STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

CHARLES LEWIS,

Defendant.,

No. 76-005890-01-FC
Hon. Qiana Lillard 76-005890-01-FC

THOMAS DAWSON (P40984)
NATAYAI SCOTT (P78816)
Assistant Prosecuting Attorney
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CHARLES LEWIS #150709
In Propria Persona
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

RESPONSE TO DEFENDANT'S OBJECTIONS TO THE NOVEMBER 11, 2016 ORDER ISSUED BY THE HONORABLE QIANA LILLARD

NOW COME the People of the State of Michigan, by KYM L. WORTHY, Prosecuting Attorney for the County of Wayne, and in response to Defendant's Objections to the November 11, 2016 Order Issued by the Honorable Qiana Lillard state:

1. On July 18, 1977, in a jury trial before Judge Joseph Maher, Defendant was convicted of First Degree Murder. Defendant was 17 years old at the time he committed this crime.

2. On July 27, 1977, Judge Maher sentenced the Defendant to mandatory life in prison without the possibility of parole.

3. On July 22, 2016, in accordance with *Miller v. Alabama*[1] and MCL 769.25a(4)(b), the People filed a motion with this Court seeking to impose a sentence of imprisonment for life without the possibility of parole for this Defendant.

4. On October 21, 2016, Valerie Newman, Defendant's former attorney, filed a motion to sentence Defendant to a term of years. In said motion, Defense counsel petitioned the court to dismiss the People's motion to sentence Defendant to life imprisonment without the possibility of parole, arguing that since portions of Defendant's original trial file had been lost, Defendant was entitled to be sentenced to a term of years or in the alternative to have his case dismissed.

5. On November 11, 2016, Judge Qiana Lillard held that the case law Defense Counsel submitted was unpersuasive to grant the requested relief. This Court held that it would not be reevaluating the validity of the Defendant's conviction, but instead would be resentencing Defendant in light of *Miller,* MCL 769.25 and 769.25a.

6. On June 23, 2017, the Defendant filed a document entitled "Objections to the November 11, 2016, Order Issued by the Honorable Qiana Lillard" and "Memorandum of Law in Support" of said Objections.

7. For the reasons stated in the attached brief, the Defendant's "Objections" should be denied.

[1] 132 S. Ct. 2455; 183 L. Ed. 407 (2012).

WHEREFORE, the People respectfully request that the Court deny Defendant's Objections and Defendant's Request for Immediate Relief from Prison because he has not demonstrated that he is entitled to said relief.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

By:_____
Thomas L. Dawson, Jr. (P40984)
Natayan T. Scott (P78816)
Assistant Prosecuting Attorney

Dated: September 11, 2017

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PEOPLE'S BRIEF IN OPPOSITION TO DEFENDANT'S OBJECTIONS TO THE NOVEMBER 11, 2016 ORDER ISSUED BY THE HONORABLE QIANA LILLIARD

On July 30, 1976, Defendant shot and killed off-duty Detroit police officer Gerald Spitkowski. Based on the Defendant's actions of July 30, 1976, the People charged the Defendant with one count of First Degree Murder. On July 18, 1977, in a jury trial before Honorable Joseph Maher, Defendant was convicted of First Degree Murder. On July 27, 1977, Judge Maher sentenced the Defendant to life in prison without the possibility of parole. At the time the Defendant murdered Officer Spitowski, he was 17 years old.

On March 4, 2014, MCL 769.25a (2014) (Public Act 22) was enacted in response to the U.S. Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455; 183 L. Ed. 407 (2012). *Miller* held that juveniles cannot be sentenced to life without parole absent an individualized sentencing hearing. On January 25, 2016, the U.S. Supreme Court gave *Miller* retroactive effect for juveniles sentenced to mandatory life imprisonment without parole in its decision in *Montgomery v. Louisiana*, __ US __; 136 S Ct 718 (2016). In light of *Miller, Montgomery*, and MCL 769.25a, the prosecution filed a motion requesting that this Court conduct a hearing and continue the Defendant's sentence of imprisonment for life without the possibility of parole.

