No. 19-3294

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 17, 2019
DEBORAH S. HUNT, Clerk

DUANE GREGLEY,

Petitioner-Appellant,

v.

DOUGLAS FENDER, WARDEN,

Respondent-Appellee.

ORDER

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

Duane Gregley petitions for rehearing en banc of this court's order entered on August 14, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Murphy recused himself from participation in this ruling.

No. 19-3294

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DUANE GREGLEY,

Petitioner-Appellant,

v.

DOUGLAS FENDER, Warden,

Respondent-Appellee.

ORDER

Duane Gregley, an Ohio prisoner proceeding pro se, appeals the district court's denial of his Federal Rule of Civil Procedure 60(b)(1) motion to reopen the 2015 judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Currently pending are Gregley's application for a certificate of appealability (COA) and motion to proceed in forma pauperis.

State Court Proceedings

In June 1998, Gregley was convicted of two counts of aggravated murder with firearm and mass-murder specifications, and one count each of attempted aggravated murder, carrying a concealed weapon, and having a weapon under disability. *See State v. Gregley*, No. 75032, 1999 WL 1204872, at *1 (Ohio Ct. App. Dec. 16, 1999). He was sentenced to consecutive terms of life in prison without parole for the two aggravated murders and several shorter sentences for the remaining convictions. *Id.* The Ohio Court of Appeals affirmed the judgment and sentence on December 16, 1999. *Id.* On May 17, 2000, the Ohio Supreme Court denied Gregley's motion for leave to file a delayed appeal. *State v. Gregley*, 728 N.E.2d 402 (Ohio 2000) (table). While his appeal was pending in the Ohio Supreme Court, Gregley filed a motion to reopen the appeal under Ohio Rule of Appellate Procedure 26(B) in the Ohio Court of Appeals. *See State v. Gregley*, No.

75032, 2000 WL 1610106, at *1 (Ohio Ct. App. Oct. 18, 2000). The court of appeals denied that motion on October 18, 2000, and Gregley did not appeal further. *Id.*

On December 18, 2009, Gregley filed in the trial court a "motion for sentencing and final appealable order," arguing that his sentence was invalid because it lacked a term of post-release control. *See State ex rel. Gregley v. Friedman*, No. 96255, 2011 WL 1842221, at *1 (Ohio Ct. App. May 10, 2011). The motion was denied on the ground that Gregley's consecutive life sentences without parole made post-release control unnecessary. *Id.* Gregley did not appeal that ruling, but instead filed an application for a writ of procedendo in the Ohio Court of Appeals, seeking an order requiring the trial court judge to impose post-release control. *Id.* The court of appeals denied the writ. *Id.* at *3. The Ohio Supreme Court dismissed Gregley's appeal from that order because the trial court had scheduled a resentencing hearing. *See State ex rel. Gregley v. Friedman*, 957 N.E.2d 1166 (Ohio 2011) (table).

At the October 7, 2011, resentencing hearing, the trial court imposed a term of mandatory post-release control for Gregley's attempted-aggravated-murder and having-a-weapon-while-under-disability convictions. *See State v. Gregley*, No. 97469, 2012 WL 3129934, at *2 (Ohio Ct. App. Aug. 2, 2012). Gregley appealed, challenging the newly imposed post-release control and asserting that his conviction was invalid for several other reasons. *Id.* at *1-2. The court of appeals reversed the imposition of Gregley's post-release control, finding that the trial court lacked authority to impose post-release control because the shorter sentences to which it had been applied had already been served in full. *Id.* at *3. The court reversed the trial court's ruling and "remanded in order to correct the record as to post[-]release control by journal entry." *Id.* The court denied the remaining claims. *Id.* On January 23, 2013, the Ohio Supreme Court denied Gregley leave to appeal the partial denial. *State v. Gregley*, 981 N.E.2d 886 (Ohio 2013) (table). On August 10, 2012, in accordance with the order of the Ohio Court of Appeals, the trial court entered a journal entry vacating its prior order imposing post-release control.

