Sentence(s) to be served consecutively/concurrently to: each other. Case Numbers: _____

6. Defendant shall pay a \$60.00 assessment for the Crime Victim Rights Fund.

7. Defendant shall pay a \$150.00 assessment for forensic lab test.

 8. Court recommendation: AMENDMENT AS TO THE SPELLING OF THE DEFENDANT'S NAME, WAS SPELLED
UPCAPHER CORRECT SPELLING IS UNCAPHER.

03/25/2003

P#43475

Bar no.

Judge

HONORABLE VONDA R. EVANS

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

Notify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

Appendix B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JOHN UNCAPHER,

Defendant-Appellant.

UNPUBLISHED
April 13, 2004

No. 246222
Wayne Circuit Court
LC No. 01-014257-01

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, in the stabbing death of Robin Howard, and second-degree murder, MCL 750.317, in the stabbing death of Roger Sanford. Defendant was sentenced to concurrent terms of natural life, and twenty-five to fifty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first claims on appeal that the trial court erred in excluding two types of evidence: 1) testimony regarding a condition that allegedly interfered with his ability to deliberate, and 2) testimony regarding his state of mind as to his relationship with Howard, whom he had dated for several months. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000); *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant sought to admit the following evidence: 1) the results of a spinal tap procedure performed on defendant; 2) the results of a glucose tolerance test performed on defendant; and, 3) expert testimony regarding the effects on the human body of the conditions uncovered by the tests performed on defendant, such as defendant's low serotonin level. According to defense counsel, the evidence was not being offered to negate defendant's intent to kill one of the victims, but to show that defendant was unable "[t]o rationally think through decisions." It appears that the trial judge viewed defendant's proffered evidence as the basis of a "diminished capacity" defense, and denied defendant's motion in reliance on *People v Carpenter*, 464 Mich 223, 226; 627 NW2d 276 (2001), where our Supreme Court interpreted MCL 768.21a, which addresses which persons are deemed legally insane. Defendant denied that he was claiming diminished capacity and argued that he was not trying to negate specific intent;

rather, he was admitting he had the ability to form intent, but alleging that he was incapable of premeditation or deliberation. Defendant argued that the proffered evidence would show a biological, physical problem, rather than a psychological problem as anticipated in *Carpenter*, *id.*

The core of our Supreme Court's decision in *Carpenter* involved the admissibility of evidence regarding the defendant's mental capacity. Although defendant here tried to distinguish between a "psychological" and a "biological" conditions affecting the brain, we note that, in *Carpenter*, the defendant wanted to reduce his criminal culpability by showing that he suffered from organic brain damage. *Id.*, 464 Mich 228. Similarly, defendant here sought to reduce his criminal culpability by showing that he had "biological" problems that diminished his ability to reason and control his impulses.

Defendant also suggests that *Carpenter* does not apply here because specific intent was the element at issue there, while premeditation and deliberation are at issue in this case. However, our Supreme Court relied in part on the United States Supreme Court decision in *Fisher v. United States*, 328 US 463; 66 S Ct 1318; 90 L Ed 1382 (1946), where the U.S. Supreme Court upheld the exclusion of evidence, short of insanity, pertaining to "the fact of and the . . . capacity for premeditation and deliberation." *Carpenter, supra*, 464 Mich 240, quoting *Fisher, supra*, 328 US 470. Our Supreme Court clearly concluded that "the insanity defense as established by the Legislature is the sole standard for determining criminal responsibility" when it is based on either mental illness or retardation. *Carpenter, supra*, 464 Mich 228, 239, 241. Quoting *State v. Mott*, 187 Ariz 536, 541; 931 P2d 1046 (1997), our Supreme Court noted, "*Fisher* stands for the proposition that state legislatures, without violating the constitution, may preclude defendants from offering evidence of mental and psychological deficiencies to challenge the elements of a crime." *Carpenter, supra*, 464 Mich 241.

Here too, no matter how defendant frames it, the defense argument was that defendant should be relieved of criminal responsibility because he was incapable, because of "a biological disorder," of forming a mental element of the crime. As the trial court indicated, the ruling in *Carpenter* precludes admission of such evidence. The trial court did not abuse its discretion in excluding the evidence of defendant's "chemical imbalance." *Jones, supra*, 240 Mich App 706.

Defendant also argues that the trial court erred in excluding testimony regarding a telephone conversation the day before the victims were murdered. Defendant's friend testified that defendant called Howard on a cell phone while defendant and the witness were in a vehicle. The witness said he could hear what defendant said during the conversation, and that defendant relayed Howard's part of the conversation to him. The trial court sustained, on the basis of hearsay, the prosecutor's objection to testimony regarding specific statements. However, through later questions, defense counsel effectively obtained the substantive information he claimed he had been seeking previously. The witness testified without objection that Howard told defendant in detail about an apartment she found for her and defendant to rent together. Thus regardless of the merits of defendant's challenge on appeal, defendant was not precluded from presenting the evidence and the trial court's ruling on the phrasing of a single question was clearly not outcome determinative. *Lukity, supra*, 460 Mich 495-496.

Defendant also argues that there was insufficient evidence of premeditation and deliberation to convict him of the first-degree murder of Howard. We disagree. This Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a

rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000).

Viewing the evidence in a light most favorable to the prosecution, there was ample evidence here of premeditation and deliberation. Several witnesses testified regarding defendant's prior relationship with Howard, and of defendant's jealousy. Defendant himself testified that, the night before the stabbings, he suspected that Howard was being unfaithful to him and "just drove around for a while thinking." There was evidence that defendant had previously threatened to kill Howard and told her he wished she were dead. Defendant acquired a large hunting knife, which he carried with him in his vehicle. Defendant followed the victims' cars with his vehicle, rammed Howard's car in an effort make her pull over, and waited until she was alone in a parking lot to approach her. There was evidence that Sanford also pulled into the parking lot and put himself between defendant and Howard. Defendant testified that he concealed the knife and took it with him as he confronted the two victims. Defendant said that he stabbed Sanford in the back, prevented Howard from seeking safety in her car, and stabbed her to death. On this evidence, a rational trier of fact could have found that the essential elements of first-degree murder were proven beyond a reasonable doubt. *Hampton, supra*, 407 Mich 368.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio

Appendix C

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE MICHIGAN

Plaintiffs,

v.