Defendant, through his prior attorney, filed various motions in this case requesting this Court to: 1) recuse itself and send the case to Judge Ewell, Judge Thomas, or Judge Chylinski; 2) dismiss his case since portions of his original case file are missing; or 3) grant him a term of years sentence because a portion of the court file was lost. On November 11, 2016, this Court denied the Defendant's motions and ordered the parties and the court clerk to recreate the Defendant's trial court file. Pursuant to that order, the parties and the court clerk recreated, to the best of their abilities, the Defendant's trial court file. On June 23, 2017, the Defendant filed a document entitled "Objections to the November 11, 2016, Order Issued by the Honorable Qiana Lillard" and "Memorandum of Law in Support" of said Objections. For the reasons stated below, the Defendant's "Objections" should be denied.

I. No Error is Committed By Having Successor Judge Qiana Lillard Preside Over Defendant's Resentencing Hearing

A "defendant is entitled both to be sentenced by the trial judge, and to have his post conviction motion for new trial predicated on the great weight of the evidence, adjudicated by

the trial judge, the only judicial officer with knowledge and appreciation of the relevant credibility of witnesses and other extra-record aspects of the trial." *People v. Bart*, 220 Mich. App. 1, 8 (1996) quoting *People v. McCline*, 442 Mich. 127, 131, 499 N.W.2d 341 (1993). Here, Defendant claims that he is entitled to have his case heard before Judge Edward Ewell, who was the last judge to review the files and records in this case. However, *Bart* held that a judge generally cannot complete a duty begun by his predecessor if that duty entails exercise of judgment, and application of legal knowledge to, and judicial deliberation of, facts only known by the predecessor. *McCline*, at 133. The rule is designed to prevent substitution of a judge in the midst of a trial after evidence has been adduced before the original judge. Defendant has misconstrued *Bart*. In this case, Defendant has already had a trial. He has already been sentenced. His appeals with regard to his conviction have been denied. At this stage, the court is not deciding whether or not to grant a new trial based on the weight of the evidence.

Judge Lillard's substitution does not offend *Bart* because her substitution did not occur as part of an ongoing trial or hearing. *Bart* prohibits substitution where the successor judge is not familiar with the prior testimony or evidence, and not in a position to give the accused a fair and impartial trial. *Id.* at 132. Since there has not been any testimony taken or any law applied by Judge Ewell or any previous judge that dealt with this case as to the resentencing of the Defendant, Judge Lillard's substitution is not a miscarriage of justice.

Further, MCL 769.25a specifically states that the determination of imprisonment for life without parole eligibility or a term of years "shall be made by the sentencing judge or his or her successor." MCL 769.25a(3). Approximately forty (40) years ago, Judge Maher presided over the jury trial in which the Defendant was found guilty of First Degree Murder. Judge Maher sentenced the Defendant to life in prison without the possibility of parole. Judge Lillard is Judge

Maher's successor. Pursuant to MCL 769.25a(3), Judge Lillard shall preside over the hearing to determine whether the Defendant's life sentence is continued or whether he is entitled to a term of years sentence.

II. Defendant Has Not Established a Reason to Reconsider the Court's November 11, 2016 Order

On September 26, 2016, Defendant filed a Motion to Dismiss based on portions of his court file being lost. Defendant argued that the loss of his court file required the dismissal of his case or mandated a term of year's sentence. On November 11, 2016, this Court issued an order and opinion in which it denied Defendant's relief stating that it was "unpersuaded by the case law cited by Defendant because those cases involve situations where records were missing or the accuracy of transcripts were called into question on direct appeal or collateral attack of a defendant's conviction or sentence."[2] In addition, this Court stated that since Defendant's sentence was already vacated based on the Michigan Supreme Court's decision, it was only tasked with holding a resentencing hearing, not reevaluating Defendant's conviction.

On June 23, 2017, Defendant filed a document entitled "Objections to the November 11, 2016, Order Issued by the Honorable Qiana Lillard" and "Memorandum of Law in Support" of said Objections. Defendant argued that the case the Court cited in support of its denial, *Newton v. Newton,*[3] was no longer good law. The People disagree. While the case law maybe antiquated, the case has not been overturned and is still good law.

For reasons stated in the Court's Order, the People see no reason for this Court to depart from or change its decision. As such, the People assert that the Order is valid and should stand.

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[2] See page 5 of This Court's "Order and Opinion Denying Defendant's Motion to Dismiss and Motion to Sentence to a Term of Years" dated November 11, 2016.
[3] 166 Mich 421, 426 (1911).