In August 2013, Gregley filed another pro se motion for sentencing and final judgment in the trial court, again seeking the imposition of post-release control. The trial court denied the

motion, and the Ohio Court of Appeals denied Gregley's application for a writ of procedendo as barred by res judicata. *See State ex rel. Gregley v. Friedman*, No. 100601, 2014 WL 265646, at *2-3 (Ohio Ct. App. Jan. 21, 2014). The Ohio Supreme Court affirmed, concluding that Gregley's application was barred by res judicata, that the case was moot, and that Gregley's arguments concerning post-release control were meritless. *State ex rel. Gregley v. Friedman*, 49 N.E.3d 264, 266 (Ohio 2014) (per curiam).

Federal Habeas Proceedings

On January 8, 2014, Gregley filed a § 2254 habeas petition, advancing three grounds for relief. *Gregley v. Bradshaw*, No. 1:14-cv-00050-DAP, R. 1 (N.D. Ohio) ("*Gregley I*"). The magistrate judge recommended dismissing the petition as untimely, finding that the one-year statute of limitations began to run on December 4, 2000, forty-five days after the Ohio Court of Appeals denied Gregley's Rule 26(B) application to reopen his direct appeal. The magistrate judge rejected Gregley's argument that the statute of limitations did not begin to run until after he had exhausted his state court challenges to the trial court's October 2011 judgment imposing post-release control. While that petition was pending, Gregley filed a second § 2254 petition through counsel, advancing fourteen grounds for relief. This petition was docketed as a separate matter, under case number 1:14-cv-00971-DAP ("*Gregley II*"). Gregley did not file objections to the magistrate judge's report and recommendation in *Gregley I*, and, two weeks later, the district court adopted the recommendation and dismissed that petition as untimely. Gregley did not appeal from that judgment. Meanwhile, the magistrate judge issued a report and recommendation in *Gregley II* that recommended transferring that second petition to this court for consideration as an application for an order authorizing the district court to hear a second or successive habeas petition. Before the district court ruled on that recommendation, Gregley filed a motion pursuant to Federal Rule of Civil Procedure 60(b) in *Gregley I* to vacate the district court's dismissal of the first petition, claiming that he had not received a copy of the report and recommendation and therefore was unable to file his objections. The district court ultimately rejected the magistrate judge's recommendation to transfer the second petition, instead construing the second petition as a motion

to amend the first, pursuant to authority from several federal circuit courts. Then, after finding that court documents confirmed the mailing of the report and recommendation in *Gregley I* and that prison mail records indicated receipt by Gregley, the court denied the second petition and the Rule 60(b) motion in a single order, finding again that the first petition was filed after the limitations period had expired and holding that the second petition did not alter the timeliness analysis. The district court declined to issue a COA. Gregley filed notices of appeal in both cases—one challenging the district court's denial of his Rule 60(b) motion to vacate the denial of his first § 2254 petition and the other challenging the court's denial of his second § 2254 petition. This court consolidated the appeals and denied Gregley's application for a COA. *Gregley v. Bradshaw*, Nos. 15-3363/3371 (6th Cir. Dec. 22, 2015) (order).

Over three years later, in February 2019, Gregley filed a motion to reopen the judgment in *Gregley II*, pursuant to Rule 60(b)(1). In it, he argued that the district court erred as a matter of law when it deemed his petition untimely. He asserted that, under this court's ruling in *Carnail v. Marquis*, No. 17-3222 (6th Cir. Apr. 16, 2018) (order), his "§ 2254 petition was due within one-year of conclusion of the direct appeal process relating to his 2011 resentencing." According to Gregley, that direct appeal process concluded on January 23, 2013, when the Ohio Supreme Court denied discretionary review, and thus his January 6, 2014, § 2254 petition was timely filed. Finding that Gregley's motion repeated arguments that he had previously made, the district court declined to consider the motion. The court also declined to consider Gregley's motion for reconsideration and his application for a COA.

Gregley now appeals. He has filed two separate applications for a COA, a supplement to his COA application, and a motion to amend his COA application. He raises the same challenge to the district court's timeliness ruling that he presented in his Rule 60(b) motion.

A habeas petitioner must obtain a COA to appeal the denial of a Rule 60(b) motion in a habeas corpus proceeding. *See Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010). To obtain a COA in the context of a denial of a Rule 60(b) motion, a movant must demonstrate that jurists of reason could debate whether the district court properly denied the motion or whether the issues

raised are adequate to deserve further review. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *United States v. Hardin*, 481 F.3d 924, 926 n.1 (6th Cir. 2007).

