APPENDICES FROM THE FEDERAL COURTS

IN THE FOLLOWING ORDER

A. Opinion of the United States Court of Appeals for the Sixth Circuit in Lewis v. Miniard, No. 21-1833 (Oct. 7, 2022)

B. Opinion and Order in the United States District Court for the Eastern District in Lewis v. Vasbinder (April 19, 2022)

C. Opinion and Order of the United States District Court for the Eastern District in Lewis v. Vasbinder (Dec. 7, 2021)

D. Opinion and Order in the United States District Court for the Eastern District of Michigan in Lewis v. Vasbinder (Mar. 24, 2021)

E. Order denying Petitioner's Motion for Permission to Appeal In Forma Pauperis for the United States District Court for the Eastern District (Feb. 10, 2020)

F. Order Granting Petitioner's Motion for Extensions of Time (ECF No. 65) and Denying Petitioner's Request for an En Banc Rehearing before a Three-Judge Panel (ECF No. 64) United States District Court for the Eastern District of Michigan (Jan. 14, 2020)

G. Order Denying the Petition for Panel Rehearing for the United States District Court for the Eastern District of Michigan in Lewis v. Vasbinder, (Aug. 8, 2019)

H. Opinion and Order for the United States District Court for the Eastern District of Michigan in Lewis v. Vasbinder (Jan. 14, 2019)

No. 21-1833

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTIN A. LEWIS,

Petitioner-Appellant,

v.

WARDEN GARY MINIARD,

Respondent-Appellee.

ORDER

Before: SUTTON, Chief Judge.

Martin A. Lewis, a pro se Michigan prisoner, appeals the district court's order denying his motion for reconsideration of the district court's denial of his Federal Rule of Civil Procedure 60(b) motion to reopen his habeas proceedings, which had concluded in 2008. Lewis moves the court for a certificate of appealability (COA) and for leave to proceed in forma pauperis on appeal.

In 2000, Lewis was convicted of first-degree murder after a bench trial, and the trial court sentenced him to life in prison without parole. The Michigan Court of Appeals affirmed. *People v. Lewis*, No. 230887, 2002 WL 31957700 (Mich. Ct. App. Dec. 27, 2002) (per curiam), *perm. app. denied*, 671 N.W.2d 880 (Mich. 2003).

In 2004, Lewis filed a 28 U.S.C. § 2254 habeas corpus petition in the district court. As is relevant here, Lewis claimed that his trial attorney performed ineffectively by not securing an expert witness to challenge allegedly unreliable eyewitness testimony and by not complying with the trial court's trial schedule, thereby depriving him of the opportunity to impeach two witnesses with their prior convictions. The respondent moved to dismiss Lewis's entire petition because he failed to exhaust these two claims in state court. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982). Lewis disputed the respondent's contention that he failed to exhaust these two claims, but he stated

that if the district court concluded otherwise, it should delete the unexhausted claims and proceed to adjudicate the merits of his exhausted claims. *See id.* at 520. The district court agreed with the respondent that Lewis did not exhaust these claims, deleted them from Lewis's petition, and denied the remaining claims on the merits. This court denied Lewis a COA. *Lewis v. Vasbinder*, No. 07-2265 (6th Cir. June 6, 2008).

More than 12 years later, Lewis filed a motion in the district court to reopen the judgment under Federal Rule of Civil Procedure 60(b)(4) and (6), arguing that the court had misconstrued his opposition to the respondent's motion to dismiss as agreeing to the deletion of his unexhausted ineffective-assistance claims. Lewis contended that his agreement to delete these claims was conditional and that under *Castro v. United States*, 540 U.S. 375 (2003), the district court should have given him notice and an opportunity to respond before construing his response to the motion to dismiss as agreeing to deletion. He argued therefore that the judgment was void under Rule 60(b)(4). Further, Lewis argued that the district court had erred in concluding that he failed to exhaust his ineffective-assistance claims in state court, therefore entitling him to relief from the judgment under Rule 60(b)(6).

The district court denied the motion. First, the court found that Lewis's motion was untimely because he filed it almost 13 years after the entry of the judgment. Second, the court found that the judgment was not void under Rule 60(b)(4) because the court had subject-matter jurisdiction over Lewis's petition and Lewis received sufficient notice and an opportunity to respond to the exhaustion issue. Moreover, the court found that the judgment was not void even if it had erred in ruling that Lewis failed to exhaust his ineffective-assistance claims. Third, the court found that Lewis was not entitled to relief under Rule 60(b)(6) because his unexhausted ineffective-assistance claims lacked merit and there were no other grounds for relief. The court denied Lewis's subsequent motion to reconsider. The court declined to issue a COA.

Lewis now moves this court for a COA. He continues to argue that the district court erred in concluding that he failed to exhaust his ineffective-assistance claims and in failing to give him sufficient notice and an opportunity to respond before deleting those claims from his petition. Additionally, Lewis devotes substantial time and space to arguing the merits of his ineffective-assistance claims. To obtain a COA, Lewis must show that reasonable jurists could disagree with

the district court's resolution of his Rule 60(b) motion or could conclude that the issues presented deserve encouragement to proceed further. *See United States v. Hardin*, 481 F.3d 924, 926 & n.1 (6th Cir. 2007).

Under Rule 60(b)(4), a movant may obtain relief if "the judgment is void." Rule 60(b)(6) permits a district court to grant relief from the judgment for "any other reason that justifies relief." But motions under Rule 60(b)(4) and (6) must be filed "within a reasonable time." Fed. R. Civ. P. 60(c)(1). Reasonable jurists would not debate the district court's conclusion that by waiting over a decade to file his motion—without any explanation for the delay—Lewis did not seek relief under Rule 60(b)(4) and (6) within a reasonable time. *See Tyler v. Anderson*, 749 F.3d 499, 510 (6th Cir. 2014); *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 905-06 (6th Cir. 2006). Moreover, reasonable jurists would not debate whether Lewis's non-jurisdictional due-process challenge to the district court's finding that he consented to the dismissal of his unexhausted ineffective-assistance claims renders the judgment void under Rule 60(b)(4). *See Days Inns*, 445 F.3d at 906-07 (noting that such a violation renders the judgment voidable, but not void). Finally, reasonable jurists would not debate the district court's conclusion that the judgment was not void even if the court decided the exhaustion issue incorrectly. *See Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 611 (6th Cir. 2011).

For these reasons, the court **DENIES** Lewis's COA application. The court **DENIES** Lewis's motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-1833

MARTIN A. LEWIS,

Petitioner-Appellant,

v.

WARDEN GARY MINIARD,

Respondent-Appellee.

Before: SUTTON, Chief Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Martin A. Lewis for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN A. LEWIS,

Petitioner,

v.

Case No. 2:04-cv-71140
Honorable Sean F. Cox

DOUG VASBINDER,

Respondent.
_____/

OPINION AND ORDER DENYING PETITIONER'S MOTION FOR PAUPER STATUS ON APPEAL (ECF No. 83) AND HIS APPLICATION FOR A CERTIFICATE OF APPEALABILITY (ECF No. 84)

This is a closed habeas corpus case that was filed under 28 U.S.C. § 2254. Petitioner has appealed the Court's denial of a petition for rehearing a motion to re-open this case. Pending before this Court are Petitioner's application for a certificate of appealability (ECF No. 84) and his motion for pauper status in the United States Court of Appeals for the Sixth Circuit (ECF No. 83). For the following reasons, the Court is denying the application and motion.

I. Background

Following a bench trial in the year 2000, Petitioner was found guilty of first-degree murder, Mich. Comp. Laws § 750.316, and sentenced to mandatory life imprisonment without the possibility of parole. The Michigan Court of Appeals affirmed Petitioner's conviction, *see People v. Lewis*, No. 230887, 2002 WL

31957700, at *1 (Mich. Ct. App. Dec. 27, 2002) (*per curiam*), and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. *See People v. Lewis*, 671 N.W.2d 880 (Mich. 2003) (table).

Petitioner commenced this case in 2004 by filing a motion to proceed *in forma pauperis* (ECF No. 1) and a petition for the writ of habeas corpus (ECF No. 3). The State initially moved for summary judgment and dismissal of the habeas petition because Petitioner had not exhausted state remedies for two claims about his trial attorney. *See* Mot. for Summary J. and Dismissal of Pet. (ECF No. 11). The two claims in question alleged that trial counsel was ineffective for (1) failing to procure an expert witness on eyewitness identification and (2) forfeiting Petitioner's right to impeach two trial witnesses with their prior convictions. *See id.* at PageID.195-96.

Former United States District Judge Lawrence P. Zatkoff agreed with the State that Petitioner had not exhausted state remedies for those claims. However, because Petitioner offered to delete those claims, Judge Zatkoff denied the State's motion for summary judgment and dismissal. *See* Op. and Order Denying Respondent's Mot. for Summary J. and Dismissal (ECF No. 33).

Among the exhausted issues that remained in the case was a claim that the trial court had interfered with Petitioner's right to present a defense by preventing defense counsel from impeaching two witnesses with their prior convictions. In a

dispositive opinion dated September 27, 2007, Judge Zatkoff denied the habeas petition. *See* Op. and Order Denying the Habeas Corpus Pet. (ECF No. 41.)