Furthermore, Defendant failed to raise his objections in a timely manner. MCR 7.105(A)(2) states:

> An application for leave to appeal must be filed with the clerk of the circuit court within 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, *or a motion for other relief from the judgment, order, or decision*, if the motion was filed within: a) the initial 21-day period, or b) such further time as the trial court or agency may have allowed during that 21-day period.

Here, Defendant filed his objections on June 23, 2017; over seven (7) months after Judge Lillard issued her decision. Since Defendant did not ask for reconsideration or file an appeal in the proper twenty-one (21) day time frame, his "objections" are untimely and should be dismissed.[4]

III. Judge Lillard's Order to Recreate the Trial Court File is Valid

As previously mentioned, on June 23, 2017, Defendant filed a document objecting to Judge Lillard's Order. In said document, Defendant's objections to Judge Lillard's Order include opposition to his trial file being recreated. The most notable objection is found in section "I" which reads:

> The file does not contain a copy of the transcript of proceedings held on April 3, 2000, before the Honorable Gershwin A. Drain.[5]

The United States Sixth Circuit Court of Appeals denied Defendant's application for a certificate of appeal ability. In its decision, the Sixth Circuit noted:

> "In 2011, Defendant filed a motion for state-post conviction relief, claiming that the trial court had entered an order on April 3, 2000, dismissing his conviction and sentence. The matter was heard before the Honorable Gershwin A. Drain, who denied the motion on the basis that the order and record of actions that Defendant submitted in support of his claim were fraudulent. Specifically, the trial court found that the signature on the order purporting to dismiss

[4] In this case, the 21 day time period to file a motion for reconsideration or to file an appeal expired on December 2, 2016.

[5] See page 7 of Defendant's response entitled "Objections to the November 11, 2016, Order Issued by the Honorable Qiana Lillard" and "Memorandum of Law in Support" of said Objections.

> [Defendant's] conviction and sentence—which appeared to be Judge Drain's—was a forgery and that a list of [Defendant's] state post-conviction actions showed that Judge Drain had never presided over any of [Defendants'] motions." *Lewis v. Hoffner,* US Court of Appeals, Sixth Circuit, April 7, 2017, No. 16-2226. Copy attached as Exhibit A.

Although this Court already granted an order for recreation of the file and in its November 11, 2016 decision denied Defendant's relief, the People must address the irony of Defendant's objections. Defendant asserts that there was a missing transcript of the proceedings held before Judge Drain. He further asserts that since these files are missing, dismissal of his case is warranted. However, Defendant has failed to state that the missing documents he speaks of were found to be fraudulent. He has come to this Court with unclean hands by asking it to consider fraudulent documents.

Further, Defendant claims that the documents used by his prior counsel, Valerie Newman, to assist in the recreation of the trial court file were subject to the attorney-client privilege. "Under Michigan law, the attorney client privilege attaches to both written and oral communication, but the scope of the privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice." *Augustine v. Allstate Insurance*, 292 Mich. App. 408, 420, 807 N.W.2d 77 (2011) quoting *Reed Dairy Farm v. Consumers Power Company*, 227 Mich. App. 614, 576 N.W.2d 709 (1998). Here, all documents supplied by Ms. Newman to the court to recreate the Defendant's trial court file were public documents; i.e. court orders, filed pleadings or transcripts. Ms. Newman did not turn over a single confidential communication between the Defendant and his attorney. The attorney client privilege does not apply to public documents. As such, Defendant's assertion that the recreation of his trial court file is the fruit of the poisonous tree is spurious and should be denied.

Aside from the fact that Defendant has tried to deceive this Court, his reasons against recreation of the file are without merit as the Court only has to follow the blueprint for resentencing set out in *Miller* and MCL 769.25 and 769.25a. As the Court has noted in its Order, these factors include the Defendant's youth, prior record, prison record, and the facts and circumstances surrounding his murder of Officer Spitkowski. The recreated file contains trial transcripts, including the one in which a jury found Defendant guilty of First Degree Murder, the sentencing transcript, various motions filed by the Defendant, and other documents. Based on the afore-mentioned factors, the recreated trial court file has the information necessary to assist this Court in reaching a decision pursuant to *Miller* and MCL 769.25 and 769.25a.