Gregley moved to reopen the judgment under subsection (1) of Rule 60(b). Rule 60(b)(1) provides for relief from a final judgment based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). This subsection "governs instances where the mistake was based upon legal error." *Okoro v. Hemingway*, 481 F.3d 873, 874 (6th Cir. 2007). A motion under Rule 60(b)(1) must be filed within one year of the entry of the judgment. Fed. R. Civ. P. 60(c)(1).

Reasonable jurists would not debate the district court's decision to deny Gregley's Rule 60(b)(1) motion. To start, the motion was untimely because it was filed nearly four years after the district court's judgment denying his § 2254 petition. *See* Fed. R. Civ. P. 60(c)(1). Gregley contended that this court's 2018 ruling in *Carnail* established the district court's legal error in its timeliness ruling, but even assuming that it did, Gregley would still not be entitled to relief because the motion was not timely filed. *See Short v. Washburn*, No. 18-5910, 2018 WL 6264399, at *2 (6th Cir. Nov. 26, 2018). To the extent Gregley would argue that the decision in *Carnail* was an "extraordinary circumstance" justifying relief under Rule 60(b)(6), *Carnail* does not rise to that level. In *Carnail*, an Ohio prisoner had filed a second § 2254 petition after having been resentenced in state court for the imposition of term of post-release control, and this court permitted him to proceed with the second petition in the district court without obtaining authorization from this court under 28 U.S.C. § 2244(b). But the ruling did not introduce any change in the law. Rather, it relied on earlier decisions from this court concerning when a resentencing creates a new judgment that resets the second-or-successive count and the habeas statute of limitations. These cases include *Crangle v. Kelly*, 838 F.3d 673 (6th Cir. 2016) (per curiam), *In re Stansell*, 828 F.3d 412 (6th Cir. 2016), *Askew v. Bradshaw*, 636 F. App'x 342 (6th Cir. 2016), and *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015), all of which were available to Gregley long before he filed his Rule 60(b) motion in 2019.

Even if Gregley's Rule 60(b) motion were timely, there is no merit to his assertion that the statute of limitations did not start running until after he was resentenced in 2011 and exhausted his

state court challenges to the new judgment. It is true that a state court order imposing post-release control after resentencing creates a new judgment that resets the one-year statute of limitations for filing a § 2254 petition following the conclusion of a direct appeal. *See Crangle*, 838 F.3d at 675, 678. And, here, the trial court entered such an order. However, as explained above, Gregley appealed, and the new judgment was vacated. Thus, there is no new judgment that restarted the statute of limitations period.

Accordingly, Gregley's application for a COA is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DUANE GREGLEY,	)	**CASE NO. 1:14-CV-971**
	)	
Petitioner,	)	
	)	**JUDGE DAN AARON POLSTER**
v.	)	
	)	
MAGGIE BRADSHAW,	)	**OPINION & ORDER**
	)	
Respondent.	)	

Before the Court's is Petitioner Duane Gregley's Motion for Certificate of Appealability, Doc #: 20. In his Motion, Gregley repeats the same arguments that he has previously made to this Court and the Sixth Circuit. *See* Mot. at 1-5. As the Court stated in its February 15, 2019 Opinion & Order denying Gregley's Motion to Reopen Judgment, Doc #: 16, and its March 8, 2019 Opinion & Order denying Gregley's Motion for Reconsideration, Doc #: 17, the Court will not consider any additional filings from Gregley regarding his § 2254 Petition. Should Gregley wish to appeal the Sixth Circuit's denial of a certificate of appealability, he may do so to the Supreme Court of the United States.

IT IS SO ORDERED.