On the impeachment issue, Judge Zatkoff opined that, even if the trial court's ruling on the impeachment of witnesses violated Petitioner's right to defend himself, the error was harmless, given Petitioner's admissions to close friends and relatives that he killed a man. (*Id.* at PageID.2077-78.) Petitioner appealed Judge Zatkoff's decision, but the United States Court of Appeals for the Sixth Circuit declined to issue a certificate of appealability. *See Lewis v. Vasbinder*, No. 07-2265 (6th Cir. June 6, 2008); ECF No. 51 in this case.

In 2018, Petitioner moved to amend his habeas petition and to re-open this case pursuant to Federal Rule of Civil Procedure 60(b)(6). *See* Mots. (ECF Nos. 57 and 58). He maintained that his previously unexhausted claims about trial counsel were now exhausted and that the Court should re-open his case and adjudicate those claims. Petitioner's case was reassigned to this Court following Judge Zatkoff's retirement, and on January 14, 2019, the Court denied Petitioner's Rule 60(b) motion because the motion was untimely. *See* Op. and Order (ECF No. 61).

Petitioner filed a motion for rehearing or reconsideration (ECF No. 62), which this Court denied on August 8, 2019 (ECF No. 63). In the order denying reconsideration, the Court agreed with the trial court that trial counsel's failure to procure an expert witness on identification did not prejudice Petitioner because there

was other evidence implicating Petitioner in the crime, and the outcome of the trial would not have been different with an expert witness. *See* Order Denying the Pet. for Rehearing (ECF No. 63, PageID.2292).

The Court reached a similar conclusion on the issue of trial counsel's alleged failure to take adequate steps to impeach two prosecution witness with their criminal records. The Court said there was not a reasonable probability that the outcome of the trial would have been different even if counsel had impeached the witnesses with their prior convictions because there was substantial evidence implicating Petitioner in the murder, apart from those witnesses. *See id.* at 2293.

Petitioner appealed the Court's denial of his Rule 60(b) motion and petition for rehearing. *See* Notice of Appeal (ECF No. 67). The Sixth Circuit Court of Appeals denied a certificate of appealability because no reasonable jurist could conclude that this Court had abused its discretion in denying Petitioner's motion. *See Lewis v. Winn*, No. 20-1094 (6th Cir. June 2, 2020); ECF No. 72 in this case.

On August 27, 2020, Petitioner filed another motion to re-open this case and request for consideration of the ineffectiveness claims that Judge Zatkoff failed to adjudicate. *See* Mot. for Leave to Re-Open J. (ECF No. 73, PageID.2349). On March 24, 2021, the Court denied Petitioner's motion to re-open the case. *See* Op. and Order Denying Mot. for Leave to Re-Open J. (ECF No. 75.) Petitioner filed a petition for rehearing (ECF No. 79), which the Court denied on December 7, 2021.

See Op. and Order Denying Pet. for Rehearing (ECF No. 80.) Petitioner now seeks a certificate of appealability and permission to proceed *in forma pauperis* on appeal.

II. Discussion

Petitioner seeks a certificate of appealability from the Court's previous order, which denied Petitioner's request for a rehearing of the order denying leave to re-open this case. *See* Application for Certificate of Appealability (ECF No. 84, PageID.2452). In the motion to re-open this case, Petitioner challenged Judge Zatkoff's failure to adjudicate Petitioner's claims about trial counsel's failure to obtain an expert witness and impeach two prosecution witnesses with their prior convictions. *See* Mot. for Leave to Re-Open J. (ECF No. 73, PageID.2349).

The Court arguably lacks jurisdiction to issue a certificate of appealability on the claims about trial counsel and Judge Zatkoff's ruling on the exhaustion issue because the Court denied leave to re-open this case to raise those issues. *See Smith v. Anderson*, 402 F.3d 718, 727–28 (6th Cir. 2005) (stating that it was not clear how the district court had authority to grant a certificate of appealability regarding an issue about the grand jury foreperson where the court denied the petitioner's Rule 60(b) motion to re-open proceedings as to that claim).

Even if the Court has jurisdiction to issue a certificate of appealability, the Court may grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

To satisfy this standard, a habeas petitioner must demonstrate that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "While this standard is not overly rigid, it still demands 'something more than the absence of frivolity.' In short, a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020) (internal citations omitted).

This Court determined in its order denying Petitioner's most recent motion to re-open this case that Petitioner's motion was untimely and that he was not entitled to relief under Rule 60(b)(4) because Judge Zatkoff did not violate Petitioner's right to due process. *See* Op. and Order Denying Petitioner's Mot. for Leave to Re-Open J. (ECF No. 75, PageID.2400-01, 2403). The Court denied relief under Rule 60(b)(6) because Petitioner's underlying claims about trial counsel lacked merit. The Court pointed out that the outcome of the trial would not have been different even if an expert witness had testified for the defense and even if defense counsel had impeached two prosecution witnesses with their prior convictions, because there was substantial evidence implicating Petitioner in the murder. *See id.* at PageID.2401-02. The Court denied Petitioner's request for reconsideration for

similar reasons. *See* Op. and Order Denying the Pet. for Rehearing (ECF No. 80, PageID.2442-44).

Petitioner's arguments do not deserve encouragement to proceed further, and there is not a substantial basis for concluding that the Court's denial of Petitioner's motion to re-open this case and his petition for rehearing might be incorrect. Accordingly,

IT IS ORDERED that Petitioner's application for a certificate of appealability (ECF No. 84) is DENIED.

IT IS FURTHER ORDERED that Petitioner's motion for pauper status in the Court of Appeals (ECF No. 83) is DENIED because an appeal could not be taken in good faith. 28 U.S.C. § 1915(a)(3).

IT IS SO ORDERED.

Dated: April 19, 2022

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN A. LEWIS,

Petitioner,

v.

Case No. 2:04-cv-71140
Honorable Sean F. Cox

DOUG VASBINDER,

Respondent.
_____/

OPINION AND ORDER GRANTING PETITIONER'S MOTION AND REQUEST FOR AN EXTENSION OF TIME (ECF Nos. 77 & 78) AND DENYING THE PETITION FOR PANEL REHEARING (ECF No. 79)

This closed habeas corpus case has come before the Court on Petitioner's letter request (ECF No. 77) and motion (ECF No. 78) for an extension of time to respond to the Court's last order and a petition for panel rehearing (ECF No. 79). The petition for a rehearing seeks reconsideration of the Court's order dated March 24, 2021, in which the Court denied Petitioner's motion to reopen this case. For the reasons set forth below, the Court will grant the request and motion for an extension of time and deny the petition for a rehearing.

I. Background

Following a bench trial in 2000, Petitioner was found guilty of first-degree murder, Mich. Comp. Laws § 750.316, and sentenced to mandatory life imprisonment without the possibility of parole. The conviction was based on

evidence that Petitioner beat the victim to death with a baseball bat. The Michigan Court of Appeals affirmed Petitioner's conviction, *see People v. Lewis*, No. 230887, 2002 WL 31957700, at *1 (Mich. Ct. App. Dec. 27, 2002) (*per curiam*), and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. *See People v. Lewis*, 671 N.W.2d 880 (Mich. 2003) (table).

Petitioner commenced this case in 2004. The State initially moved for summary judgment and dismissal of the habeas petition on the basis that Petitioner had not exhausted state remedies for two claims about his trial attorney. The two claims in question alleged that trial counsel (1) failed to obtain an expert witness on eyewitness identification and (2) forfeited Petitioner's right to impeach two trial witnesses with their prior convictions by not complying with the trial court's motion schedule. (ECF No. 11, PageID.196). In a response to the State's motion, Petitioner maintained that he had exhausted state remedies. But he also stated that, if the Court agreed with the State's argument, he was willing to delete the unexhausted claims and proceed with his exhausted claims. (ECF No. 30, PageID.1968).

Former United States District Judge Lawrence P. Zatkoff was assigned to the case at the time, and he agreed with the State that Petitioner had not exhausted state remedies for his impeachment and expert-witness claims. (ECF No. 33, PageID.1989-1992). However, because Petitioner had offered to delete those

claims, Judge Zatkoff denied the State's motion for summary judgment and dismissal. (*Id.* at PageID.1992.)

Among the exhausted issues that remained in the case was a claim that the trial court had interfered with Petitioner's right to present a defense by preventing defense counsel from impeaching two witnesses with their prior convictions. In a dispositive opinion dated September 27, 2007, Judge Zatkoff denied the habeas petition. (ECF No. 44.) On the impeachment issue, he opined that, even if the trial court's ruling on impeachment of witnesses violated Petitioner's right to defend himself, the error was harmless, given Petitioner's admissions to close friends and relatives that he killed a man. (*Id.* at PageID.2077-78.) Petitioner appealed Judge Zatkoff's decision, but the United States Court of Appeals for the Sixth Circuit declined to issue a certificate of appealability. *See Lewis v. Vasbinder*, No. 07-2265 (6th Cir. June 6, 2008); (ECF No. 51 in this case).

In 2014, Petitioner filed a motion for relief from judgment in the state trial court. He raised the two ineffective-assistance-of-counsel claims that Judge Zatkoff had determined were unexhausted. The trial court determined, among other things, that Petitioner had raised the impeachment/ineffectiveness claim in a motion to remand and that the Michigan Court of Appeals had decided the issues against Petitioner on appeal. The trial court concluded that it was precluded from granting relief on that issue. *See People v. Lewis*, No. 2000-0171-FC (Kalamazoo Cty. Cir.

Ct. Mar. 30, 2015). Petitioner appealed the trial court's decision, but the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *See People v. Lewis*, No. 328472 (Mich. Ct. App. Sept. 29, 2015); *People v. Lewis*, 882 N.W.2d 144 (Mich. 2016).

In 2018, Petitioner moved to amend his habeas petition and to re-open this case pursuant to Federal Rule of Civil Procedure 60(b). (ECF Nos. 57 and 58.) He argued that his trial attorney was ineffective for failing to obtain an expert witness and impeach two prosecution witnesses with their criminal histories. Petitioner also claimed that Judge Zatkoff had erred when he determined that Petitioner did not exhaust state remedies for those claims.

Petitioner's case was reassigned to this Court following Judge Zatkoff's retirement, and on January 14, 2019, the Court denied Petitioner's motions to amend the habeas petition and to re-open this case. (ECF No. 61.) Petitioner requested a rehearing (ECF No. 62), but the Court denied the request, in part, because there was not a reasonable probability that the outcome of the trial would have been different if defense counsel had impeached the witnesses with their prior convictions. The court noted that there was substantial evidence implicating Petitioner in the murder, apart from the witnesses' testimony. (ECF No. 63, PageID.2293). Petitioner then requested a rehearing *en banc* (ECF No. 64), which this Court denied on January 14, 2020 (ECF No. 66).

Petitioner unsuccessfully appealed the Court's denial of his Rule 60(b) motion. The Sixth Circuit Court of Appeals denied a certificate of appealability on the basis that no reasonable jurist could conclude that this Court had abused its discretion in denying Petitioner's motion. *See Lewis v. Winn*, No. 20-1094 (6th Cir. June 2, 2020); (ECF No. 72 in this case).

On August 27, 2020, Petitioner filed another motion to re-open this case on the ground that Judge Zatkoff had failed to adjudicate the merits of his impeachment/ineffective-assistance-of-counsel claim. (ECF No. 73, PageID.2368.) On March 24, 2021, the Court denied Petitioner's motion to re-open the case. (ECF No. 75.) Now before the Court are Petitioner's letter request and motion to extend the time to file a response to the Court's March 24, 2021 order (ECF Nos. 77 and 78) and his petition for rehearing of the March 24, 2021 order.

II. Discussion

A. The Request and Motion for an Extension of Time

In his letter request dated March 30, 2021, Petitioner alleged that he needed an extension of time to respond to the Court's latest order due to an outbreak of COVID at the prison where he is confined. (ECF No. 77). In his subsequent motion for an extension of time, Petitioner requested an additional fourteen days, or until the prison's "outbreak status" was lifted, to seek reconsideration of the Court's March 24, 2021 order. (ECF No. 78.)

The Court's Local Rules require motions for rehearing or reconsideration of nonfinal orders to be filed within fourteen days after entry of the order in question. LR 7.1(h)(2) (E.D. Mich. Dec. 1, 2021). Petitioner's letter request and motion for extension of time were filed within fourteen days of the Court's previous order. Moreover, the outbreak of COVID in prisons was an exceptional circumstance, which apparently limited Petitioner's freedom of movement and ability to respond to the Court's order. Accordingly, the Court grants Petitioner's letter request and motion for an extension of time and proceeds to address his petition for rehearing.

B. The Petition for Rehearing

As noted above, Petitioner's latest petition for rehearing seeks reconsideration of the Court's March 24, 2021 order, which denied Petitioner's motion to re-open this case. Once again, Petitioner is challenging Judge Zatkoff's determination that Petitioner did not exhaust state remedies for his claim about trial counsel's failure to impeach key trial witnesses with their prior convictions. Petitioner maintains that the impeachment error was raised in a proper motion for remand in state court and that this Court had a duty to articulate the law and apply *Strickland v. Washington*, 466 U.S. 668 (1984), to his claim about trial counsel.

Under the version of Local Rule 7.1(h) in effect at the time Petitioner filed his petition for rehearing, the Court could not grant motions for rehearing or reconsideration that merely presented the same issues ruled upon by the Court. *See*

LR 7.1(h)(3) (E.D. Mich. July 1, 2013). The movant was required to demonstrate a palpable defect in the order and to show that correcting the defect would result in a different disposition of the case. *Id.*

This Court has already rejected Petitioner's requests to amend his petition and to re-open this case to include his impeachment/ineffectiveness claim. The Court has also denied Petitioner's prior requests for rehearing on that issue. Motions to reconsider

> are "extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged." *In re August, 1993 Regular Grand Jury,* 854 F.Supp. 1403, 1406 (S.D. Ind. 1994). To be sure, "a court can always take a second look" at a prior decision; but "it need not and should not do so in the vast majority of instances," especially where such motions "merely restyle or re-hash the initial issues." *Id.* at 1407.

McConocha v. Blue Cross & Blue Shield Mut. of Ohio, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996).

Petitioner is re-hashing an issue that the Court has already rejected. Furthermore, even if the Court were to re-open Petitioner's case and allow him to amend his petition to include his impeachment/ineffectiveness claim, adjudicating that issue on the merits would not result in a different disposition of this case.

One of the disputed witnesses apparently had a prior conviction for first-degree retail fraud, and the other witness had prior convictions for conspiracy to commit false pretenses and attempted uttering and publishing. (ECF No. 3,

PageID.64). However, as the Court pointed out in one of its previous orders, *see* ECF No. 63, PageID.2293, there was substantial evidence implicating Petitioner in the murder, apart from those witnesses' testimony. Petitioner made admissions to close friends and relatives that he killed a man. *See* ECF No. 41, PageID.2062, 2064-65 (summarizing the testimonies of Wylene Betty Bennett and her two sons, Kenneth and Donald Garland, and Petitioner's brother-in-law, George Armstead).

Because there is not a reasonable probability that the outcome of the trial would have been different if defense counsel had impeached the two witnesses with their prior convictions, adjudicating Petitioner's impeachment/ineffectiveness claim on the merits would not result in a different disposition of this case. Accordingly,

IT IS ORDERED that Petitioner's petition for rehearing (ECF No. 79) is DENIED.

IT IS FURTHER ORDERED that Petitioner's letter request and motion for extension of time (ECF Nos. 77 and 78) are GRANTED.

IT IS SO ORDERED.

Dated: December 7, 2021

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

Lewis v. Vasbinder

United States District Court for the Eastern District of Michigan, Southern Division

March 24, 2021, Decided; March 24, 2021, Filed

Case No. 2:04-cv-71140

Reporter
2021 U.S. Dist. LEXIS 55188 *

MARTIN A. LEWIS, Petitioner, v. DOUG VASBINDER, Respondent.

Core Terms

exhausted, re-open, unexhausted, delete, habeas petition, expert witness, state remedy, witnesses, impeach, trial counsel, motions

Counsel: **[*1]** Martin Lewis, Petitioner, Pro se, FREELAND, MI.

For Doug Vasbinder, Warden, Respondent: Debra M. Gagliardi, LEAD ATTORNEY, Michigan Department of Attorney General, Licensing & Regulation Division, Lansing, MI.

Judges: Honorable Sean F. Cox, United States District Judge.

Opinion by: Sean F. Cox

Opinion

OPINION AND ORDER DENYING PETITIONER'S MOTION FOR LEAVE TO RE-OPEN THE JUDGMENT

This is a closed habeas corpus case. Before the Court is Petitioner Martin A. Lewis's motion for leave to re-open the judgment pursuant to *Federal Rule of Civil Procedure 60(b)(4)* and *Rule 60(b)(6)*. For the reasons given below, the motion is denied.

I. Background

Following a bench trial in the year 2000, Petitioner was found guilty of first-degree murder, *Mich. Comp. Laws § 750.316*, and sentenced to mandatory life imprisonment without the possibility of parole. The conviction was based on evidence that Petitioner beat the victim to death with a baseball bat. The Michigan Court of Appeals affirmed Petitioner's conviction, *see People v. Lewis, No. 230887, 2002 Mich. App. LEXIS 2279, 2002 WL 31957700, at *1 (Mich. Ct. App. Dec. 27, 2002)* (*per curiam*), and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. *See People v. Lewis, 469 Mich. 969, 671 N.W.2d 880 (Mich. 2003)* (table).

Petitioner commenced this action in 2004. The State moved for summary judgment and dismissal of the habeas petition on the basis that Petitioner had not exhausted state remedies for his claims that **[*2]** his trial attorney (1) failed to obtain an expert witness on eyewitness identification and (2) forfeited his right to impeach two witnesses with their prior convictions by not complying with the trial court's motion schedule. (Docket No. 11). In a response to the State's motion for summary judgment and dismissal of the habeas petition, Petitioner maintained that he had exhausted state remedies. But he stated that, if the Court agreed with the State's argument, he was willing to delete the unexhausted claims and proceed with his exhausted claims. (Docket No. 30).