WHEREFORE, the People respectfully request this Honorable Court to deny Defendant's request for immediate release from prison.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

By:_____
Thomas L. Dawson, Jr. (P40984)
Natayai T. Scott (P78816)
Assistant Prosecuting Attorney

Dated: September 11, 2017

Exhibit

A

No. 16-2226

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES LEWIS,

Petitioner-Appellant,

v.

BONITA J. HOFFNER,

Respondent-Appellee.

ORDER

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

In 1977, a jury convicted Lewis—a juvenile at the time—of first-degree murder. The trial court imposed a mandatory life term of imprisonment without the possibility of parole. The Michigan Court of Appeals affirmed his conviction and sentence, and the Michigan Supreme Court denied leave to appeal. Lewis has since filed multiple state post-conviction motions. In 2011, Lewis filed a motion for state post-conviction relief, claiming that the trial court had entered an order on April 3, 2000, dismissing his conviction and sentence. The matter was heard by the Hon. Gershwin A. Drain, who denied the motion on the basis that the order and record of actions that Lewis submitted in support of his claim were fraudulent. Specifically, the trial court found that the signature on the order purporting to dismiss Lewis's conviction and sentence—which appeared to be Judge Drain's—was a forgery and that a list of Lewis's state post-conviction actions showed that Judge Drain had never presided over any of Lewis's motions. The Michigan Court of Appeals denied leave to appeal for lack of merit, and on February 17,

2010, the Michigan Supreme Court declined leave to appeal because Lewis's claim was raised in an unauthorized successive state post-conviction motion. *See* Mich. Ct. R. 6.502(G).

In 2012, Lewis sought state post-conviction relief in light of the Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that mandatory life imprisonment without the possibility of parole constitutes cruel and unusual punishment when imposed on those under the age of eighteen at the time of their crime. The trial court granted Lewis's motion for resentencing, but the Michigan Court of Appeals reversed the trial court's order, relying on state law that held that *Miller* was not retroactively applicable to cases on collateral review. *See People v. Carp*, 828 N.W.2d 685 (Mich. Ct. App. 2012). The Michigan Supreme Court initially denied leave to appeal, but on May 24, 2016, after that order was vacated by the United States Supreme Court, the Michigan Supreme Court vacated the Michigan Court of Appeals' order and remanded the matter to the trial court for resentencing in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

On March 2, 2015, Lewis, proceeding with the assistance of counsel, filed a habeas corpus petition pursuant to § 2254, claiming that he was entitled to resentencing under *Miller*. But after his habeas petition was filed, Lewis fired his counsel and submitted a letter requesting to be released from incarceration in light of the state court order that purportedly dismissed his conviction and sentence. The government filed a motion to dismiss, which the district court granted, reasoning that Lewis had already received resentencing relief, thereby mooting his *Miller* claim. The district court also concluded that the trial court had not made an unreasonable factual determination under 28 U.S.C. § 2254(d)(2) when it found that the order purportedly dismissing his conviction and sentence was fraudulent.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate 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 (2000).

Under the Antiterrorism and Effective Death Penalty Act, the district court may not grant habeas relief on a claim that was adjudicated on the merits in state court "unless the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' meaning Supreme Court precedent, or 'was based on an unreasonable determination of facts in light of the evidence presented' during the state court proceedings." *Railey v. Webb*, 540 F.3d 393, 397 (6th Cir. 2008) (quoting 28 U.S.C. § 2254(d)(1)-(2)). "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

Reasonable jurists would not debate the district court's rejection of Lewis's claims. The Michigan Supreme Court ordered that Lewis's sentence for first-degree murder be vacated and that his case be remanded to the trial court for resentencing—the precise relief that Lewis requested. *People v. Lewis*, 878 N.W.2d 479 (Mich. 2016) (mem.); *see Chafin v. Chafin*, 133 S. Ct. 1017 (2013); *Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993) (a case becomes moot when the requested relief is granted). In addition, Lewis has not presented any evidence, much less clear and convincing evidence, to rebut the presumption of correctness afforded to Judge Drain's factual findings regarding the fraudulent state-court order. *See* 28 U.S.C. § 2254(e)(1); *Skaggs v. Parker*, 235 F.3d 261, 266 (6th Cir. 2000). Absent clear and convincing evidence to the contrary, the state court's decision was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2). Reasonable jurists would not debate the district court's rejection of these claims.

Accordingly, we **DENY** Lewis's application for a COA.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk