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APPENDIX A

THE JANUARY 29, 2021, JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN DENYING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN A. CRAIG, # 381110,

Petitioner,

Case Number: 2:17-CV-12830
HON. GEORGE CARAM STEEH

v.

THOMAS MACKIE,

Respondent.
_____/

OPINION AND ORDER

(1) DENYING IN PART AND TRANSFERRING IN PART PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT (ECF No. 20),

(2) DENYING MOTION FOR EXTENSION OF TIME (ECF No. 23),

(3) GRANTING APPLICATION TO PROCEED *IN FORMA PAUPERIS* ON APPEAL (ECF No. 19), AND

(4) DENYING A CERTIFICATE OF APPEALABILITY

On July 15, 2020, the Court denied Petitioner Kevin A. Craig's habeas corpus petition and denied a certificate of appealability. (ECF No. 16) Now before the Court are Petitioner's Motion for Relief from Judgment (ECF No. 20), Motion for Extension of Time to File Notice of Appeal (ECF

No. 23), and Application to Proceed *In Forma Pauperis* on Appeal (ECF No. 19). The Court denies in part Petitioner's motion for relief from judgment. The Court also transfers to the Sixth Circuit Court of Appeals the remainder of the motion because the Court concludes it is a successive petition pursuant to 28 U.S.C. § 2244(b)(3)(A). The Court denies Petitioner's Motion for Extension of Time and grants the Application to Proceed *In Forma Pauperis* on Appeal.

I. Discussion

A. Motion for Relief from Judgment

In his habeas corpus petition, Petitioner challenged his convictions for first-degree murder, assault with intent to murder, and possession of a firearm during the commission of a felony. He raised three claims: (i) the trial court abused its discretion in denying Petitioner's motion for relief from judgment; (ii) Petitioner's right to a speedy trial was violated; and (iii) the trial court abused its discretion in when it failed to address all claims raised in Petitioner's motion for relief from judgment. The Court denied the petition. (ECF No. 16.) The Court also denied a certificate of appealability. (*Id.*) Petitioner now seeks relief from judgment under Fed. R. Civ. P. 60(b)(1).

As a threshold matter, the Court must decide whether it has jurisdiction to consider Petitioner's motion. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court does not have jurisdiction to consider a petitioner's "second or successive" habeas petition unless the petitioner first obtains authorization from the Court of Appeals. 28 U.S.C. § 2244(b)(3)(A); *Franklin v. Jenkins*, 839 F.3d 465, 473 (6th Cir. 2016). Under some circumstances, a Rule 60(b) motion filed in a § 2254 action may be subject to AEDPA's restrictions on second or successive habeas petitions. *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005). The Sixth Circuit explained the difference between a "true" Rule 60(b) motion and a "second or successive" habeas application "cloaked in Rule 60(b) garb" as follows:

> A petitioner's Rule 60(b) motion is a "second or successive" habeas application "when it 'seeks vindication of' or 'advances' one or more 'claims.'" *Post v. Bradshaw*, 422 F.3d 419, 424 (6th Cir. 2005) (quoting *Gonzalez*, 545 U.S. at 531-32, 125 S. Ct. 2641). A "claim," in turn, "is 'an asserted federal basis for relief from a state court's judgment of conviction.'" *Ibid.* (quoting *Gonzalez*, 545 U.S. at 530, 125 S. Ct. 2641). For example, a habeas petitioner's Rule 60(b) motion advances claims "when [the petitioner] seeks to add a new ground for relief or seeks to present 'new evidence in support of a claim already litigated.'" *Moreland*, 813 F.3d at 322 (quoting *Gonzalez*, 545 U.S. at 531, 125 S. Ct. 2641). By contrast, a petitioner does not seek to advance new claims "when [his] motion 'merely asserts that a previous ruling which precluded a merits determination was in

challenge to the Court's merits determination. As such, it is a successive habeas petition. Petitioner has not obtained appellate authorization to file a second or successive habeas petition as required by 28 U.S.C. § 2244(b)(3)(A). The Court will transfer the motion to the Sixth Circuit Court of Appeals for a determination whether he is authorized to file a successive petition. *See* In Re Sims, 111 F.3d 45, 47 (6th Cir. 1997).

B. Motion for Extension of Time

Petitioner has filed a motion for extension of time to file a notice of appeal, but an extension is unnecessary pursuant to Federal Rule of Appellate Procedure 4(a)(4)(A)(vi). Petitioner filed a notice of appeal after filing his motion for relief from judgment but before the Court ruled on the motion. (ECF No. 21.) Where a notice of appeal is filed before the Court decides a timely Rule 60(b) motion, "the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." *Id.* Petitioner's notice of appeal, therefore, was timely filed.

C. Application to Proceed *In Forma Pauperis* on Appeal

Also before the Court is Petitioner's application to proceed *in forma pauperis* on appeal. Federal Rule of Appellate Procedure 24(a)(1)

provides that a party to a district-court action who desires to appeal *in forma pauperis* must file a motion in the district court. An appeal may not be taken *in forma pauperis* if the court determines that it is not taken in good faith. 28 U.S.C. § 1915(a)(3). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." *Walker v. O'Brien*, 216 F.3d 626, 631 (7th Cir. 2000). The Court finds that an appeal may be taken in good faith.

D. Certificate of Appealability

A certificate of appealability is necessary to appeal the denial of a Rule 60(b) motion. *See Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010) (citing *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007)). A certificate of appealability may issue only if a habeas petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies relief on the merits, the substantial showing threshold is met if the petitioner demonstrates that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Petitioner fails to show that reasonable jurists would find the Court's decision denying relief from judgment to be debatable or wrong and the

> error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" *Post*, 422 F.3d at 424 (quoting *Gonzalez*, 545 U.S. at 532 n.4, 125 S. Ct. 2641).

Franklin, 839 F.3d at 473.

Petitioner seeks relief from judgment on two grounds. First, he argues that the Court erred in procedurally defaulting his claims and failing to address the merits. Because this claim does not attack the substance of the Court's resolution of the claims on the merits, it is not a successive challenge to his conviction. *See Gonzalez*, 545 U.S. at 532, n.4. The Court has jurisdiction to decide this claim.

Relief under Rule 60(b)(1) may be granted where the Court's judgment was the result of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Here, the basis for Petitioner's argument – that the Court failed to consider the merits of his claims based upon procedural default – is incorrect. The Court chose to bypass the procedural default question and proceeded directly to the merits of Petitioner's claims. (ECF No. 16, PageID.2320-21.) Petitioner is not entitled to relief from judgment on this claim.

Second, Petitioner's other asserted basis for relief from judgment – that the Court erred in denying his speedy trial claim – constitutes a

Court will deny a certificate of appealability.

II. Conclusion

For the reasons stated, the Court:

(1) DENIES IN PART Petitioner's Motion for Relief from Judgment (ECF No. 20);

(2) ORDERS the Clerk of Court to transfer the Motion for Relief from Judgment to the United States Court of Appeals for the Sixth Circuit;

(3) DENIES a certificate of appealability;

(4) GRANTS Petitioner's application to proceed *in forma pauperis* on appeal (ECF No. 19); and

(5) DENIES Petitioner's Motion for Extension of Time (ECF No. 23).

IT IS SO ORDERED.