Former United States District Judge Lawrence P. Zatkoff was assigned to the case at the time, and he

agreed with the State that Petitioner did not exhaust state remedies for his claims about trial counsel's failure to obtain an expert witness and failure to impeach two prosecution witnesses with their prior convictions. (Docket No. 33). However, because Petitioner had agreed to delete those claims, Judge Zatkoff subsequently adjudicated Petitioner's exhausted claims and denied the petition on the merits. (Docket No. 41). Petitioner appealed Judge Zatkoff's decision, but the United States Court of Appeals for the Sixth Circuit **[*3]** declined to issue a certificate of appealability. *See Lewis v. Vasbinder, No. 07-2265, 2008 U.S. App. LEXIS 28502 (6th Cir. June 6, 2008)*; Docket No. 51 in this case.

In 2009, Petitioner filed a motion for relief from Judge Zatkoff's judgment in this case. Petitioner claimed that state officials had committed a fraud on the courts by misleading the courts into believing that probable cause existed for Petitioner's arrest. (Docket No. 52). Judge Zatkoff treated the motion as a second or successive habeas petition and then transferred the case to the Sixth Circuit Court of Appeals for a determination on whether Petitioner could proceed with a second or successive petition. (Docket No. 53).[1] The Sixth Circuit denied Petitioner's request to file a second or successive petition. *See In re Lewis, No. 09-1670, 2009 U.S. App. LEXIS 29929 (6th Cir. Nov. 24, 2009)*. Petitioner filed two additional motions for authorization to file a second or successive habeas petition, but the Sixth Circuit denied both motions. *See In re Lewis, No. 11-1658, 2011 U.S. App. LEXIS 26868 (6th Cir. Sept. 12, 2011)*; Docket No. 54 in this case; *In re Lewis, No. 12-2446, 2013 U.S. App. LEXIS 26488 (6th Cir. May 16, 2013)*; Docket No. 55 in this case.

In 2014, Petitioner filed a motion for relief from judgment in the state trial court. **[*4]** He raised the two ineffective-assistance-of-counsel claims that Judge Zatkoff had determined were unexhausted. The trial court denied the motion for relief from judgment. *See People v. Lewis*, No. 2000-0171-FC (Kalamazoo Cty. Cir. Ct. Mar. 30, 2015). Petitioner appealed the trial court's decision without success. The Michigan Court of Appeals denied leave to appeal for failure to establish entitlement to relief under *Michigan Court Rule 6.508(D)*, *see People v. Lewis, No. 328472, 2015 Mich. App. LEXIS 2624 (Mich. Ct. App. Sept. 29, 2015)*, and on July 26, 2016, the Michigan Supreme Court likewise denied leave to appeal under *Rule 6.508(D)*. *See People v. Lewis, 499 Mich. 983, 882 N.W.2d 144 (Mich. Sup. Ct. 2016)*.

In 2017, Petitioner filed a habeas corpus petition in which he asserted that he had exhausted state remedies for his previously unexhausted claims about trial counsel. He asserted that the claims were ripe for review and that he had new reliable evidence from an expert witness who could discredit the eyewitnesses' trial testimony. The 2017 case was assigned to United States District Judge Paul D. Borman, who transferred the petition to the Sixth Circuit as a second or successive petition. *See Lewis v. Haas, No. 2:17-cv-10734, 2017 U.S. Dist. LEXIS 33477 (E.D. Mich. Mar. 9, 2017)*. The **[*5]** Sixth Circuit denied permission for leave to file a second or successive petition. *See In re Lewis, No. 17-1253, 2017 U.S. App. LEXIS 28040 (6th Cir. July 19, 2017)*.

In 2018, Petitioner moved to re-open this case (Docket No. 58) and to amend his habeas petition (Docket No. 57). Petitioner reiterated his claims about trial counsel's failure to obtain a defense expert and impeach two prosecution witnesses with their criminal histories. Petitioner argued that Judge Zatkoff had erred when he determined that Petitioner did not exhaust state remedies for these claims.

The case was reassigned to this Court following Judge Zatkoff's retirement, and on January 14, 2019, the Court denied the motions to re-open this case and to amend the petition. (Docket No. 61.) Petitioner requested a rehearing (Docket No. 62), but the Court denied the request (Docket No. 63). Although Petitioner appealed the Court's denial of his request for a rehearing, the Sixth Circuit Court of Appeals denied Petitioner's application for a certificate of appealability because no reasonable jurist could conclude that this Court had abused its discretion in denying Petitioner's *Rule 60(b)* motion. *See Lewis v. Winn, No. 20-1094, 2020 U.S. App. LEXIS 17409 (6th Cir. June 2, 2020)*; Docket No. **[*6]** 72 in this case. On August 27, 2020, Petitioner filed his most recent motion to re-open Judge Zatkoff's judgment. (Docket No. 73).

II. Discussion

Although portions of Petitioner's typewritten motion are too faint to read, he seems to be raising the same

[1] Under *28 U.S.C. § 2244(b)*, a habeas petitioner who seeks to file a second or successive petition must first seek and obtain authorization from the appropriate court of appeals before filing a second or successive petition in the district court. *28 U.S.C. § 2244(b)(3)(A)*.

issues that he presented to the Court in his previous motion to re-open this case. He claims that Judge Zatkoff erred by not addressing the merits of his claims about trial counsel's failure to impeach two prosecution witnesses with their prior convictions and failure to take adequate steps to obtain an expert witness. The Court understands Petitioner to be alleging that, at least one of his claims about trial counsel was exhausted when his appellate attorney raised the claim in a motion to remand his case to the trial court.

Petitioner also alleges that his willingness to delete the claims on habeas review was a conditional statement and that Judge Zatkoff erred by mischaracterizing Petitioner's conditional statement as a motion to withdraw the unexhausted claims. Finally, Petitioner asserts that Judge Zatkoff should have given him an opportunity to be heard before recharacterizing his conditional statement as a motion to withdraw or **[*7]** to delete the unexhausted claims.

Petitioner filed his motion under *Federal Rule of Civil Procedure 60(b)(4)* and *60(b)(6)*. Those rules authorize federal courts to relieve a party from a final judgment "when the judgment is void," *Fed. R. Civ. P. 60(b)(4)*, and for "any other reason that justifies relief," *Fed. R. Civ. P. 60(b)(6)*. But "*Rule 60(b)(4)* does not provide a license for litigants to sleep on their rights," *United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 275, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010)*, and motions filed under both *Rule 60(b)(4)* and *Rule 60(b)(6)* "must be made within a reasonable time." *Fed. R. Civ. P. 60(c)(1)*.

Petitioner filed his pending *Rule 60(b)* motion to re-open this case almost thirteen years after Judge Zatkoff entered the judgment in this case. The motion was not filed within a reasonable time. The motion fails for the following additional reasons.

A. *Rule 60(b)(4)*

A void judgment under *Rule 60(b)(4)* "is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Espinosa, 559 U.S. at 270*. "The list of such infirmities is exceedingly short[.]" *Id.* "'A judgment is not void,' for example, 'simply because it is or may have been erroneous.'" *Id.* (end citations omitted). "*Rule 60(b)(4)* applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id. at 271*.

Judge Zatkoff had jurisdiction **[*8]** in this case, and even though Petitioner alleges a violation of his right to due process, "[d]ue process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id. at 272* (quoting *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*). Petitioner had notice and an opportunity to be heard on the exhaustion issue, and he took advantage of the opportunity. After the State filed its motion for summary judgment and dismissal of the habeas petition, Petitioner filed a response to the State's motion and argument regarding the exhaustion requirement. (Docket No. 30).

Furthermore, Judge Zatkoff did not mischaracterize Petitioner's comment that, "if this Court decides in favor of Respondent, for any reason that Petitioner did not foresee (not being an attorney) that, Petitioner would delete the claims at issue and move forward with the Writ." (Docket No. 30, PageID.1968). This statement was an indication that Petitioner was willing to waive or delete any unexhausted claims. Petitioner, in fact, concedes in one of his previous motions in this case that he deleted the unexhausted claims. *See* Petitioner's Brief in Support of **[*9]** Mot. for Leave to Amend Pet., Docket No. 57, PageID.2201.

Even if Judge Zatkoff erred on the exhaustion issue, a judgment is not void merely because it may have been erroneous. *Espinosa, at 270*. The Court, therefore, concludes that Petitioner is not entitled to relief under *Rule 60(b)(4)*. That leaves *Rule 60(b)(6)*.

B. *Rule 60(b)(6)*

Rule 60(b)(6) is *Rule 60*'s "catchall category." *Buck v. Davis, 137 S. Ct. 759, 777, 197 L. Ed. 2d 1 (2017)*. It "vests wide discretion in courts," *id.*, but the scope of the rule "is narrower than it sounds: *Rule 60(b)(6)* permits relief only in 'unusual and extreme situations where principles of equity *mandate* relief.'" *Gillispie v. Warden, London Corr. Inst., 771 F.3d 323, 327 (6th Cir. 2014)* (quoting *Stokes v. Williams, 475 F.3d 732, 735 (6th Cir.2007)*) (emphasis in original). "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors." *Buck, 137 S. Ct. at 778*.