Circuit No. 01-014257-01
Hon. Vonda R. Evans

KENNETH JOHN UNCAPHER

Defendants,

ORDER

At a session held in the Frank Murphy
Hall of Justice, Detroit, MI on:

APR 10 2007

PRESENT: HON. VONDA R. EVANS

For the reasons stated in the forgoing Opinion, **IT IS HEREBY ORDERED**

That the Defendant's MOTION FOR RELIEF FROM JUDGMENT is hereby **DENIED**.

Dated: April 10, 2007


HONORABLE VONDA R. EVANS
Third Circuit Court Clerk, Wayne County, Michigan
WAYNE COUNTY CLERK

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

Case No. 01-014257-01
Hon. Vonda R. Evans

KENNETH JOHN UNCAPHER
Defendant,

OPINION

The defendant was convicted by jury trial of one count of **First Degree Murder**, MCL 750.316(a) and one count of **Second-Degree Murder**, MCL 750.317 on September 12, 2002.

On October 3, 2002, the defendant was sentenced to natural life for First Degree Murder conviction and a term of 25 to 50 years for the Second Degree Murder conviction by the court.

The Michigan Court of Appeals affirmed the defendants conviction on April 13, 2004.

The Michigan Supreme Court denied defendant a application on October 24, 2004.

The defendant's claimed that he was denied a fair trial, where a member of the jury told the judge he was accosted by members of the victims family. The defendant's request for a mistrial was denied.

Upon review of the facts and issues in this motion the defendant's motion is Hereby

DENIED.

Dated: 04/10/2007

Judge Vonda R. Evans
Third Judicial Circuit Court Division
A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK

Appendix D

Court of Appeals, State of Michigan

ORDER

People of MI v Kenneth John Uncapher

Docket No. 281084

LC No. 01-014257 01

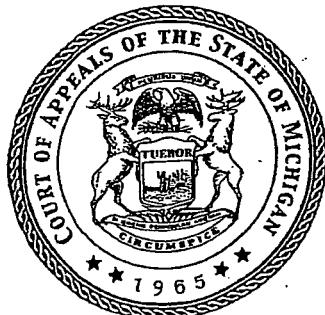
Helene N. White
Presiding Judge

Christopher M. Murray

Karen M. Fort Hood
Judges

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on



DEC 19 2007
Date

Sandra Schultz Mengel
Chief Clerk

Appendix E

Order

Michigan Supreme Court
Lansing, Michigan

July 29, 2008

Clifford W. Taylor,
Chief Justice

135786

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

KENNETH JOHN UNCAPHER,
Defendant-Appellant.

SC: 135786
COA: 281084
Wayne CC: 01-014257-01

On order of the Court, the application for leave to appeal the December 19, 2007 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 29, 2008

Corbin R. Davis

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
FEB - 3 2012

CLERK'S OFFICE
U.S. DISTRICT COURT
ANN ARBOR, MI

KENNETH UNCAPHER,

Petitioner,

Case Number: 5:08-cv-10583

v.

Honorable John Corbett O'Meara

MARY BERGHUIS,

Respondent.

OPINION AND ORDER (1) GRANTING MOTION TO
LIFT STAY, REOPEN HABEAS PROCEEDINGS, AND AMEND PETITION FOR
WRIT OF HABEAS CORPUS, (2) ORDERING SERVICE OF THE PETITION,
AND (3) DIRECTING RESPONDENT TO FILE RESPONSIVE MATERIALS

This is a habeas case filed under 28 U.S.C. § 2254. Petitioner Kenneth Uncapher, a state inmate confined by the Michigan Department of Corrections at the Kinross Correctional Facility in Kincheloe, Michigan, filed a *pro se* habeas petition on February 8, 2006, challenging his convictions for one count of first-degree murder and one count of second-degree murder. Subsequently, on November 16, 2009, Petitioner filed a motion to stay his habeas proceedings, in order for him to return to state court to exhaust his newly-discovered-evidence claim; Petitioner alleged that he had newly-discovered evidence that he was actually innocent of the charges because of his mental state at the time of the murders. On December 10, 2009, the Court granted his request to stay the proceedings. In its order, the Court directed that the petition would be stayed provided that Petitioner: (i) presented his claims in state court within sixty days of the Court's order staying the petition; and (ii) asked the Court to lift the stay within sixty days of exhausting his state-court remedies.

Pending before the Court is Petitioner's "Motion to Lift Stay and Amend Petition for Writ of Habeas Corpus," filed on January 23, 2012. In his pleadings, Petitioner states that he has exhausted his state-court remedies through collateral review in state court regarding his claim. Petitioner filed a successive motion for relief for judgment, pursuant to Mich.Ct.R. 6.500, which was denied on January 13, 2011. *People v. Uncapher*, No. 01-014257-01 (Wayne Cnty. 3rd Cir. Ct. Crim. Div. Jan. 13, 2011). Subsequently, he filed a delayed application for leave to appeal the denial of his motion for relief from judgment with the Michigan Court of Appeals, which was denied on August 16, 2011. *People v. Uncapher*, No. 304009 (Mich.Ct.App. Aug. 16, 2010). His application for leave to appeal that decision was denied by the Michigan Supreme Court on December 28, 2011. *People v. Uncapher*, 490 Mich. 972, 806 N.W.2d 521 (2011). Because Petitioner timely returned to this Court moving for the stay to be lifted and the case to be reopened, the Court will grant his motion, lift the stay, and permit the filing of the amended petition.

"Federal courts have the power to order that a habeas petition be reinstated upon timely request by a habeas petitioner." See *Bennett v. Howes*, No. 2:06-CV-13730, 2011 WL 718589 (E.D. Mich. Feb. 22, 2011) (citation omitted). Because Petitioner is alleging that his remaining claim has been exhausted with the state courts, his petition is now ripe for consideration. Accordingly, the Court will order that this case be reopened. The amended petition is deemed filed.

The Court also orders that the Clerk of the Court serve a copy of the amended petition and a copy of this order on Respondent and on the Attorney General for the State of Michigan by

first class mail, as provided in Rule 4 of the Rules Governing § 2254 Cases, Rule 4. *See Coffee v. Harry*, 2005 WL 1861943 (E.D. Mich. Aug. 2, 2005).

The Court further orders Respondent to file a response to the amended petition within sixty days from the date of this order. A habeas corpus petitioner who challenges the legality of his state custody is entitled to reasonably prompt disposition of his petition. *Ukawabutu v. Morton*, 997 F. Supp. 605, 610 (D.N.J. 1998). This Court has the discretion under the rules governing responses in habeas corpus cases to set a deadline for a response to Petitioner's habeas petition. *Erwin v. Elo*, 130 F. Supp. 2d 887, 891 (E.D. Mich. 2001); 28 U.S.C. § 2243.

Respondent is also directed to provide this Court with any additional Rule 5 materials at the time that he files his answer. The habeas-corpus rules require that the respondents attach the relevant portions of the transcripts of the state-court proceedings, if available, and the court may also order, on its own motion, or upon the petitioner's request, that further portions of the transcripts be furnished. *Griffin v. Rogers*, 308 F. 3d 647, 653 (6th Cir. 2002); Rules Governing § 2254 Cases, Rule 5, 28 U.S.C. foll. § 2254. An appropriate response to a habeas petition is an answer which responds to each allegation contained in the petition and which attaches copies of the relevant judgment of conviction, any available and relevant transcripts, and any post-conviction pleadings and decisions. *Chavez v. Morgan*, 932 F. Supp. 1152, 1153 (E.D. Wis. 1996).

Finally, the Court will afford Petitioner forty-five days from the receipt of Respondent's answer to file a reply brief to Respondent's answer, if he so chooses. Rule 5(e) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 states that a habeas petitioner "may submit a

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F I L E D
FEB 24 2015
CLERK'S OFFICE
U.S. DISTRICT COURT
ANN ARBOR, MI

KENNETH UNCAPHER,

Petitioner,
v.

Case No. 5:08-CV-10583

HONORABLE JOHN CORBETT O'MEARA
UNITED STATES DISTRICT COURT JUDGE

MARY BERGHUIS,

Respondent.

**OPINION AND ORDER TRANSFERRING CASE TO THE COURT OF
APPEALS PURSUANT TO 28 U.S.C. § 2244(b)(3)(A)**

Kenneth Uncapher, ("Petitioner"), confined at the Richard A. Handlon Correctional Facility in Ionia, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his *pro se* application, petitioner challenges his conviction for one count of first-degree murder, M.C.L.A. 750.316; and one count of second-degree murder, M.C.L.A. 750.317. Because the Court concludes that the present petition constitutes a "second or successive petition" within the meaning of 28 U.S.C. § 2244(b)(3), the Court will transfer the matter to the Court of Appeals so that petitioner may seek permission to proceed.

I. Background

Petitioner was convicted in 2002 of one count of first-degree murder and one count of second-degree murder following a jury trial in the Wayne County Circuit Court. Petitioner's conviction was affirmed on appeal. *People v. Uncapher*, No. 246222, 2004

WL 790329 (Mich. Ct. App. Apr. 13, 2004); *lv. den.* 471 Mich. 901; 688 N.W.2d 89 (2004); *cert. den. sub. nom. Uncapher v. Michigan*, 544 U.S. 930 (2005). Petitioner then filed a post-conviction motion for relief from judgment, which was denied by the trial court. *People v. Uncapher*, No. 01-014257-01 (Wayne Cnty. 3rd Cir. Ct. Crim. Div. April 10, 2007). The Michigan appellate courts denied petitioner leave to appeal. *People v. Uncapher*, No. 281084 (Mich. Ct. App. December 19, 2007); *lv. den.* 482 Mich. 892, 753 N.W.2d 151 (2008).

On February 8, 2008, petitioner, through counsel Michael F. Skinner, filed a petition for writ of habeas corpus, which was filed under the above case number and assigned to this Court. In his habeas application, petitioner sought relief on claims that he had raised either on his direct appeal or in his post-conviction motion with the state courts. (Dkt. # 1). This Court ordered the respondent to file an answer by August 18, 2008. (Dkt. # 2).

While this petition was pending in this Court, petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Western District of Michigan, in which he also challenged his 2002 convictions for first and second-degree murder out of the Wayne County Circuit Court. The petition was summarily denied pursuant to Rule 4 of the Rules Governing § 2254 Cases. The court also denied petitioner a certificate of appealability. *See Uncapher v. Michigan*, No. 1:08-CV-457, 2008 WL 2945951 (W.D. Mich. July 28, 2008)(adopting Report and Recommendation of Magistrate Judge).

Respondent filed an answer to the petition in this case on August 18, 2008. (Dkt. # 5).

On November 16, 2009, petitioner moved for a stay of the proceedings so he could return to the state courts to file a second motion for relief from judgment based on newly discovered evidence. On November 24, 2009, petitioner's attorney moved to withdraw as counsel. On December 10, 2009, this Court granted the motion to stay the proceedings, granted the motion to withdraw as counsel, and administratively closed the case. (Dkt. # 15).

Petitioner returned to the state courts and filed a second motion for relief from judgment, which the trial court denied. *People v. Uncapher*, No. 01-014257-01 (Wayne Cnty. 3rd Cir. Ct. Crim. Div. Jan. 13, 2011). The Michigan appellate courts denied petitioner leave to appeal. No. 304009 (Mich.Ct.App. Aug. 16, 2011); *lv. den.* 490 Mich. 972, 806 N.W.2d 521 (2011).

On January 23, 2012, petitioner filed a motion to lift the stay of proceedings and a motion to amend or correct the habeas petition. (Dkt. # 24). On February 25, 2012, this Court granted the motion to lift the stay and the motion to amend the habeas petition. The Court ordered respondent to file an answer to the amended petition. (Dkt. # 25). On April 3, 2012, respondent filed an answer to the amended habeas petition. (Dkt. # 29).

II. Discussion

The Court transfers the case to the United States Court of Appeals for the Sixth

Circuit because petitioner's current habeas petition, as discussed below, amounts to a second or successive habeas petition.

An individual seeking to file a second or successive habeas petition must first ask the appropriate court of appeals for an order authorizing the district court to consider the petition. See 28 U.S.C. § 2244(b)(3)(A); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998). Congress has vested in the court of appeals a screening function that the district court would have performed otherwise. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Under the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal district court does not have jurisdiction to entertain a successive post-conviction motion or petition for writ of habeas corpus in the absence of an order from the court of appeals authorizing the filing of such a successive motion or petition. See *Hervey v. United States*, 105 F. Supp. 2d 731, 735 (E.D. Mich. 2000)(citing *Ferrazza v. Tessmer*, 36 F. Supp. 2d 965, 971 (E.D. Mich. 1999)). Unless the Sixth Circuit Court of Appeals has given its approval for the filing of a second or successive petition, a district court in the Sixth Circuit must transfer the petition to the Sixth Circuit Court of Appeals no matter how meritorious the district court believes the claim to be. *Id.* at 735-36; See also *In Re Sims*, 111 F. 3d 45, 47 (6th Cir. 1997). This requirement transfers to the court of appeals a screening function which the district court previously would have performed. *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

Petitioner has previously filed a habeas petition challenging his 2002 murder

convictions, which was denied on the merits by the Western District of Michigan.¹ Although petitioner filed a petition in this case prior to filing his petition in the Western District, petitioner's original habeas petition that was filed in Case # 5:08-CV-10583 in 2008 would not count as his "first petition," for purposes of 28 U.S.C. § 2244(b)(3)(A), because petitioner superseded this initial habeas petition when he filed his amended habeas petition with this Court in 2012. *See Calhoun v. Bergh*, 769 F.3d 409, 411 (6th Cir. 2014); *petition for cert filed*, No. 14-7246 (U.S. Nov. 7, 2014). "An amended complaint supersedes an earlier complaint for all purposes." *Id.*, at 410 (quoting *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586, 589 (6th Cir. 2013)). This rule applies to habeas cases. *Id.* The only petition pending before this Court now is petitioner's amended habeas petition that was filed in 2012. *Id.*, at 410-11. Because the Western District of Michigan adjudicated petitioner's habeas petition on the merits prior to the filing of the amended habeas petition in this case, petitioner's current amended habeas petition is a second or successive petition that would require authorization from the Sixth Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A).

Petitioner has previously filed a habeas petition with the federal courts. Although petitioner would not have been required to obtain a certificate of authorization following the dismissal of his petition if it had been dismissed without prejudice on exhaustion

¹ Although neither party informed this Court of petitioner's 2008 habeas petition in the Western District of Michigan, the Court learned about the case while searching Westlaw's website to obtain citations for petitioner's state court appeals. See www.westlaw.com. Public records and government documents, including those available from reliable sources on the Internet, are subject to judicial notice. *See United States ex. rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003).

grounds, *See Harris v. Stovall*, 22 F. Supp. 2d 659, 664 (E.D. Mich. 1998), petitioner's habeas petition in the Western District of Michigan was dismissed on the merits.

Petitioner's current habeas petition is a second or successive petition for a writ of habeas corpus and he is therefore required to obtain a certificate of authorization. Although neither party raised the issue of this being a second or successive petition, it is appropriate for this Court to consider the issue *sua sponte* because subject matter jurisdiction goes to the power of the courts to render decisions under Article III of the Constitution. *See Williams v. Stegall*, 945 F. Supp. 145, 146 (E.D. Mich. 1996).

III. Conclusion

Petitioner has not obtained the appellate authorization to file a subsequent petition as required by 28 U.S.C. § 2244(b)(3)(A). Accordingly, the Court ORDERS the Clerk of the Court to transfer this case to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631 and *In Re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

s/John Corbett O'Meara
United States District Judge

Date: February 24, 2015

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, February 24, 2015, using the ECF system and/or ordinary mail.

s/William Barkholz
Case Manager

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: KENNETH UNCAPHER,
Movant.

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)
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)

FILED
Sep 08, 2015
DEBORAH S. HUNT, Clerk

O R D E R

Before: DAUGHTREY and CLAY, Circuit Judges; ECONOMUS, District Judge.*

Kenneth Uncapher, a Michigan prisoner proceeding *pro se*, moves for authorization to proceed with a second habeas corpus petition under 28 U.S.C. § 2254.

A jury found Uncapher guilty of first-degree murder and second-degree murder. The trial court sentenced him to concurrent prison terms of life and 25 to 50 years, respectively. The Michigan Court of Appeals affirmed the trial court's judgment, *People v. Uncapher*, No. 246222, 2004 WL 790329 (Mich. Ct. App. Apr. 13, 2004), and the Michigan Supreme Court denied leave to appeal, *People v. Uncapher*, 688 N.W.2d 89 (Mich. 2004) (table).

In February 2008, while represented by counsel, Uncapher filed a federal habeas petition in the Eastern District of Michigan, raising several claims. In May 2008, Uncapher, acting *pro se*, filed another habeas petition in the Western District of Michigan, arguing that his murder convictions and sentences were illegal because the judges and lawyers involved in his case were not properly licensed. The district court denied the May 2008 petition on the merits and declined to issue a certificate of appealability. *Uncapher v. Michigan*, No. 1:08-cv-457, 2008 WL 2945951 (W.D. Mich. July 28, 2008).

*The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

In November 2009, Uncapher moved to stay his February 2008 petition pending the exhaustion of additional claims in state court. The district court granted the motion. In January 2012, Uncapher moved to lift the stay and to amend his petition with several additional claims. The district court granted the motion. The court subsequently transferred the amended petition to this court for a determination of whether Uncapher was authorized to proceed with a second habeas petition.

Uncapher's amended petition is "second or successive." An amended petition supersedes an earlier-filed complaint. *Calhoun v. Bergh*, 769 F.3d 409, 410-11 (6th Cir. 2014), *cert. denied*, *Calhoun v. Booker*, 155 S. Ct. 1403 (2015). The amended petition challenges the same judgment as the May 2008 petition, and it asserts claims that could have been raised in that petition. *See In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006). Uncapher has not made the *prima facie* showing necessary to obtain authorization to proceed with a second habeas petition because he has neither identified a new, retroactive rule of constitutional law that is relevant to his proposed claims nor presented newly discovered facts that would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty. *See* 28 U.S.C. § 2244(b).

Accordingly, we **DENY** Uncapher's motion for authorization to proceed with a second habeas petition.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Feb 15, 2017

DEBORAH S. HUNT, Clerk

In re: KENNETH UNCAPHER,

Movant.

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)
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)

O R D E R

Before: COLE, Chief Judge; BOGGS and MOORE, Circuit Judges.

Kenneth Uncapher, a Michigan prisoner proceeding pro se, moves the court, pursuant to 28 U.S.C. § 2244(b)(3)(A), for an order authorizing the district court to consider a second or successive habeas corpus petition to be filed under 28 U.S.C. § 2254.

In 2002, a jury found Uncapher guilty of first-degree murder and second-degree murder. He was sentenced to life in prison for first-degree murder and twenty-five to fifty years of imprisonment for second-degree murder. The Michigan Court of Appeals affirmed Uncapher's convictions. *People v. Uncapher*, No. 246222, 2004 WL 790329 (Mich. Ct. App. Apr. 13, 2004). The Michigan Supreme Court denied leave to appeal.