/s/Dan Aaron Polster Apr. 16, 2019
DAN AARON POLSTER
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DUANE GREGLEY,	)	**CASE NO. 1:14-CV-971**
	)	
Petitioner,	)	
	)	**JUDGE DAN AARON POLSTER**
v.	)	
	)	
MAGGIE BRADSHAW,	)	**OPINION & ORDER**
	)	
Respondent.	)	

Before the Court's is Petitioner Duane Gregley's Motion for Reconsideration, Doc #: 17. In his Motion, Gregley repeats the same arguments that he has previously made to this Court and the Sixth Circuit. *See* Mot. at 1-2. As the Court stated in its February 15, 2019 Opinion & Order denying Gregley's Motion to Reopen Judgment, Doc #: 16, the Court will not consider any additional filings from Gregley regarding his § 2254 Petition. Should Gregley wish to appeal the Sixth Circuit's denial of a certificate of appealability, he may do so to the Supreme Court of the United States.

IT IS SO ORDERED.

/s/Dan Aaron Polster Mar. 8, 2019
DAN AARON POLSTER
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DUANE GREGLEY,	)	**CASE NO. 1:14-CV-971**
	)	
Petitioner,	)	
	)	**JUDGE DAN AARON POLSTER**
v.	)	
	)	
MAGGIE BRADSHAW,	)	**OPINION & ORDER**
	)	
Respondent.	)	

Before the Court's is Petitioner Duane Gregley's Motion to Reopen Judgment, Doc #: 15. This Motion comes nearly four years after this Court denied Gregley's § 2254 Petition as untimely and, subsequently, the Sixth Circuit denied Gregley's application for a certificate of appealability. Doc #: 10 and 14. In his Motion, Gregley repeats the same arguments that he has previously made to this Court and the Sixth Circuit. *See* Mot. at 3. This Court will not consider any additional filings from Gregley regarding his § 2254 Petition. Should Gregley wish to appeal the Sixth Circuit's denial of a certificate of appealability, he may do so to the Supreme Court of the United States.

IT IS SO ORDERED.

/s/Dan Aaron Polster Feb. 15, 2019
DAN AARON POLSTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DUANE GREGLEY,	)	CASE NOS. 1:14 CV 50 1:14 CV 971
Petitioner,	)	JUDGE DAN AARON POLSTER
vs.	)	OPINION AND ORDER
MARGARET BRADSHAW, Warden,	)	
Respondent.	)	

In January 2014, *Pro Se* Petitioner Duane Gregley filed a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, under Case No. 1:14 CV 50 (hereafter, "Gregley I" or "first petition"). In August 2014, Magistrate Judge George J. Limbert issued a Report and Recommendation ("R&R") urging the Court to deny the petition as time-barred. On September 19, 2014, no objections having been filed, the Court issued an Opinion and Order adopting the R&R and dismissing the petition as time-barred. On March 5, 2015, Petitioner filed a Rule 60(b) Motion to Vacate Judgment that is presently pending before me. (**Doc #: 10.**)

While Gregley I was pending before Magistrate Judge Limbert, Petitioner, through counsel, filed another Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, under Case No. 1:14 CV 971 (hereafter, "Gregley II" or "second petition"). Presently pending before me is a Motion to Dismiss and/or Transfer, an R&R, and Petitioner's Objections. (Respectively, **Doc ##: 7, 8, 9.**) Because the cases are related, the Court will address all pending matters in one document, which will be filed in both cases.

I. Gregley I

On January 8, 2014, Gregley his first habeas petition, challenging his June 1998 judgment of conviction for two counts of aggravated murder with a mass murder specification, one count of attempted aggravated murder with a 3-year firearm specification, one count of carrying a concealed weapon, and one count of having a weapon under a disability. (Gregley I, Doc #: 1.) Among other things, the trial court sentenced Petitioner to life imprisonment without parole on each aggravated murder conviction, and nine years of imprisonment on the attempted aggravated murder conviction with these three sentences running consecutively. In October 2011, Petitioner was re-sentenced by the trial court for the purpose of properly advising him of a 5-year period of post-release control.

This first petition, which alleged three grounds for relief, was assigned by random lottery to me, and was immediately transferred to Magistrate Judge Limbert, pursuant to Local Rule 72.2(b)(2), for preparation of an R&R.

On March 6, 2014, Magistrate Judge Limbert issued an Order directing Respondent to file, no later than 60 days from the date of the Order, an answer to the petition; and directing Petitioner to file, no later than 30 days from the filing of Respondent's answer, a response brief. (Id., Doc #: 4.) The docket shows that a copy of the Order was mailed to Petitioner, # 358808, Richland Correctional Institution, P.O. Box 8107, Mansfield, Ohio 44901 (where he resides) on the same day.