Petitioner challenges Judge Zatkoff's conclusion that Petitioner did not exhaust state remedies for his claim that defense counsel failed to adequately seek a defense expert on eyewitness identification. The attorney apparently failed to inform the trial court that the defense expert required more money than the amount authorized by the trial court. The state trial court, however, determined during post-conviction proceedings that, "even if the expert witness had been able to testify and discredit the eyewitness testimony, . . . there was still **[*10]** plenty of other evidence to implicate the Defendant, including his confessions to family and friends, his connection to the suspect vehicle, the fact that [he] was seen with a bat both before and immediately after the murder, and the fact that [he] had injuries on his hands that were consistent with having been in a physical altercation." *People v. Lewis*, Op. and Order Denying Defendant's Mot. for Relief from J., p. 6, No. 2000-0171-FC (Kalamazoo Cty. Cir. Ct. Mar. 30, 2015) (citations omitted); Docket No. 58, PageID.2247 in this case.

This Court agreed with the trial court's reasoning in one of the Court's previous orders. The Court concluded that the outcome of the trial would not have been different if the defense expert had testified and, therefore, Petitioner was not prejudiced by his trial attorney's failure to procure the expert witness. (Order Denying Rehearing, Docket No. 63., PageID.2292.) Because Petitioner's underlying claim about trial counsel lacks merit, Judge Zatkoff's failure to address the issue on the merits does not mandate relief from judgment.

The other issue that Judge Zatkoff did not address on the merits was Petitioner's claim that trial counsel was ineffective **[*11]** for failing to impeach two prosecution witness with their criminal histories. This Court, however, concluded in its order denying rehearing that even if defense counsel had impeached the witnesses with their prior convictions, there was not a reasonable probability that the outcome of the trial would have been different. The basis for the Court's ruling was that there was substantial evidence implicating Petitioner in the murder, apart from the testimony of the two witnesses in question. *Id.* at PageID.2292-2293.

III. Conclusion and Order

Petitioner did not file his motion within a reasonable time, and he is not entitled to relief under *Rule 60(b)(4)* because his arguments are not premised on a jurisdictional error, and he has not demonstrated a violation of his right to due process. His motion also fails under *Rule 60(b)(6)* because his underlying claims about trial counsel lack merit, and there is no other reason that justifies relief from judgment. Accordingly, the Court denies Petitioner's motion for leave to re-open the judgment (Docket No. 73).

The Court also declines to issue a certificate of appealability because Petitioner has not demonstrated that jurists of reason would disagree with the Court's resolution **[*12]** of his motion or that the issues presented deserve encouragement to proceed further. *Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*.

IT IS SO ORDERED.

Dated: March 24, 2021

/s/ Sean F. Cox

Sean F. Cox

U. S. District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN A. LEWIS,

Petitioner,

v.

Case No. 2:04-cv-71140
Honorable Sean F. Cox

DOUG VASBINDER,

Respondent.
_____/

ORDER DENYING PETITIONER'S MOTION FOR PERMISSION TO APPEAL *IN FORMA PAUPERIS* (ECF NO. 69)

This is a closed habeas corpus case under 28 U.S.C. § 2254. In 2004, petitioner Martin A. Lewis filed a *pro se* habeas corpus petition, which challenged his state-court conviction for first-degree murder, Mich. Comp. Laws § 750.316. (ECF No. 3). In 2007, former United States District Judge Lawrence P. Zatkoff denied the habeas petition on the merits. (ECF No. 41). The United States Court of Appeals for the Sixth Circuit subsequently declined to grant a certificate of appealability. (ECF No. 51).

In 2018, Petitioner filed a motion to amend his habeas petition and a motion to re-open this case pursuant to Federal Rule of Civil Procedure 60(b). (ECF Nos. 57 and 58). On January 14, 2019, the Court denied Petitioner's motions because Petitioner did not file his Rule 60(b) motion within a reasonable time and because his new claims about trial counsel appeared to be barred by the one-year statute of limitations. (ECF No. 61).

Next, Petitioner filed a "Petition for Panel Rehearing" (ECF No. 62), which the Court denied on August 8, 2019, because the Court was not persuaded that it made a palpable error when it denied Petitioner's motions to amend his habeas petition and to re-

open this case. (ECF No. 63). Petitioner then requested an *en banc* rehearing before a three-judge panel. (ECF No. 64). On January 14, 2020, the Court denied Petitioner's request. (ECF No. 66).

Petitioner has appealed the Court's order denying his request for an *en banc* hearing before a three-judge panel. (ECF No. 67). Currently before this Court is Petitioner's motion for permission to proceed *in forma pauperis* on appeal. (ECF No. 69).

Under 28 U.S.C. § 1915(a)(3), an appeal may not be taken *in forma pauperis* if the appeal is not taken in good faith. "Good faith" requires showing that the issues are arguable on the merits. *Foster v. Ludwick*, 208 F. Supp.2d 750, 765 (E.D. Mich. 2002).

Petitioner brought his motion for an *en banc* rehearing before a three-judge panel under Federal Rule of Appellate Procedure 35(a), which is not applicable to this Court, and under Local Rule 9.1(c), which refers to 28 U.S.C. § 2284. Section 2284, in turn, states in relevant part that

> [a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

28 U.S.C. § 2284(a).

Petitioner did not cite an Act of Congress in his motion for a rehearing *en banc*, and he was not challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. Therefore, he was not entitled to an *en banc* rehearing before a three-judge panel, and his appeal from the Court's order denying his request for such a hearing is not arguable on the merits.

Accordingly, Petitioner's request for permission to proceed *in forma pauperis* on appeal (ECF No. 69) is denied.

Dated: February 10, 2020

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN A. LEWIS,

Petitioner,

v.

Case No. 2:04-cv-71140
Honorable Sean F. Cox

DOUG VASBINDER,

Respondent.
_____/

ORDER GRANTING PETITIONER'S MOTION FOR AN EXTENSION OF TIME (ECF NO. 65) AND DENYING PETITIONER'S REQUEST FOR AN *EN BANC* REHEARING BEFORE A THREE-JUDGE PANEL (ECF NO. 64)

I. Background

This is habeas corpus case under 28 U.S.C. § 2254. The habeas petition challenged Petitioner's state-court conviction for first-degree murder, Mich. Comp. Laws § 750.316. The Michigan Court of Appeals affirmed Petitioner's conviction, and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. *See People v. Lewis*, 671 N.W.2d 880 (Mich. 2003) (table).

In 2004, Petitioner commenced this case. Former United States District Judge Lawrence P. Zatkoff denied the habeas petition on the merits (ECF No. 41), and the United States Court of Appeals for the Sixth Circuit declined to grant a certificate of appealability (ECF No. 51). In subsequent years, Petitioner unsuccessfully moved for permission to file a second or successive habeas petition.

In 2018, Petitioner filed a motion to amend his habeas petition and a motion to re-open this case pursuant to Federal Rule of Civil Procedure 60(b). (ECF Nos. 57 and 58). He argued in his motion to amend that trial counsel was ineffective for failing to (1) alert the trial court that the

defense expert needed additional funds to cover his costs and (2) impeach two prosecution witnesses with their criminal histories.

The case was reassigned to this Court, and on January 14, 2019, the Court denied Petitioner's motions to amend his habeas petition and to re-open this case. The Court stated that Petitioner did not file his Rule 60(b) motion within a reasonable time and that leave to amend was not warranted because Petitioner's claims appeared to be barred by the one-year statute of limitations. (ECF No. 61.)

Petitioner filed a "Petition for Panel Rehearing" (ECF No. 62), which the Court denied on August 8, 2019, because it was not persuaded that it made a palpable error when it denied Petitioner's motion to amend his habeas petition and motion to re-open this case (ECF No. 63). Now before the Court are Petitioner's motion to extend the time to file a request for an *en banc* rehearing (ECF No. 65) and Petitioner's request for an *en banc* rehearing before a three-judge panel (ECF No. 64). The request for an *en banc* rehearing (ECF No. 64) challenges the Court's denial of the Petition for Panel Rehearing (ECF No. 62).

II. Discussion

A. The Motion to Extend

Motions for rehearing or reconsideration ordinarily must be filed within 14 days after entry of the judgment or order in question. LR 7.1(h)(1). Petitioner filed his request for an *en banc* rehearing more than 14 days after the Court denied his Petition for Panel Rehearing. He alleges, however, that (i) he is untrained in the law, (ii) there are limits to the amount of time that he can spend in the prison law library, (iii) he must wait for his authorized day to pick up mailing envelopes from the prison store, and (iv) he needs additional time to complete his request for an *en banc* hearing. Given Petitioner's *pro se* status and the limitations he faces in preparing legal

documents, the Court grants his motion for an extension of time (ECF No. 65). Thus, the request for an *en banc* rehearing before a three-judge panel (ECF No. 64) is deemed timely.