After unsuccessfully pursuing state post-conviction relief, Uncapher filed, through counsel, a § 2254 habeas corpus petition in February 2008 in the Eastern District of Michigan. He subsequently moved to stay the proceedings and hold his petition in abeyance pending exhaustion of available state-court remedies. The district court granted Uncapher's motion and counsel's motion to withdraw. Uncapher returned to the state courts and, again, pursued post-conviction relief. His efforts were unsuccessful.

In the meantime, Uncapher filed a pro se § 2254 habeas corpus petition in May 2008 in the Western District of Michigan. He argued that the attorneys and judges involved in his criminal prosecution were not properly licensed to practice law. On the recommendation of a

magistrate judge and in the absence of objections from Uncapher, the district court dismissed Uncapher's habeas corpus petition and denied a certificate of appealability. Uncapher did not appeal.

Thereafter, the district court granted Uncapher's pro se motion to lift the stay, reopen the habeas corpus proceedings, and amend his February 2008 habeas corpus petition. Uncapher raised the following grounds for relief in his amended petition: (1) he "is entitled to a new trial where newly discovered evidence has recently materialized regarding the adverse effects—*violent, angry*[,] and *aggressive* involuntary acts/behavior—caused by the prescription medication Zoloft"; (2) he was denied "effective assistance of trial counsel where counsel failed to base a defense on the fact that the medication Zoloft causes adverse affects [sic] such as violent and and [sic] out-of-control behavior"; (3) he was denied "effective assistance of appellate counsel" and a fair appeal "where counsel failed to raise [] 'significant' and 'obvious' issues on his appeal of right"; (4) he was denied due process "where the trial court refused to hold an evidentiary hearing on his non-record claim of newly discovered evidence, as mandated by state and federal law, and where the court failed to apply the appropriate test in review of his newly discovered evidence of innocence"; and (5) Michigan Court Rule "6.502(G)(1), which provides that a defendant may not appeal the denial or rejection of a successive motion for relief from judgment," violates the Michigan constitution because it prevented him "from obtaining appellate review of the trial court's decision on [his] claim of newly discovered evidence justifying a new trial."

In light of the dismissal of Uncapher's May 2008 habeas corpus petition in the Western District of Michigan, the district court in the Eastern District of Michigan concluded that his February 2008 habeas corpus petition, as amended, was second or successive and transferred it to this court for consideration because he had not obtained authorization from this court to file it. See *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). We denied authorization. *In re Uncapher*, No. 15-1239 (6th Cir. Sept. 8, 2015) (unpublished).

Appendix J

FILED - GR

May 16, 2008 2:23 PM

RONALD C. WESTON, SR., CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
BY: rmw

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Ex Parte:)		
Plaintiff,)		
Kenneth J. Uncapher)		
)	File No.	1:08-cv-457
vs)	Hon.	Janet T. Neff - US District Judge
)		
STATE OF MICHIGAN)		Joseph G Scoville - US Magistrate Judge
DEFENDANT/RESPONDENT)		

WRIT OF HABEAS CORPUS RELEASE IN PURSUANCE OF
LACK OF SUBJECT MATTER JURISDICTION
WRIT OF QUO WARRANTO
TO VACATE VOID JUDGEMENT

In Pursuance of the Law of the United States, Kenneth J. Uncapher brings forth this Writ of Right and jurisdiction is conferred upon the District Court pursuant to 28 U.S.C.A., Section 1331; Fed. R. Civil P. 60b (4); Title 22 U.S.C.A., Sections 611 & 612; Title 4 U.S.C.A., Sections 101 & 102.

One Kenneth J. Uncapher, Penal Number 430066, is illegally detained at the E.C. Brooks Correctional Facility, 2500 S. Sheridan Dr., Muskegon Heights, Michigan 49444, in violation of the Foreign Agent Registration Act of 1938 (FARA), and in violation of United States Constitution, Article VI, the Fifth and Fourteenth Amendments.

To all to whom these present shall know that this Quo Warranto is a common-law constitutional Entity and operates in accordance with the following:

On December 6th, 1865 the Supreme Court of the United States of America conceded the ratification of the 13th Original Article in the Amendment to the United States Constitution.

Proposed in the year of 1810, (2 U.S. statues at large 613), it was recently discovered to have been properly ratified under the United States Constitution, Article V. The necessary number to achieve ratification was obtained when Virginia ratified the Article and promulgated its ratification in the Laws of many States as part of the Constitution.

The issue has been brought before the Supreme Court, and the Court conceded its ratification in 6-3 vote. It was in effect from the day of its ratification March 12th 1819, not from the time when the Supreme Court recognized it.

The ruling was promulgated in (cite omitted). The 13th Original Article in Amendment to the United States Constitution reads as follows and declares without equivocation:

“ If any citizen of the United States shall accept, claim, receive, or retain any title of nobility, or honor, or without the consent of Congress, accept and retain any present, pension, office, or employment of any kind whatsoever, from any Emperor, King, Prince, or Foreign Power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them or either of them.”

In Pursuance of Law, the following matter filed, establishing that Kenneth J. Uncapher, penal number 430066 has been illegally incarcerated by unauthorized persons acting as governmental officials, in the capacity of foreign agents that have failed to establish their Fiduciary Obligations in accordance with the Foreign Agent Registration Act of 1938, in violation of Oath of Office under Michigan Constitution, 1963, Article 11, Section 1; Registration a License under Title 22 U.S. C. A., Sections 611 & 612, Title 4. U.S.C.A., Section 101 & 102, establishing the procedures for a foreign agent to legally practice law in United States.

Integrated State Bars are a relatively recent innovation in United States, they were promulgated through the American Bar Association, (here in after “IBA”). The International Bar Associations mailing Address is:Byron House, 7/9 St. James Street, London SW1A1EE, England. Historically known as “THE FOUNTAIN OF HONOR”.

An “Honor” is an advantage or special privilege . . A license granted to some, but not generally possessed by others, giving some unequal opportunity to achieve or exercise political power.

Only Michigan State BAR members have THE PRIVILEGE to "PRACTICE LAW" M.C.L.A., Section 600.901 State Bar: membership; Section .910 Admission to Bar; Section .925 Applicants for Admission; and rules concerning State Bar, Rule 1, Rule 3 (a), Rule 15 sec. 1, 2, and 3. Furthermore, M.C.L.A., Section 450.681, prohibits the practice of law by a corporation or voluntary association, and the Michigan Bar is a "public body corporate", and thus is public property.

State Bar of Michigan V City of Lansing, 361 Mich. 185, 197-198; 105 NW2d 131 (1960).

In addition to that, Michigan State Bar members have the "HONOR" of exclusive opportunity to become Judges of the Courts of record within Michigan Republic, see the Organic Michigan State Constitution, Art, 6, Sec. 19.

Under the United States Constitution "No title of nobility shall be granted by the United States", United States Constitution Article 1, Section 10, clause 1.

This "HONOR" is void through the "Supremacy Clause", Maryland v Louisiana, 451 US 725, 746; 101 S. CT.2114, 2128, 2129 (1981), "All laws which are repugnant to the constitution are null and void".

Marbury v Madison, 5 US 137 (1803).

Thus, having accepted a "Title of Honor" under State Law, the Judges presiding in the courts of record in the Michigan Republic, County, located in the city of Detroit, are each "incapable of holding any office of trust or profit", nor the prosecutors and attorneys, from the time which they accepted the "HONOR" membership to the State BAR in Michigan Republic.

Their citizenship is void; they are foreign powers whose lawful status in Michigan is that of aliens, (Title 8 U.S.C.A., Section 1101(a). They posses no immunities for any purpose, nor protection from any source, and any alleged Judgment(s) or Order(s) from these foreign powers have no standing in Law, they are void from the beginning and confer no power to enforce, thus, establishing that, the below listed Judges, Prosecutors, and Attorneys are in fact terrorist operating upon United States soil.

1) The following matter is filed in regards to the fact that, Kenneth J. Uncapher #430066, has been illegally incarcerated by unauthorized persons acting as government officials, in the capacity of foreign

agents that have failed to register and be licensed in accordance with the Foreign Agent Registration Act of 1938, in violation of Title 22 U.S.C.A., Sections 611 & 612 which states in part: "No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by subsection (a) and (b) of this section." "every person who becomes an agent of a foreign principal shall, within ten days thereafter, file with Attorney General, in duplicate, a registration statement, under oath on a form prescribed by the Attorney General." "Within thirty days after the expiration of each period of six months succeeding such filing, file with the Attorney General a supplement thereto under oath, on a form prescribed by the Attorney General, establishing the procedures for a foreign agent to legally practice law in United States, thus establishing that , the enclosed named persons are in fact terrorist operating upon United States soil.

Ex Parte Plaintiff, Kermeth J. Uncapher, referenced case number 01-14257, was tried and confined by the following unregistered foreign agents on September 12, 2002, and various other trial dates thereafter.

2) The following persons working as Judges/Officers of the Court, in violations of the corporate charter & by-laws of the District of Columbia i.e., UNITED STATES, INC., which requires all agents to submit a registration statement as members of the B.A.R., as established by the search conducted by the United States Department of Justice and the National Security Division under the following file numbers:

DOJ NO. : NSD No. 6150

3) The person named Honorable William J. Sutherland (P21179) acting as a judge, was an unregistered foreign agent, and without an Oath, committed fraud upon the 23rd District Court, when he held the preliminary examination which bound Kenneth J. Uncapher over to the 3rd Circuit Court

4) The person named Honorable Vonda R. Evans (P43475) acting as a judge, whom committed fraud by acting as an unregistered foreign agent, and without an Oath, who tried Kenneth J. Uncapher in the 3rd Circuit Court.

- 5) The person named Michael E. Duggan (P35893), committed fraud by acting as a prosecuting attorney, whom was an unregistered foreign agent, without an Oath of office, that tried the matter against Kenneth J. Uncapher, before the 23rd District Court and the 3rd Circuit Court.
- 6) The person named Donna L. Pendergast (P41015) acting as a assistant prosecuting attorney, was an unregistered foreign agent, without an Oath of office, and committed fraud on the 23rd District Court where the preliminary examination was held, which bound Kenneth J. Uncapher over to the 3rd judicial Circuit Court.
- 7) The person named Robert A Moran (P46346) also committed fraud on the Court by acting as an assistant prosecuting attorney, he was an unregistered foreign agent, without and Oath of office, that tried the matter against Kenneth J. Uncapher before the 3rd judicial Circuit Court.
- 8) The person named Suzette M Samuels (P51796) committed fraud on the Court by acting as an assistant prosecuting attorney, she was an unregistered foreign agent, that tried the matter against Kenneth J. Uncapher before the 3rd judicial Circuit Court.
- 9) The person named Marc E. Hart (P36686) committed fraud on the Court by acting as a licensed defcnse attorney, he was an unregistered foreign agent, that was retained on behalf of Kenneth J. Uncapher
- 10) The person named Marvin Blake (P10864) committed fraud on the Court by acting as a licensed defense attorney, he was an unregistered foreign agent, that was retained on behalf of Kenneth J. Uncapher
- 11) The anagram of B.A.R stands for British Accredited Registry. The British colonies under patent established the first British Accredited Registry in Boston during 1761 to allow only accredited barrister-lawyers access to the British Courts of New England. This was the first attempt to control who could represent Defendants in the court as [or within] the "Bar" in America. Today each "Corporate" State in America has it's own BAR Association that licenses (in reality only the acceptance of admission) government "officer attorneys," not lawyers to freely enter within the bar while prohibiting those learned of the law [lawyers] to do so.
- 12) When the several United States signed the treaty with Great Britain ending the Revolutionary War, it was a concession that ALL COMMERCE would be regulated and contracted through British Attorney's know as Esquires only.

13) This condition and concession still exist today. No Attorney or lawyer in United States of America has ever been "licensed" to practice law as they are a legal fiction "person" and only as "ADMITTED MEMBER" to practice in the private franchise club called the BAR (which is itself an acronym for the British or Barrister Aristocratic Accreditation Regency),, as such are unregistered foreign agents and so they are traitors. Esquires (unconstitutional title of honor and nobility), foreign non-citizens (aliens) who are specifically prohibited from ever holding and elected Public Office of trust whatsoever!

14) Because all members of the BAR are British agents working for the Crown, they are required to register as a foreign agent and submit a registration statement to the United States Attorney General.

15) The practice of law by corporations or voluntary associations is prohibited under the patent first established in 1761, any corporation or voluntary association appearing as an attorney representing the Crown for any person in any court or before any judicial body which have not filed a registration statement with the United States Attorney General is prohibited.

16) In keeping with the patent established by the Crown of who can enter the BAR and practice law as an attorney, Congress legislated United States Codes (U.S.C.A.) in order to define who were eligible to work as a foreign agent, the areas and terms that define foreign agents and foreign territories in Title 22 U.S.C.A., Sections 611 & 612, and violation thereof Title 18 U.S.C.A., Ch. 115, Section 2386.

17) Therefore, in accordance with the codes established for the United States employee to work for Crown. Title 22 U.S.C.A., Sections 611 & 612 clearly states, "all persons including legal organizations and corporations are agents of a foreign country". Title 22 U.S.C.A., Section 611 (2) (1), includes any of the states where signatory to the final act of the Second meeting of the Ministers of Foreign Affairs of the American Republics at Havana, Cuba, July 30, 1940. Therefore, because all attorney, and judges are acting as agents for a foreign country, they are required under Title 22 U.S.C.A., Section 612 to register with United States Attorney General, in accordance with subsection (a) "No person shall act as an agent

of a foreign principal unless he/she has filed with the Attorney General a true and complete registration statement and supplements thereto as required by subsection (a) and (b) of this section."

18) In accordance with Title 4 U.S.C.A., Sections 101 & 102, all judges, and attorneys who's Oaths of office and registration which is not properly filed and certified with the United States Attorney General are acting in violation of the requirements established by the British Courts of 1761 to allow only accredited barrister-lawyer access to the Courts. "Every member of Congress, and every executive and judicial officer of a state, shall before he proceeds to execute the duties of his office take an Oath."

19) Presently none of the listed individuals above are properly registered with United States Attorney General to practice law who could prosecute, judge or defend either U.S. citizens or sovereign citizens, as attorneys and lawyers, they have not applied for or received a license to do business in the State of Michigan, either as a foreign agent or agency, Pursuant to the Bar Association Act of 1913.

20) A Motion to vacate void judgment under Fed. R. Civil P. Rule 60b (4) may be brought at any time....however, when the court is faced with a void judgment, it has no discretion and the judgment must be vacated whenever the lack of jurisdiction come to light. Mitchell V Kitsap County, 59 Wn. App 177, at 180; 797 P2d 516 (1990)

21) The "Certificate" issued by the Michigan State Bar is merely a certificate of membership in a private, fraternal organization, signed by the clerk of a court.

22) In accordance with the National Supremacy Clause, obligation of State courts under the clause: "The Constitution, laws, and treaties of United States are as much a part of the law of every States as its own local laws and Constitution." State courts are therefore bound then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and Congressional enactments and treaties but as well the interpretations of their meanings by the United States Supreme Court.

23) In accordance with the National duties of State officers; "Thus the legislatures, courts, and magistrates, or the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends.

24) In accordance with United States Constitution, Article VI: "This Constitution, and the laws of United States which shall be made in pursuance thereof: and all treaties made, or which shall be made, under the authority of United States, shall be the supreme law of the land: and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

25) Establishing in effect that all Governmental, Federal and State Agencies, are acting as foreign agents within United States. See Viereck v. U.S., 318 US 236; 63 S.Ct 561; 87 L.Ed 734 (1934)

In light of the facts herein stated and supported by the attachments, this Court has the duty to uphold the laws and abide by the Constitutional provisions.

Wherefore, in pursuance of Law of the United States, the Treaties, and patents of this Federal Government, the lack of Jurisdiction has been established, therefore, in accordance with the Supremacy Clause of Article VI of the United States Constitution, which declares that all laws made in pursuance of the Constitution and all treaties made under the authority of United States shall be the "supreme law of the land" and shall enjoy legal superiority over and conflicting provision of a State Constitution or law.

REQUESTED RELIEF

In Pursuance of Law of United States, I Kenneth J. Uncapher hereby respectfully request that this Honorable Court grant Immediate release from custody, vacating all sentences imposed by non-registered foreign agents practicing law in violation of failing to register as an acting foreign agent or agency with United States Attorney General.

In Pursuance of Law,

Kenneth J. Uncapher

Penal Number 430066
E.C. Brooks Correctional Facility
2500 S. Sheridan Dr.
Muskegon Heights, Michigan
49444

Dated: 5-10-08

2008 U.S. Dist. LEXIS 113577, *

KENNETH JOHN UNCAPER, Petitioner, v. STATE OF MICHIGAN, Respondent.

Case No. 1:08-cv-457

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2008 U.S. Dist. LEXIS 113577

July 7, 2008, Decided
July 7, 2008, Filed

SUBSEQUENT HISTORY: Approved by, Adopted by, Writ of habeas corpus dismissed, Certificate of appealability denied Uncapher v. Mich., 2008 U.S. Dist. LEXIS 57018 (W.D. Mich., July 28, 2008)

PRIOR HISTORY: People v. Uncapher, 2004 Mich. App. LEXIS 923 (Mich. Ct. App., Apr. 13, 2003)

CORE TERMS: licensed, factual allegations, recommend, corpus, habeas corpus, state prisoner, frivolous claims, corporate entities, oaths of office, ruling class, incredible, summarily, frivolous, licensure, palpably, notice, murder

COUNSEL: [*1] Kenneth John Uncapher # 430066, named as Kenneth J. Uncapher, petitioner, Pro se, Muskegon Heights, MI.

JUDGES: Joseph G. Scoville, United States Magistrate Judge. Honorable Janet T. Neff.

OPINION BY: Joseph G. Scoville

OPINION

REPORT AND RECOMMENDATION

This purports to be a habeas corpus action brought by a state prisoner. Habeas corpus actions filed by state prisoners are governed by 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4, RULES GOVERNING § 2254 CASES; see 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; see *Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to "screen out" petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, [*2] I recommend that the petition be dismissed as frivolous.

Factual Allegations

Petitioner Kenneth John Uncapher presently is incarcerated with the Michigan Department of Corrections and housed at the Earnest C. Brooks Correctional Facility. He was convicted by a Wayne County jury of one count of first-degree murder and one count of second-degree

murder. The trial court sentenced him on October 3, 2002 to terms of imprisonment of life and 25-50 years, respectively. Petitioner names the State of Michigan as the Respondent, but he complains of the conduct of 23rd District Court Judge William J. Sutherland, Wayne County Circuit Judge Vonda R. Evans, attorney Michael E. Duggan, assistant prosecuting attorney Suzette M. Samuels, and defense attorneys Marc E. Hart and Marvin Blake.

According to quasi-legalistic ramblings of the complaint, Petitioner appears to allege that attorneys licensed by the State Bar of Michigan are not, in fact, "licensed" to practice law in Michigan because the State Bar of Michigan is a voluntary association, under MICH. COMP. LAWS § 450.681. Petitioner contends that licensing may only be conducted in accordance with the British Accredited Registry (BAR) system established [*3] in Boston in 1761, which certified BAR attorneys as officers of the court. Attorneys licensed by the State Bar of Michigan, Petitioner argues, are merely foreign agents as defined under 22 U.S.C. § 611, who have not properly registered under 22 U.S.C. § 612. As a result, Petitioner contends, his conviction through the practice of un-licensed, non-BAR attorneys and judges was reached in the absence of all jurisdiction. He further argues that the actions of the attorneys and judges named were taken on behalf of foreign corporate entities (the State and its subdivisions) and violated the attorneys' and judges' oaths of office. Indeed, he contends that, because they are foreign powers, their citizenship is void, they are aliens under 8 U.S.C. § 1101(a), and they are terrorists operating on United States soil. He also contends that the state bar rules create a "ruling class," in violation of "Article 4, § 4 of the Organic United States Constitution of 1781" and the United States Constitution, Article 1, Section 10, clause 1. For these reasons, he contends that the actions in question were taken in violation of the Supremacy Clause, U.S. CONST., art. 6, cl. 2. For relief, he seeks immediate [*4] release from prison and an order vacating all sentences imposed upon him by these non-registered foreign agents.

Discussion

The court may entertain an application for habeas relief on behalf of a person in custody pursuant to the judgment of a State court in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). A habeas petition must "state facts that point to a 'real possibility of constitutional error.'" *Blackledge v. Allison*, 431 U.S. 63, 75 n.7, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977) (quoting Advisory Committee Notes on Rule 4, RULES GOVERNING HABEAS CORPUS CASES).

As previously noted, Rule 4 permits the dismissal of petitions that raise either legally frivolous claims or factual allegations that are "palpably incredible or false." *Carson*, 178 F.3d at 437. Petitioner's claims clearly lack an arguable basis in law or in fact. His recitation of the origins of legal licensure in the United States and the State of Michigan is neither accurate nor relevant. As a matter of public record, the attorneys involved in Petitioner's conviction were properly licensed in the State of Michigan and the judges had clear jurisdiction to decide various aspects of the case. None of the attorneys [*5] or judges is a foreign agent required to register under 22 U.S.C. § 612. Further, the State of Michigan and its subdivisions are not foreign corporate entities required to file registration statements under the statute. In addition, the named attorneys and judges have not violated their oaths of office and the Michigan licensure process does not create a "ruling class" in violation of the Constitution. Petitioner therefore has asserted no grounds on which his conviction could be said to violate the Constitution.

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be summarily dismissed pursuant to Rule 4 because it is frivolous. I further recommend that a certificate of appealability be denied. See *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Dated: July 7, 2008

/s/ Joseph G. Scoville

United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further **[*6]** right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).



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Appendix K

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Hon. Vonda R. Evans
Case No. 01-014257-01

-vs-

KENNETH JOHN UNCAPHER,
Defendant.

OPINION AND ORDER DENYING DEFENDANT'S
SECOND MOTION FOR RELIEF FROM JUDGMENT

At a session held in the Frank Murphy Hall of Justice
JAN 13 2011

on _____

PRESENT: Hon. Vonda R. Evans
HON. VONDA R. EVANS
CIRCUIT COURT JUDGE

Defendant was convicted by a jury of first-degree murder, MCL 750.316, in the stabbing death of Robin Howard, and second-degree murder, MCL 750.317, in the stabbing death of Roger Sanford. Defendant was sentenced to concurrent terms of natural life, and twenty-five to fifty years imprisonment. On April 13, 2004, the Michigan Court of Appeals affirmed defendant's convictions and sentences. On April 13, 2004, the Michigan Supreme Court denied defendant's application for leave to appeal the Court of Appeals judgment. On April 10, 2007, this Court denied defendant's Motion for Relief from Judgment.

Defendant now files a Second Motion for Relief from Judgment.

Defendant claims newly discovered evidence that the drug Zoloft has the adverse effects of violent, angry and aggressive involuntary acts and behavior. If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter *MCR 6.500*. However, pursuant to *MCR 6.502(G)(1)&(2)*, as of August 1, 1995, only one Motion for Relief from Judgment may be filed with regard to a conviction. The only exception to this rule is that if there is a "retroactive change in law that occurred after the first Motion for Relief from Judgment or a claim of new evidence that was not discovered before the first such motion," then the defendant may file a second or subsequent motion. This Court denied defendant's previous Motion for Relief from Judgment. There have been no "retroactive changes" in the law relative to any issue raised in this case or a claim of new evidence sufficient to meet the requirement.

Accordingly, defendant's Second Motion for Relief from Judgment is hereby **DENIED**.

Dated: JAN 18 2011

Circuit Court Judge

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK

Appendix L

IN THE MICHIGAN COURT OF APPEALS
ORDER

Re: People of MI v Kenneth Uncapher
Docket No. 304009
L.C. No. 01-014257

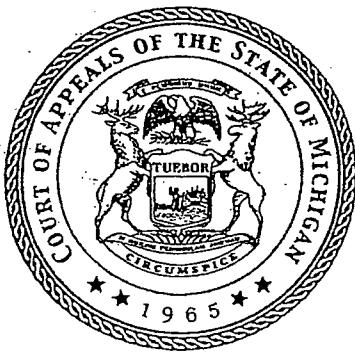
David H. Sawyer, Chief Judge Pro Tem, acting under MCR 7.203(F)(1), orders:
The motion to remand is DENIED.

The delayed application for leave to appeal is DISMISSED. Defendant's appeal from the order denying a successive motion for relief from judgment is prohibited by MCR 6.502(G).



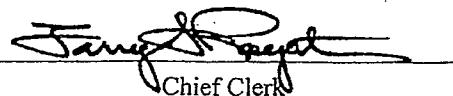
Chief Judge Pro Tem David H. Sawyer

A true copy entered and certified by Larry S. Royster, Chief Clerk, on



AUG 16 2011

Date



Chief Clerk

Appendix M

Order

Michigan Supreme Court
Lansing, Michigan

December 28, 2011

143737 & (13)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

KENNETH JOHN UNCAPHER,
Defendant-Appellant.

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

v

SC: 143737
COA: 304009
Wayne CC: 01-014257

On order of the Court, the application for leave to appeal the August 16, 2011 order of the Court of Appeals is considered, and it is DENIED, because the defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The motion to remand is DENIED.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 28, 2011

Corbin R. Davis