On April 29, 2014, Respondent filed a Return of Writ arguing that the petition should be time-barred. (Id., Doc #: 5.) Based on this filing, the deadline for Petitioner to file a response

brief, or traverse, was May 29, 2014. Petitioner never filed a traverse or a motion for extension of time to file a traverse. However, he did file, through counsel, another § 2254 habeas petition.

On August 29, 2014, three months after the deadline for filing the traverse expired, the Magistrate Judge issued an R&R, urging the Court to deny the petition as time-barred. (Gregley I, Doc #: 7.) The R&R notified Petitioner that he had 14 days from service of the R&R to file objections. (Id. at 22.) The docket shows that a copy of the R&R was mailed to Petitioner at the Richland Correctional Institution on the same day it was issued.

Petitioner never filed objections or a motion for extension of time to file objections. Accordingly, on September 19, 2014, the Court, after reviewing the R&R, issued an Opinion and Order adopting the R&R and dismissing the petition as time-barred. (Respectively, Doc ##: 8, 9.) The docket shows that the Court mailed a copy of the Opinion and Order and the Judgment Entry to Petitioner at the Richland Correctional Institution on the same day they were issued.

On March 5, 2015, Petitioner filed the pending Rule 60(b) Motion to Vacate Judgment. (Doc #: 10.) Therein, Petitioner states that he never received copies of the R&R or my order adopting the R&R; he first became aware of those filings when he received the R&R addressing the second petition; he noted his current address **(which is the same address to which all the documents were mailed)**. Based on these representations, he asks the Court to vacate the judgment so that he may file timely objections and notice of appeal.

II. Gregley II

While the first petition was pending, Petitioner, through counsel, filed a second habeas petition on May 5, 2014. (Gregley II, Doc #: 1.) This time, Petitioner asserted fourteen grounds for relief arising from his 1998 convictions, three of which were pending before Magistrate

Judge Limbert in Gregley I. (Id.) Although the first two pages of the Civil Cover Sheet noted that the case was related to Gregley I, it was assigned by random lottery to District Judge Jeffrey J. Helmick, and was then transferred to Magistrate Judge Limbert for briefing and preparation of an R&R pursuant to Local Rule 3.1. In short order, the case was reassigned to me as related to Gregley I. (Id., Doc #: 6.)

On May 14, 2014, Magistrate Judge Limbert issued an Order directing Respondent to file an answer to the petition within 60 days from the date of the Order, and directing Petitioner to file a response no later than 30 days after the answer was filed. (Id., Doc #: 5.) The docket shows that the Court mailed a copy of the Order to Petitioner at the Richland Correctional Institution on the same day it was issued.

On July 11, 2014, Respondent filed a Motion to Dismiss and Transfer, asking the Court to dismiss the three repeated grounds for relief "because they were raised in a previously filed habeas action that is pending in this district court and challenges the same judgment of conviction as that in the instant petition." (Gregley II, Doc #: 7 at 1.) Respondent asked the Court to transfer the remaining eleven claims to the Sixth Circuit Court of Appeals for authorization to file a successive habeas petition under 28 U.S.C. § 2244(b)(3)(A) and (C). (Id.) According to Respondent, "Petitioner's counsel failed to notify the court of having filed Gregley I when filling out the Gregley II petition," citing inconsistent answers located in the bowels of the Petition. (Id. at 5.) In fact, Petitioner made very clear that Gregley II was related to Gregley I. (See id., Doc #: 1 at 1-2.)

The deadline for Petitioner to file a response to the July 11, 2014 Motion to Dismiss and/or Transfer was August 11, 2014. But Petitioner filed nothing.

On February 19, 2015, Magistrate Judge Limbert issued an R&R recommending that the Court treat Gregley II as a second or successive petition which must be transferred to the Sixth Circuit for permission to file it in the district court. (Doc #: 8.)

On March 3, 2015, Petitioner timely filed Objections. Construing the Objections liberally, as the Court must when reviewing *pro se* filings, Petitioner argues that Gregley II is not a "second or successive petition" because it should have been construed as a motion to amend the first petition.

Three days later, Petitioner returned to Gregley I to file the Rule 60(b) Motion to Vacate Judgment that is presently pending

III. Analysis

While neither the Supreme Court nor the Court of Appeals for the Sixth Circuit has addressed the issue, other courts have uniformly held that when a second habeas petition is filed before the adjudication of the initial petition is complete, the district court should construe the second petition as a motion to amend the first petition, rather than as a second or successive petition. *See, e.g., Woods v. Carey*, 525 F.3d 886, 889-90 (9th Cir. 2008) (when a pro se petitioner files a second § 2254 motion before the district court rules on the petitioner's first § 2254 motion, the second motion should be construed as a motion to amend the first); *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) ("when a § 2255 motion is filed before adjudication of an initial § 2255 motion is complete, the district court should construe the second § 2255 motion as a motion to amend the pending § 2255 motion"); *United States v. Williams*, 185 Fed.Appx. 917, 919 (11th Cir. 2006) (holding the same); *United States v. Sellner*, 773 F.3d 927, (8th Cir. 2014) (joining the circuits holding that when a pro se petitioner files a second §

2255 motion while the first § 2255 motion is still pending before the district court, the second motion should be construed as a motion to amend); *Motley v. Rapelje*, No. 10-13132, 2011 WL 4905610, at *1 (E.D. Mich. Oct. 13, 2011) ("If a pro se habeas corpus petition is filed while an earlier petition is still pending in the district court, the district court must construe the second petition as a motion to amend the first petition.") (citing *Woods*, 525 F.3d 890, which was "cited with approval in *In re Juan E. Fitchett*, No. 10-2045 (6th Cir. June 6, 2011) (unpublished)").

Accordingly, the Court rejects the R&R in Gregley II, and will construe the second petition filed by Gregley as a motion to amend his first petition, which the Court hereby **GRANTS**. That said, as the Court has already ruled that Gregley I was time-barred, the Court concludes that Gregley II is time-barred as well, as it was filed four months after Gregley I.

The Court also denies the Rule 60(b) Motion to Vacate the Court's judgment that Petitioner filed in Gregley I. "A party's failure to file timely objections to a magistrate judge's report and recommendation constitutes waiver of that party's right to appeal the court's judgment." *Blount v. Mansfield*, No. 07-13101, 2009 WL 2057367, at *1 (E.D. Mich. Jul. 13, 2009) (citing *United States v. Branch*, 537 F.3d 582, 587 (6th Cir. 2008), in turn citing *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981)). The Sixth Circuit has held that the mere allegation of delayed receipt is an insufficient basis upon which to deviate from the waiver rule. *Id.* (citing *Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987).

Here, Petitioner simply asserts that he never received the R&R, the opinion and the judgment entry. However, the docket in Gregley I shows that these documents were mailed to Petitioner at the correct address the same day they were issued. Moreover, Respondent has provided evidence showing that Petitioner received all the documents in a timely manner. (Doc

#: 11.) Attached to Respondent's opposition brief are copies of the mail logs from the prison indicating that Petitioner did in fact receive the R&R (received at the prison from the district court in Youngstown on September 4, 2014; Petitioner signed for the parcel on September 5, 2014) and my final orders (received at the prison on September 23, 2014; Petitioner signed for the parcel on September 24, 2014). (See Doc #: 11-1.)

Gregley's assertion that he did not receive these documents is uncorroborated by affidavit. It is well settled that proof that a document properly directed was placed in the mail "creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." *Blount*, 2009 WL 2057367, at *1 (quoting *Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417 (1932), in turn citing *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382 (1884)). *See also Crosby v. Rohn & Haas Co.*, 480 F.3d 423, 430 (6th Cir. 2007)). For these reasons, the Court **DENIES** Petitioner's Rule 60(b) Motion.

IV.

Based on the foregoing, the Court **DENIES** the Rule 60(b) Motion filed in Gregley I; **CONSTRUES** the habeas petition filed in Gregley II as motion to amend the first habeas petition filed in Gregley I and **GRANTS** the motion; and **DISMISSES AS TIME-BARRED** the petitions in both Gregley I and II.

IT IS SO ORDERED.

/s/ Dan A. Polster March 19, 2015
Dan Aaron Polster
United States District Judge