B. The Request for an *En Banc* Rehearing

Petitioner brings his request for an *en* banc rehearing before a three-judge panel under Federal Rule of Appellate Procedure 35(a) and Local Rule 9.1(c). Appellate Rule 35 is not applicable to this Court, and Local Rule 9.1(c) merely refers to 28 U.S.C. § 2284. Section 2284 states in relevant part that

> [a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

28 U.S.C. § 2284(a).

Petitioner has not cited an Act of Congress that requires the Court to convene a panel of three judges to hear his claims, and he is not challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. Accordingly, Petitioner's request for an *en banc* rehearing before a three-judge panel (ECF No. 64) is denied.

Dated: January 14, 2020

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN A. LEWIS,

Petitioner,

v.

Case No. 2:04-cv-71140
Honorable Sean F. Cox

DOUG VASBINDER,

Respondent.
_____/

ORDER DENYING THE "PETITION FOR PANEL REHEARING"
(Docket No. 62)

I. Background

This is a habeas corpus action under 28 U.S.C. § 2254. Following a bench trial in 2000, Petitioner was found guilty of first-degree, premeditated murder, Mich. Comp. Laws § 750.316(1)(a), and sentenced to life imprisonment without the possibility of parole. The conviction arose from

> the 1980 beating death of Cornell Smith. The incident occurred at about 10:30 p.m. on July 31, 1980 on the grounds of the Woodward School in Kalamazoo County. Witnesses saw two cars pull up to the school. The assailant got out of one car and approached the other car. An argument ensued, during which the assailant returned to his car and retrieved a baseball bat. The driver of the second car subsequently drove off, leaving the victim, who had been his passenger. The assailant chased the victim, and, according to witnesses, inflicted a fatal blow to the victim's head with a full swing of the bat.

People v. Lewis, No. 230887, 2002 WL 31957700, at *1 (Mich. Ct. App. Dec. 27, 2002). The Michigan Court of Appeals affirmed Petitioner's conviction, and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. *See People v. Lewis*, 671 N.W.2d 880 (Mich. 2003) (table).

In 2004, Petitioner filed his habeas corpus petition, which was assigned to former United States District Judge Lawrence P. Zatkoff. (Docket No. 3). The State moved for summary judgment and dismissal of the petition on the basis that Petitioner had not exhausted state remedies for his claims that his trial attorney (1) failed to obtain the services of an expert witness on eyewitness identification and (2) waived his right to impeach two witnesses with their prior convictions by failing to comply with the trial court's motion schedule. (Docket No. 11). Petitioner disagreed with the State's argument, but he stated in a response to the State's motion that, if Judge Zatkoff agreed with the State, he was willing to delete the claims which the State had argued were unexhausted and proceed with his other claims. (Docket No. 30).

Judge Zatkoff subsequently agreed with the State that Petitioner did not exhaust state remedies for his claims that trial counsel failed to take adequate steps to obtain an expert witness and to impeach prosecution witnesses. However, because Petitioner had agreed to delete those claims to expedite review of his case on his other claims, Judge Zatkoff denied the State's motion for summary judgment. (Docket No. 33). Judge Zatkoff then adjudicated Petitioner's exhausted claims and denied the petition on the merits. (Docket No. 41). Petitioner appealed Judge Zatkoff's decision, but the United States Court of Appeals for the Sixth Circuit declined to grant a certificate of appealability. *See Lewis v. Vasbinder*, No. 07-2265 (6th Cir. June 6, 2008). In subsequent years, Petitioner attempted to file second or successive habeas petitions. The Sixth Circuit Court of Appeals, however, denied the requests for authorization to proceed with a second or successive habeas petition.

In 2014, Petitioner raised his two unexhausted claims about trial counsel in a motion for relief from judgment, which he filed in the state trial court. The trial court determined that it was precluded from adjudicating Petitioner's claim about trial counsel's failure to impeach prosecution

witnesses with their criminal histories because the issue was decided against Petitioner on appeal. The trial court adjudicated Petitioner's other claim about trial counsel on the merits and concluded that Petitioner was not prejudiced by counsel's failure to procure an expert witness. *See People v. Lewis*, No. 2000-0171-FC (Kalamazoo Cty. Cir. Ct. Mar. 30, 2015). Both the Michigan Court of Appeals and the Michigan Supreme Court denied Petitioner's applications for leave to appeal the trial court's decision. *See People v. Lewis*, No. 328472 (Mich. Ct. App. Sept. 29, 2015); *People v. Lewis*, 882 N.W.2d 144 (Mich. 2016).

In 2017, Petitioner filed another habeas corpus petition, claiming that he had recently exhausted state remedies for his two claims about trial counsel. The 2017 case was assigned to United States District Judge Paul D. Borman, who transferred the petition to the Sixth Circuit as a second or successive petition. *See Lewis v. Haas*, No. 2:17-cv-10734 (E.D. Mich. Mar. 9, 2017). The Sixth Circuit denied leave to file a second or successive petition. *See In re Lewis*, No. 17-1253 (6th Cir. July 19, 2017).

Petitioner subsequently filed a motion to amend his habeas petition in this case. (Docket No. 57). He also moved to re-open this case under Federal Rule of Civil Procedure 60(b) (docket no. 58) and to amend his Rule 60(b) (docket no. 60) to clarify that he was bringing his Rule 60(b) motion under subsections (4) and (6) of the rule. The basis for his motions to amend the habeas petition and re-open this case was his claim that trial counsel was ineffective for failing to (1) alert the trial court that the defense expert needed additional funds to cover his costs and (2) impeach two prosecution witnesses with their criminal histories. Petitioner argued that Judge Zatkoff erred when he determined that Petitioner had not exhausted state remedies for these claims and then declined to rule on the merits of Petitioner's claims about trial counsel.

The case was randomly reassigned to this Court following Judge Zatkoff's retirement, and on January 14, 2019, the Court granted the motion to amend the Rule 60(b) motion, but denied Petitioner's motions to re-open this case and to amend his habeas petition. The Court stated that Petitioner did not file his Rule 60(b) motion within a reasonable time and that leave to amend was not warranted because Petitioner's claims appeared to be barred by the one-year statute of limitations and the motions did not relate back in time to the date of the initial petition.

Now before the Court is Petitioner's "Petition for Panel Rehearing." Petitioner argues that: there is no time limit for filing a motion under Rule 60(b); the trial court's determination that he raised his claims on appeal was the law of the case; and this Court erred in relying on *White v. Dingle*, 616 F.3d 844 (8th Cir. 2010), and *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000), for the principle that the "relation back" rule of Federal Rule of Civil Procedure 15(c) does not apply when there is no pending petition to which an amendment can relate back.

II. Discussion

This District's Local Rules provide that

> [g]enerally, and without restricting the Court's discretion, the Court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the Court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the Court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case.

LR 7.1 (h) (3). "A 'palpable defect' is a defect which is obvious, clear, unmistakable, manifest, or plain." *Hawkins v. Genesys Health Systems*, 704 F. Supp.2d 688, 709 (E.D. Mich. 2010) (quoting *Ososki v. St. Paul Surplus Lines Ins. Co.*, 162 F. Supp. 2d 714, 718 (E.D. Mich. 2001)).

A. The Timeliness of the Rule 60(b) Motion

Petitioner alleges first that reconsideration should be granted because the Court erred in concluding that his Rule 60(b) motion was not filed within a reasonable time. Petitioner notes that he brought his motion to re-open this case under Rule 60(b)(4), and he argues that a motion under that subsection does not have to satisfy any threshold requirements such as timeliness. The Federal Rules of Civil Procedure, however, clearly state that "[a] motion under Rule 60(b) must be made within a reasonable time . . . ," Fed. R. Civ. P. 60(c)(1), and Petitioner filed his Rule 60(b) motion more than a decade after Judge Zatkoff issued the judgment in this case. This Court did not make a palpable error when it concluded that Petitioner's Rule 60(b) motion was not filed within a reasonable time.

B. Law of the Case

Petitioner alleges next that the Court should grant reconsideration under the doctrine of the law of the case. Petitioner appears to be arguing that the law of the case is that he did exhaust state remedies for his claims about trial counsel, because the trial court determined on post-conviction review that Petitioner raised at least one of his claims on appeal.

The United States Court of Appeals for the Sixth Circuit recently explained that

> [t]he defining feature of the law-of-the-case doctrine is that it applies only within the same case. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)); *Burley v. Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016); 18B C. Wright & A. Miller, *Federal Practice and Procedure* § 4478 (2d ed. Nov. 2018 update). A post-conviction habeas action is not a subsequent stage of the underlying criminal proceedings; it is a separate civil case. *See Pennsylvania v. Finley*, 481 U.S. 551, 556–57, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). . . .

Edmonds v. Smith, 922 F.3d 737, 739 (6th Cir. 2019). Thus,

> "findings made at one stage in the litigation should not be reconsidered at subsequent stages of that same litigation." *Burley*, 834 F.3d at 618. The doctrine does not mark a limit on a court's authority—courts are free to revisit their own rulings before final judgment—but is instead a recognition that for cases to reach resolution, issues cannot be argued and reargued without end. *See Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). In other words, the doctrine aims to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit," not to govern the effects that final decisions have on other courts or cases. *See* 18B Wright & Miller § 4478.