Dated: January 29, 2021

s/George Caram Steeh
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on January 29, 2021, by electronic and/or ordinary mail and also on Kevin A. Craig #381110, Saginaw Correctional Facility, 9625 Pierce Road, Freeland, MI 48623.

s/Brianna Sauve
Deputy Clerk

APPENDIX B

THE MAY 20, 2021, ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS DENYING PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

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Filed: May 20, 2021

Ms. Andrea M. Christensen-Brown
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48909

Mr. Kevin A. Craig
Saginaw Correctional Facility
9625 Pierce Road
Freeland, MI 48623

Re: Case No. 20-1844, *Kevin Craig v. O'Bell Winn*
Originating Case No. : 2:17-cv-12830

Dear Counsel and Mr. Craig,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Sharday S. Swain
Case Manager
Direct Dial No. 513-564-7027

cc: Ms. Kinikia D. Essix

Enclosure

No mandate to issue

No. 20-1844

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN A. CRAIG,

Petitioner-Appellant,

v.

O'BELL T. WINN, Warden,

Respondent-Appellee.

ORDER

Before: DONALD, Circuit Judge.

Kevin A. Craig, a Michigan prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This court construes Craig's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

Following a joint trial before a single jury, Craig and his codefendant, Donovan Young, were each convicted of first-degree premeditated murder, in violation of Michigan Compiled Laws § 750.316(1)(a); assault with intent to commit murder, in violation of Michigan Compiled Laws § 750.83; and possession of a firearm during the commission of a felony, in violation of Michigan Compiled Laws § 750.227b. The defendants' convictions arose from the June 12, 2011, shooting death of Antonio Turner and nonfatal shooting of Darneil Richardson (who was a rival drug dealer of Craig's) in Detroit, Michigan. The trial court sentenced Craig as a third-habitual offender, *see* Mich. Comp. Laws § 769.11, to life imprisonment for the murder conviction and a concurrent term of 40 to 80 years' imprisonment for the assault conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. The Michigan Court of Appeals affirmed Craig's convictions on direct appeal. *People v. Young*, Nos. 310435/311045, 2014 WL 3745186, at *4, 11 (Mich. Ct. App. July 29, 2014) (per curiam), *perm. app. denied*, 859

N.W.2d 518 (Mich. 2015). Craig subsequently filed an unsuccessful motion for relief from judgment pursuant to Michigan Court Rules 6.500 et seq.

In August 2017, Craig filed a § 2254 petition, in which he raised the following claims: (1) the state trial court, when denying his motion for relief from judgment, erred by rejecting his claims that counsel was ineffective for: (a) not arguing that his first-degree premeditated murder conviction was supported by insufficient evidence, (b) failing to raise a judicial-misconduct claim, (c) failing to raise prosecutorial-misconduct claims, (d) failing to challenge the jury instructions, and (e) not objecting to the admission of certain phone calls into evidence; (2) counsel was ineffective for failing to file a motion to dismiss the indictment on speedy-trial grounds; and (3) the state trial court abused its discretion by failing to address all of the claims that he had raised in his motion for relief from judgment. Bypassing any procedural-default analysis, the district court denied each of Craig's claims on the merits, dismissed his habeas petition with prejudice, and declined to issue a COA.

Craig subsequently advanced two arguments in a motion for relief from judgment under Rule 60(b)(1), which the district court denied in part and transferred in part to this court for consideration as a motion for leave to file a second or successive habeas petition. Specifically, the district court rejected Craig's first argument—that the district court erred in finding that he had procedurally defaulted most of his habeas claims—and declined to issue a COA. However, the district court determined that Craig's second argument, which relitigated the merits of his speedy-trial claim (Claim 2), was subject to the standard governing "second or successive" habeas petitions, *see* 28 U.S.C. § 2244(b)(2), because it constituted a challenge to the court's previous merits determination. *See Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). The district court therefore transferred that portion of Craig's motion to this court for consideration as a motion for authorization to file a second or successive habeas petition. *See* 28 U.S.C. 2244(b)(3)(A); *see also In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). The transferred action was docketed as Case No. 21-1097.