Id. at 739-40.

The law of this case is Judge Zatkoff's determination that Petitioner did not exhaust state remedies for the claims that he is currently trying to litigate. This Court is not required to reconsider an issue that Judge Zatkoff resolved almost fourteen years ago on September 30, 2005, particularly since Petitioner ultimately chose to delete his ineffective-assistance-of-counsel claims if Judge Zatkoff determined that the claims were not exhausted in state court.[1]

C. Relation Back

In his final two arguments, Petitioner alleges that the Court erred when it concluded on the basis of *White v. Dingle*, 616 F.3d 844 (8th Cir. 2010), and *Warren v. Garvin*, 219 F.3d 111 (2d Cir. 2000), that Petitioner's claims did not relate back in time to his previously dismissed habeas petition. The Court is not persuaded that it made a palpable error when it reached that conclusion, but for the following reasons, the Court also finds that Petitioner's ineffective-assistance-of-counsel claims do not warrant reconsideration or relief from the judgment in this case.

[1] *See* Petitioner's Response to Respondent's Mot. for Summary J., docket no. 30, p. 3.

1. Trial Counsel and the Expert Witness

Petitioner alleges that trial counsel was ineffective for failing to inform the trial court that his defense expert required more money than the amount authorized by the trial court. The trial court considered this issue during post-conviction proceedings and pointed out that,

> even if the expert witness had been able to testify and discredit the eyewitness testimony, . . . there was still plenty of other evidence to implicate the Defendant, including his confessions to family and friends, his connection to the suspect vehicle, the fact that [he] was seen with a bat both before and immediately after the murder, and the fact that [he] had injuries on his hands that were consistent with having been in a physical altercation.

People v. Lewis, Op. and Order Denying Deft's Mot. for Relief from J., p. 6, No. 2000-0171-FC (Kalamazoo Cty Cir. Ct. Mar. 30, 2015) (citations to the record omitted).

This Court agrees with the trial court that, in light of this other evidence, Petitioner was not prejudiced by his trial attorney's failure to procure an expert witness on identification, because the outcome of the trial would not have been different with that witness. Therefore, Petitioner's claim lacks merit, and he is not entitled to reconsideration or relief from the judgment in this case.

2. Trial Counsel and the Failure to Impeach Witnesses

Petitioner's other claim about trial counsel is that counsel failed to take adequate steps to impeach prosecution witnesses with their criminal records. According to Petitioner, Gail Johnson had a prior conviction for first-degree retail fraud, and Donald Garland had prior convictions for conspiracy to commit false pretenses and attempted uttering and publishing. *See* Mem. of Law in Support of Pet. for Writ of Habeas Corpus, docket no. 3, pp. 25-26. Trial counsel did not attempt to impeach Garland with his criminal history, and when he attempted to impeach Johnson with her prior conviction, the trial court did not allow the cross-examination because defense counsel had

failed to comply with a pretrial order requiring motions for impeachment evidence to be filed no later than the first day of trial.

Even if defense counsel had impeached Johnson and Garland with their prior convictions, there is not a reasonable probability that the outcome of the trial would have been different because there was substantial evidence implicating Petitioner in the murder, apart from the testimony of Johnson and Garland. *See* Section II.C.1 above. As Judge Zatkoff stated in his dispositive opinion, "[t]he omitted [impeachment] evidence did not 'create[] a reasonable doubt that did not otherwise exist,' given Petitioner's admissions to close friends and relatives that he killed a man." Op. and Order Denying Habeas Corpus Pet, docket no. 41, pp. 18-19 (first alteration added, second alteration in original). Thus, Petitioner's claim lacks merit, and he is not entitled to reconsideration or relief from judgment.

III. Conclusion

Petitioner has not persuaded the Court that it made a palpable error when it denied his motion to amend his habeas petition and his motion to re-open this case. Accordingly, the "Petition for Panel Rehearing" (document no. 62) is denied.

IT IS SO ORDERED.

Dated: August 8, 2019

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN A. LEWIS,

Petitioner,

v.

Case No. 2:04-cv-71140
Honorable Sean F. Cox

DOUG VASBINDER,

Respondent.
_____/

OPINION AND ORDER GRANTING PETITIONER'S MOTION TO AMEND HIS RULE 60(b) MOTION (Docket No. 60) AND DENYING PETITIONER'S MOTIONS FOR WAIVER OF FEES AND COSTS (Docket No. 56), FOR LEAVE TO AMEND HIS HABEAS PETITION (Docket No. 57), TO RE-OPEN THIS CASE (Docket No. 58), AND FOR APPOINTMENT OF COUNSEL (Docket No. 59)

I. Background

This is a habeas corpus action under 28 U.S.C. § 2254. Following a bench trial in the year 2000, Petitioner was found guilty of first-degree, premeditated murder, Mich. Comp. Laws § 750.316(1)(a), and sentenced to life imprisonment without the possibility of parole. The conviction arose from

> the 1980 beating death of Cornell Smith. The incident occurred at about 10:30 p.m. on July 31, 1980 on the grounds of the Woodward School in Kalamazoo County. Witnesses saw two cars pull up to the school. The assailant got out of one car and approached the other car. An argument ensued, during which the assailant returned to his car and retrieved a baseball bat. The driver of the second car subsequently drove off, leaving the victim, who had been his passenger. The assailant chased the victim, and, according to witnesses, inflicted a fatal blow to the victim's head with a full swing of the bat.

People v. Lewis, No. 230887, 2002 WL 31957700, at *1 (Mich. Ct. App. Dec. 27, 2002). The Michigan Court of Appeals affirmed Petitioner's conviction, *see id.*, and on November 24, 2003, the Michigan Supreme Court denied leave to appeal. *See People v. Lewis*, 671 N.W.2d 880 (Mich. 2003) (table).

Petitioner commenced this action in 2004. (Docket No. 1). The State moved for summary judgment and dismissal of the petition on the basis that Petitioner had not exhausted state remedies for his claims that his trial attorney (1) failed to properly pursue the services of an expert witness on eyewitness identification and (2) waived his right to impeach two witnesses with their prior convictions. (Docket No. 11). Petitioner disagreed with the State's argument regarding exhaustion of state remedies, but he stated in a response to the State's motion that, if the Court agreed with the State's argument, he was willing to delete the unexhausted claims and proceed with his exhausted claims. (Docket No. 30).

Former United States District Judge Lawrence P. Zatkoff was assigned to the case. He agreed with the State that Petitioner did not exhaust state remedies for his claims that trial counsel failed to take adequate steps to impeach prosecution witnesses and to obtain an expert witness on identification. (Docket No. 33). However, because Petitioner had agreed to delete those claims so that the court could proceed with his other claims, Judge Zatkoff adjudicated Petitioner's exhausted claims and denied the petition on the merits. (Docket No. 41). The United States Court of Appeals for the Sixth Circuit subsequently denied a certificate of appealability. *See Lewis v. Vasbinder*, No. 07-2265 (6th Cir. June 6, 2008).

In 2009, Petitioner filed a motion for relief from judgment, claiming that the state prosecutor committed a fraud on the state and federal courts by misleading the courts into believing that probable cause existed for Petitioner's arrest. (Docket No. 52). Judge Zatkoff transferred the motion to the Sixth Circuit Court of Appeals as a second or successive petition. (Docket No. 53).[1] The Sixth Circuit denied Petitioner's motion for authorization to proceed with a second or

[1] Under 28 U.S.C. § 2244(b), a habeas petitioner who seeks to file a second or successive petition must first seek and obtain authorization from the appropriate court of appeals before filing a second or successive petition in the district court. 28 U.S.C. § 2244(b)(3)(A).

successive petition. *See In re Lewis*, No. 09-1670 (6th Cir. Nov. 24, 2009). Petitioner filed two additional motions for authorization to file a second or successive petition, but the Sixth Circuit denied both motions. *See In re Lewis*, No. 11-1658 (6th Cir. Sept. 12, 2011); *In re Lewis*, No. 12-2446 (6th Cir. May16, 2013).

In 2014, Petitioner filed a motion for relief from judgment in the state trial court. He claimed that his trial attorney was ineffective because the attorney (1) failed to impeach two prosecution witnesses with their criminal histories and (2) failed to ask the trial court for additional funds for an expert witness on eyewitness identification. Petitioner also argued that appellate counsel was ineffective for failing to raise the issues about trial counsel on appeal.

The trial court determined that it was precluded from adjudicating Petitioner's claim about trial counsel's failure to impeach prosecution witnesses with their criminal histories because, in the court's opinion, the issue was decided against Petitioner on appeal. The trial court adjudicated Petitioner's other claim about trial counsel on the merits and concluded that Petitioner was not prejudiced by counsel's failure to procure an expert witness. The court stated that, even if the expert witness had been able to testify and discredit the eyewitnesses' testimony, there was plenty of other evidence to implicate Petitioner in the crime and, therefore, the outcome of the trial would not have been different. The trial court also found no merit in Petitioner's claim about appellate counsel. *See People v. Lewis*, No. 2000-0171-FC (Kalamazoo Cty. Cir. Ct. Mar. 30, 2015).

The Michigan Court of Appeals denied leave to appeal the trial court's decision for failure to establish entitlement to relief under Michigan Court Rule 6.508(D). *See People v. Lewis*, No. 328472 (Mich. Ct. App. Sept. 29, 2015). On July 26, 2016, the Michigan Supreme Court likewise denied leave to appeal under Rule 6.508(D). *See People v. Lewis*, No. 152662 (Mich. Sup. Ct. July 26, 2016).

In 2017, Petitioner filed another habeas corpus petition. He claimed to have new reliable evidence from an expert witness who could discredit the eyewitnesses' testimony. He asserted that his trial attorney was ineffective for (1) not informing the trial court that the expert witness had requested additional funds to cover his costs and (2) not conducting an adequate cross examination of prosecution witnesses regarding their prior convictions. Petitioner also claimed that appellate counsel was ineffective for failing to raise obvious and significant issues on appeal.

The 2017 case was assigned to United States District Judge Paul D. Borman, who transferred the petition to the Sixth Circuit as a second or successive petition. *See Lewis v. Haas*, No. 2:17-cv-10734 (E.D. Mich. Mar. 9, 2017). The Sixth Circuit denied Petitioner's motion for leave to file a second or successive petition. *See In re Lewis*, No. 17-1253 (6th Cir. July 19, 2017).

Now before the Court are Petitioner's motions to re-open this case and to amend his petition. Petitioner also has asked the Court to appoint counsel for him, to grant permission to amend his Rule 60(b) motion, and to waive payment of the fees and costs for his motions. The motions to re-open this case and to amend the petition seek to have the Court adjudicate Petitioner's claims that trial counsel was ineffective for failing to (1) alert the trial court that the defense expert needed additional funds to cover his costs and (2) impeach two prosecution witnesses with their criminal histories. Petitioner alleges that Judge Zatkoff erred when he determined that Petitioner had not exhausted state remedies for these claims.[2]

[2] Although a Rule 60(b) motion that attacks a district court's previous resolution of a claim on the merits must be treated as a successive habeas petition, Petitioner is challenging Judge Zatkoff's failure to adjudicate the merits of his two claims about trial counsel. For this reason, the Court is not treating Petitioner's Rule 60(b) as a second or successive habeas petition. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (concluding that a Rule 60(b)(6) which attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings, is not a second or successive petition; *id.* at 538 (holding that a Rule 60(b)(6) motion which challenges only the District Court's failure to reach the merits of a claim does not warrant treating the motion as a

II. Discussion

A. The Motion for Waiver of Fees and Costs (Docket No. 56)

Petitioner has asked the Court to waive all fees and costs for his pending motions because he is indigent. The Court, however, does not assess a filing fee for motions. Accordingly, the motion to waive fees and costs is denied as unnecessary.

B. The Motion to Amend the Rule 60(b) Motion (Docket No. 60)

In his motion to amend the Rule 60(b) motion, Petitioner states that he wants to amend his Rule 60(b) motion to correct a clerical error in the motion and to replace a page in the motion. According to Petitioner, the correction is necessary to show that he is filing his Rule 60(b) motion under Federal Rule of Civil Procedure 60(b)(4) and (6).

The motion is granted. Although the Court cannot replace a page in a document that has been filed and docketed, the Court agrees to treat the Rule 60(b) motion as filed under Rule 60(b)(4) and (6).

C. The Motion for Appointment of Counsel (Docket No. 59)

Petitioner has asked the Court to appoint counsel for him to assist him with his motions. He states that he is indigent, that he is untrained in the law, and that he has a limited education.

There is no right to appointment of counsel in a collateral attack on a conviction, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), and the interests of justice do not require appointment of counsel in this case. 18 U.S.C. § 3006A(a)(2)(B). Accordingly, the Court denies Petitioner's motion for appointment of counsel.

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successive habeas petition and can be ruled on by the District Court without precertification by the Court of Appeals under § 2244(b)(3)).

D. The Motion to Re-Open this Case (Docket No. 58) and to Amend the Petition (Docket No. 57)

As noted above, Petitioner seeks to re-open this case under Federal Rule of Civil Procedure 60(b)(4) and (b)(6). He also wants to amend his petition to include his claims that trial counsel was ineffective for failing to (1) impeach two prosecution witnesses with their criminal histories and (2) ask the trial court for additional funds for an expert witness on eyewitness identification.

Rule 60(b) authorizes federal courts to relieve a party from a final judgment "when the judgment is void," Fed. R. Civ. P. 60(b)(4), and for "any other reason that justifies relief," Fed. R. Civ. P. 60(b)(6). Such motions, however, "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1).

Petitioner is seeking to re-open a case that was closed over ten years ago. Although he contends that, since then, he has exhausted state remedies for the two claims that Judge Zatkoff declined to review, Petitioner could have offered to do that in 2004 when the State argued that the claims were not exhausted. Instead, he agreed to dismiss the claims, and in subsequent years, he failed to reassert the claims. The Court, therefore, concludes that Petitioner's 60(b) motion, which he filed in 2018, was not filed within a reasonable time.

Furthermore, even though leave to amend a pleading should be freely given "when justice so requires," Fed. R. Civ. P. 15(a)(2), a court is not required "to give leave if doing so would be futile, such as when the amended complaint cannot survive a motion to dismiss." *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905, 917 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2582 (2018). Petitioner's claims about trial counsel probably would not survive a motion to dismiss due to the expiration of the one-year statute of limitations for habeas petitions. *See* 28 U.S.C. § 2244(d).

Petitioner attempts to bypass the statute of limitations by arguing that his claims relate back to the date of his original petition. Under Federal Rule of Civil Procedure 15(c)(1), "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . ." Thus, in habeas cases, amendments made after the statute of limitations has run relate back to the date of the original pleading if the original and amended pleadings arose from the same conduct, transaction, or occurrence. *Mayle v. Felix*, 545 U.S. 644, 655-56 (2005) (citing Rule 15(c)(2)). "So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Id.* at 664.

Even if the Court were to assume that Petitioner's claims about trial counsel arise from conduct, a transaction, or an occurrence set out in his initial petition, this case is closed, unlike *Mayle* where the petitioner moved to amend a pending habeas petition. The "relation back" doctrine does not apply because there is no pending petition to which the amendment can relate back. *See Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000) (citing *Jones v. Morton*, 195 F.3d 153, 160–61 (3d Cir. 1999), and *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999)); *Raspberry v. Garcia*, 448 F.3d 1150, 1155 (9th Cir. 2006). As explained in *White v. Dingle*, 616 F.3d 844 (8th Cir. 2010),

> [t]here are persuasive theoretical and practical justifications for this outcome. . . . From a practical standpoint, permitting relation-back risks "eviscerat[ing] the AEDPA limitations period and thwart[ing] one of AEDPA's principal purposes," which was to expedite federal habeas review. *Graham v. Johnson*, 168 F.3d 762, 780 (5th Cir. 1999). Courts rightly fear that permitting relation-back would allow petitioners to use an original petition as a placeholder, thereby indefinitely tolling the statute of limitations. The end result of such an approach would be an exception that threatens to swallow the entire rule.

Id. at 847. The Court concludes that it is not required to permit Petitioner to re-open and amend his initial petition.

III. Order

For the reasons given above, the Court

- denies as unnecessary the motion for waiver of all fees and costs for the pending motions (docket no. 56);
- grants the motion to amend the Rule 60(b) motion (docket no. 60);
- denies the motion for appointment of counsel (docket no. 59);
- denies the motion to re-open this case (docket no. 58); and
- denies the motion to amend the petition (docket no. 57).

Finally, the Court declines to issue a certificate of appealability on Petitioner's Rule 60(b) motion, because Petitioner has not demonstrated that jurists of reason would disagree with the Court's resolution of his constitutional claims or that the issues presented deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

IT IS SO ORDERED.

Dated: January 14, 2019

s/ Sean F. Cox
Sean F. Cox
United States District Judge

I hereby certify that on January 14, 2019, the document above was served on counsel of record via electronic means and upon Martin A. Lewis via First Class Mail at the address below:

Martin Lewis
138477
SAGINAW CORRECTIONAL FACILITY
9625 PIERCE ROAD
FREELAND, MI 48623

I hereby certify that the foregoing is a true copy of the original on file in this Office.
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY: _____ Deputy

s/J. McCoy
Case Manager

APPENDICES FROM MICHIGAN LOWER COURTS

IN THE FOLLOWING ORDER

I. Order of the Michigan Supreme Court in People v. Lewis, ____ Mich. ____ (Docket No. 152662, July 26, 2016)

J. Order of the Michigan Court of Appeals in People v. Lewis, ____ Mich.App. ____ (Docket No. 328472, Sept. 29, 2015)

K. Opinion and Order in the Kalamazoo Circuit Court in People v. Lewis, LC No. 2000-0171-FC (Mar. 30, 2015)

L. Order of the Michigan Supreme Court in People v. Lewis, 671 NW2d 880 (2003)

M. Opinion and Order of the Michigan Court of Appeals in People v. Lewis, ____ Mich.App. ____ (Docket No. 230887, WL 31957700 (Dec. 27, 2000)

Additional material from this filing is available in the Clerk's Office.