As a preliminary matter, this court lacks jurisdiction to review the district court's adjudication of the first argument set forth in Craig's Rule 60(b)(1) motion because Craig failed to file a notice of appeal from that decision. *See* Fed. R. App. P. 3(c)(1)(B) (requiring the notice of appeal to "designate the judgment, order, or part thereof being appealed"); *see also* Fed. R. App. P. (4)(a)(4)(B)(ii) (requiring parties appealing rulings on post-judgment motions to "file a notice of appeal, or an amended notice of appeal"); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 757 (6th Cir. 1999) (finding no jurisdiction to review issues raised in a motion for reconsideration where the notice of appeal addressed only the district court's summary judgment rulings).

With respect to Craig's appeal from the district court's dismissal of his habeas petition, 28 U.S.C. § 2253(c)(1)(A) states that "[u]nless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In order to be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

Claim. 1. Craig asserted five instances where trial or appellate counsel allegedly rendered ineffective assistance. To establish ineffective assistance of counsel, a movant must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (holding that ineffective-assistance-of-appellate-counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The prejudice inquiry requires

the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Craig first argued that counsel rendered ineffective assistance by not arguing that the prosecution had failed to present sufficient evidence to establish either the premeditation and deliberation elements of his first-degree premeditated murder conviction, or his identity as the shooter. In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Federal habeas courts may not "reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). In Michigan, "[t]o show first-degree premeditated murder, '[s]ome time span between [the] initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation.'" *People v. Gonzalez*, 664 N.W.2d 159, 163 (2003) (second and third alteration in original) (quoting *People v. Tilley*, 273 N.W.2d 471, 474 (1979)). The time span required "between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *Id.*

The state trial court rejected this claim in its post-conviction decision, concluding that the prosecution had presented sufficient evidence showing that Craig murdered Turner deliberately and with premeditation. In reaching that conclusion, the state trial court cited Darneil Richardson's trial testimony that Craig began shooting at him while chasing him on foot. Richardson also testified that he and Turner were the only intended targets of Craig's gunfire. The state trial court also relied on the testimony of an eyewitness, Barbara Ingram, who testified that she saw Craig pull out a gun and observed Turner standing with his hands up. Ingram testified that she briefly ducked for cover, but when she looked up again, she saw Turner on the ground in a prone position. She testified that Craig left the scene but eventually returned and shot Turner again. The state trial court further noted that Craig shot Turner three times—once in the leg, once in the chest, and once in the head. Considering this evidence, Craig failed to make a substantial showing that he was

prejudiced by counsel's failure to raise this sufficiency-of-the-evidence argument. *See Strickland*, 466 U.S. at 694; *see also Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011) (holding that counsel is not ineffective for failing to pursue a meritless issue).

Next, Craig argued that counsel rendered ineffective assistance by not objecting to the state trial court's alleged bias. He specifically argued that the state trial court violated his due-process rights by consistently ruling in the prosecution's favor on evidentiary matters. Reasonable jurists could not debate the district court's determination that Craig was not prejudiced by counsel's failure to object because evidentiary rulings, standing alone, are insufficient to establish a claim of judicial bias. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

Nor could reasonable jurists debate the district court's rejection of Craig's claim that counsel was ineffective for not objecting to multiple instances of prosecutorial misconduct. Craig alleged that the prosecutor, during her closing argument, improperly vouched for the credibility of the prosecution's witnesses and misstated evidence. When reviewing a prosecutorial-misconduct claim in a habeas proceeding, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Upon reviewing the record, the district court found that the prosecutor did not improperly vouch for any witness, but merely "argued that the consistency of the testimony and the physical evidence supported the testimony of the prosecution's witnesses." The district court also rejected Craig's argument that the prosecutor had "misstated the evidence of premeditation" and the nature of Turner's fatal injuries, noting that the prosecutor's disputed statement—that Craig stood over Turner and shot him at close range—was firmly grounded in Ingram's trial testimony. Reasonable jurists could not debate the district court's conclusion that Craig was not prejudiced by counsel's failure to raise a prosecutorial-misconduct objection.

Craig argued that counsel was ineffective for not objecting to the jury instructions, which purportedly eliminated any reference to a "not guilty" verdict and essentially directed the jury to convict him. "To warrant habeas relief, jury instructions must not only have been erroneous, but

also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair." *Doan v. Carter*, 548 F.3d 449, 455 (6th Cir. 2008) (quoting *Austin v. Bell*, 126 F.3d 843, 846-47 (6th Cir. 1997)). The state trial court concluded that the "instructions, when viewed as a whole, adequately protected [Craig's] rights." The district court found that the state trial court's adjudication of this claim neither contravened nor unreasonably applied federal law. The district court noted that the state trial court properly instructed the jury that the prosecution was required to prove each element of the charged offenses beyond a reasonable doubt and that "[n]othing in the instructions could be read to mean that the jury did not have the option of finding [Craig] not guilty of any or all of the charged crimes." Reasonable jurists could not debate the district court's determination that Craig was not prejudiced by counsel's failure to object to the jury instructions.

Craig further argued that counsel was ineffective for not objecting to the state trial court's admission of recorded phone calls into evidence—namely, his jailhouse phone calls and Barbara Ingram's 911 call immediately following the shooting. Craig argued that the admission of these recorded phone calls violated his rights under the Sixth Amendment's Confrontation Clause. The Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

The state trial court determined that Craig's recorded jailhouse phone calls were properly admitted as admissions by a party-opponent because they consisted of Craig making statements against his own interest. *See* Mich. R. Evid. 801(d)(2)(A). Consequently, those recordings, by definition, were not hearsay. *See id.* The district court concluded that since the prohibition annunciated in *Crawford* applies only to hearsay, that prohibition does not cover Craig's jailhouse phone calls. *See United States v. Tolliver*, 454 F.3d 660, 664-66 (7th Cir. 2006). The district court also concluded that Ingram's 911 call was non-testimonial (and therefore not subject to the Confrontation Clause) because "[h]er statements to the 911 operator . . . were made in the context of an ongoing emergency." *See Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Considering the foregoing, reasonable jurists would not

debate the district court's determination that Craig was not prejudiced by counsel's failure to object to the admission of these phone calls.

Claim 2. Craig argued that counsel was ineffective for not moving to dismiss the indictment on the basis that the seven-month delay between his arrest and the start of his trial violated the Sixth Amendment's speedy-trial guarantee. The Sixth Amendment provides that criminal defendants "shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. To assess whether there has been a constitutional speedy-trial violation, courts balance four unweighted factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972). To make out a Sixth Amendment violation, a defendant must first show a delay that is "uncommonly long," otherwise, "judicial examination ceases." *United States v. Ferreira*, 665 F.3d 701, 705 (6th Cir. 2011) (quoting *United States v. Robinson*, 455 F.3d 602, 607 (6th Cir. 2006)). The delay must be more than ordinary; rather, it must be presumptively prejudicial. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *Girts v. Yanai*, 600 F.3d 576, 588 (6th Cir. 2010). A delay longer than one year typically is assumed to be presumptively prejudicial, *Doggett*, 505 U.S. at 652 n.1; *Girts*, 600 F.3d at 588, and this court has held that a ten-month delay is "right at the line to trigger an analysis of the remaining factors" for a constitutional speedy-trial violation, *United States v. Brown*, 498 F.3d 523, 530 (6th Cir. 2007). Because the roughly seven-month delay relied on by Craig falls short of this mark, reasonable jurists could not debate the district court's determination that Craig was not prejudiced by counsel's failure raise a speedy-trial argument in a motion to dismiss.

Claim 3. Finally, Craig argued that the state trial court abused its discretion when, contrary to Michigan Court Rule 6.508(E), it failed to fully address all of the claims that he had raised in his state motion for relief from judgment. Reasonable jurists would not debate the district court's determination that this claim failed to state a cognizable claim for relief under § 2254. It is well-settled that claims that are based on perceived errors of state law are not cognizable on federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Accordingly, Craig's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk