STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **No. 75-007704**

RICKY RIMMER,
Defendant-Appellant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

KYM WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief of Research, Training,
and Appeals

DANIEL E. HEBEL (P73580)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 444-0529

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COUNTERSTATEMENT OF FACTS

On August 7, 1975, defendant and several accomplices—Larry Smith,[1] Gregory Smith, Darrell McDonel, Kenneth Crawford, and Timothy Jordan—attempted to rob Delta Motor Sales, a used car lot. During the robbery, Joseph Kratz, the owner of the car lot, was shot in the back and killed. Defendant was convicted of felony murder under the old statute and armed robbery.

Harry Wilkie, Sr. was a commuter driving to work around 4:00 p.m. on VanDyke Avenue at the time of the murder. He was in heavy rush-hour traffic heading southbound.[2] A man—the victim—staggered out into traffic directly in front of Wilkie's vehicle causing him and the other traffic to break.[3] The victim was holding his left side with his right hand.[4] Wilkie heard the man moan. Wilkie stopped his car and opened his door with the intention of giving the victim aid.[5] Another person pursued the victim, coming from the same car lot the victim was fleeing.[6] The pursuer passed in front of Wilkie and he saw that the pursuer was carrying a silver hand gun.[7] Wilkie saw the man in court and identified defendant as the person who was holding the gun and pursuing the victim.[8] While the victim was unable to rise and turning blue, defendant

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[1] This brief will use "Smith" to discuss Larry Smith. If Gregory Smith is discussed, he will be referred to by his full name.
[2] T. 1/29/76, 31-32.
[3] T. 1/29/76, 32-33.
[4] T. 1/29/76, 33.
[5] T. 1/29/76, 34.
[6] T. 1/29/76, 34.
[7] T. 1/29/76, 34
[8] T. 1/29/76, 35.

held the gun on Wilkie and, with his other hand, searched the victim's pockets.[9] Defendant took some papers from the victim's front chest pocket.[10] Defendant walked towards Wilkie and, still holding the gun, defendant said, "You give me any trouble you S.O.B., I'll kill you."[11] Defendant then fled the scene.[12]

At trial, McDonel testified as to everyone's involvement. According to the plan, McDonel was supposed to have physically robbed Kratz.[13] Instead, he heard a gunshot and saw Kratz run out onto VanDyke Avenue.[14] McDonel saw defendant go out into the street, but lost sight of him.[15] McDonel heard Smith ask defendant "did he get the money?"[16] McDonel testified that he saw defendant chase the victim into the street.[17] He also admitted that he had told the police that defendant was the shooter and that his statement indicated that he saw defendant shoot at the victim, but claimed he had lied.[18] When they were fleeing, laying down in a getaway car, Smith asked if anyone got the money. McDonel said that it sounded like defendant said, "yeah."[19]

Larry Smith, who had previously testified at the preliminary examination, changed his mind at trial. Initially, he accused himself of

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[9] T. 1/29/76, 36, 38-39.
[10] T. 1/29/76, 38-39.
[11] T. 1/29/76, 42.
[12] T. 1/29/76, 42.
[13] T. 2/3/76, 180.
[14] T. 2/3/76, 181.
[15] T. 2/3/76, 182-85.
[16] T. 2/3/76, 185.
[17] T. 2/3/76, 203-04.
[18] T. 2/3/76, 202.
[19] T. 2/3/76, 207.

providing false testimony. After consulting with an attorney, Smith refused to testify based on his Fifth Amendment right to remain silent. Smith's preliminary examination testimony, which echoed the other testimony, was read into the record.[20] On appeal of a denied petition for federal habeas corpus, the Sixth Circuit Court of Appeals opined that Smith's recorded testimony was improperly entered into the record but that did not result in prejudice, because the evidence was cumulative.[21]

[20] T. 2/5/76, 404-449.
[21] *Rimmer-Bey v Foltz*, 917 F2d 25 (CA 6, 1990).

ARGUMENT

I.

To receive relief based on a claim of newly discovered evidence, a defendant must show that the new evidence makes a different result probable on retrial. Here, forty-five years after trial, defendant got two of his coconspirators to sign affidavits that he was not involved in the murder, despite having been identified by a lay witness as the person who chased and robbed the victim. Defendant is not entitled to relief, because a retrial would probably not have a different result.

Statement of Procedure

Defendant filed in pro per and argued the bulk of his pleading under the wrong procedure and standards. Defendant filed a motion for a new trial and argued the case under the standards of a writ for federal habeas relief. Federal habeas relief has already been denied. Likewise, defendant is far past the time wherein he may file a motion for new trial.

Specifically, defendant claims that MCL 770.1 entitles him to file a motion for new trial. Defendant is mistaken. The very next section of the statutory text, MCL 770.2, confines motions for new trials to "within 60 days after entry of the judgment."[22] The required timeline for the filing of motions for relief from judgment is further elaborated—and expanded—in the Michigan Court Rules. Specifically, MCR 6.431 allows for a motion for a new trial to be filed within the time given for the timely filing of the appellant/defendant's brief on direct appeal.[23] The

[22] MCL 770.1.
[23] MCR 6.431(1).

defendant may likewise file a motion for a new trial after receiving a grant of remand from the Court of Appeals during the pendency of defendant's direct appeal.[24] Finally, a defendant who fails to file a timely appeal or files an application for leave to appeal may have the full six months after the order of conviction, in which to file a motion for new trial.[25] It is utterly indisputable that defendant's conviction occurred more than six months ago.

As defendant is not entitled to file a motion for new trial under MCL 770.1 and 2 and MCR 6.431(1)-(3), the following portion of the court rules applies: "If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500." MCL 6.501 says::

> Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

Accordingly, the structure of both the statute and the court rules provide clear options delineated by the time in which a defendant is initiating the proceeding. Motions for new trial are only available during that time immediately after the trial and prior to the deadline of the direct appeal. After the time for a direct appeal expires, a defendant may no longer file a motion for a new trial. Nevertheless, at that point a defendant receives the ability to file a motion for relief from judgment. This requirement as to which form the motion takes is not optional or

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[24] MCR 6.431(2).
[25] MCR 6.431(3).

subject to defendant's whims. Likewise, the court rules do not conflict with the statute, in fact the court rules provide more time to file the motion for relief from judgment than does the statute.

Notably, this is not the first time a defendant has tried to use MCL 770.1 and MCL 770.2 to skirt the requirement to comply with the standards of a motion for relief from judgment. In the unpublished case of *People v Swain*, the Court of Appeals held a defendant cannot file a motion for a new trial under MCL 770.1 and MCL 770.2 after his time to file that motion had expired according to the court rules.[26] Similarly, in *People v Kincade,* the Court of Appeals held that motions for a new trial made after the expiration of the availability of a direct appeal could only be reviewed under the standards of a motion for relief from judgment.[27]

Accordingly, defendant may not file a motion for a new trial. Instead, defendant has filed a successive motion for relief from judgment. The People will answer defendant's motion and brief as though made and argued under the proper standards for a motion for relief from judgment.

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[26] Appendix 1, *People v Swain*, unpublished opinion of the Court of Appeals, issued February 5, 2015 (Docket No. 314564), 2015 WL 521623, p *6, reversed on different grounds by appeal *People v Swain*, 499 Mich 920 (2016).

[27] See *People v Kincade*, 206 Mich App 477, 482 (1994).

> Defendant's postappeal motions for a new trial, all of which were filed more than eighteen months after the original sentencing date... were reviewable only as motions for relief from judgment pursuant to MCR 6.501 *et seq*.

Standard of Review

Defendant has filed a motion that may only be reviewed as a motion for relief from judgment. Defendant has already filed multiple motions for relief from judgment. Only one motion for relief from judgment is allowed according to MCR 6.502(G)(1). Accordingly, defendant must first show that he falls into one of the exceptions listed in MCR 6.502(G)(2) or his motion will be dismissed. Defendant failed to argue that his motion falls into any of the required exceptions. As defendant's motion was made in pro per, the People will continue the analysis.

The only potentially applicable exception is that of MCR 6.502(G)(2)(b), which allows for a subsequent motion for relief from judgment based on "a claim of new evidence that was not discovered before the first such motion was filed." The affidavits of both recanting witnesses were signed in 2021, after the conclusion of defendant's previous successive motion for relief from judgment. The People have been unable to obtain defendant's file. Accordingly, it is unknown whether the information in these affidavits qualifies as newly discovered evidence.

A defendant's proper claim of newly discovered evidence is scrutinized according to MCR 6.508(D)(3).[28] The defendant bears the burden of showing "good cause" and "actual prejudice."

Any admissible newly discovered evidence is evaluated under the test established in *People v Cress*:

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[28] MCR 6.508(D)(3).

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.[29]

The Michigan Supreme Court case of *People v Johnson* both clarified the *Cress* rule and broadened the scope of information that a court could consider when determining whether a new trial should be granted based on newly discovered evidence.[30] *Johnson* clarified the fourth prong of the *Cress* test by bifurcating the test into two parts: "In order to determine whether newly discovered evidence makes a different result probable on retrial, a trial court must first determine… whether a *reasonable juror* could find the testimony credible on retrial."[31] That does not mean, however, that the burden rests on the People to show that defendant's evidence is false. Defendant still bears the burden to show that a reasonable juror would find the testimony credible. It is a "reasonable juror" standard, not an "any juror" or a "defendant friendly juror" standard. Rather, it simply means that the trial court should objectively consider how potential juries will view the evidence, rather than decide credibility based on subjective considerations that are permissible when the trial court is the finder of fact at a trial. *Johnson* also emphasized that the trial court must still decide credibility.

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[29] *People v Cress*, 468 Mich 678, 692 (2003) (citations and quotation marks omitted).
[30] *People v Johnson*, 502 Mich 541, 566–67 (2018)
[31] *Id.*

Specifically, the *Johnson* Court held, "The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked."[32] Likewise, the Court held that the credibility determination was placed in the hands of the lower court, "if the [trial] court is satisfied that, on a new trial, *such testimony would not be worthy of belief by the jury*, the motion should be denied."[33]

Discussion

Defendant's pro per motion is a combination of arguments based on speculation and conspiracy theories mixed with the discussion of two affidavits presenting alleged newly discovered evidence. Defendant is not entitled to relief based on his own speculation or his concocted conspiracy theories.

The legal question at the heart of this motion is whether defendant deserves relief based on the affidavits of two of his friends and coconspirators, Darrell McDonel and Timothy Jordan.

Neither of these affidavits—wherein defendant's coconspirators are now working together to try to get him out of prison—are remotely trustworthy. Recantation testimony, even when the circumstances do not make it clearly incredible, has long been viewed as inherently untrustworthy. "Where such newly discovered evidence, however, takes the form of witnesses' recantation testimony, it has been traditionally

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[32] *Johnson*, 502 Mich at 567 quoting *Connelly v United States*, 271 F2d 333, 335 (CA 8, 1959).

[33] *People v Johnson*, 502 Mich 541, 578 (2018) (cleaned up) quoting *People v Van Den Dreissche*, 233 Mich. 38, 46 (1925).

regarded as suspect and untrustworthy."[34] While quoting the Michigan Supreme Court, the Court of Appeals held that "There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character."[35]

Not only is the nature of the recantation untrustworthy, so is the waiting period. Defendant was convicted in 1976. Both McDonel and Jordan provided affidavits in 2021. Thus, these two witnesses waited *forty-five years* before suddenly remembering that defendant was not involved in the robbery. That type of wait does not favor memory, it favors manufacture. Furthermore, these are not outside witnesses. The outside witness who remembered seeing defendant chase the victim with a gun and search through his pockets never recanted. Rather, the two affiants are defendant's friends—those same individuals who helped him commit the murder—who now want to see him freed of responsibility for the crime. There is nothing credible or believable about either affidavit.

Furthermore, most of the information provided in the affidavits is inadmissible. McDonel and Jordan both provide affidavits that are weak on facts but strong on inadmissible hearsay. McDonel's affidavit contains only completely inadmissible hearsay, aside from points 12-14. Jordan's affidavit contains slightly more substance and parts of points

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[34] *People v Canter*, 197 Mich App 550 at 559 (1992).
[35] *Id* at 559–60; quoting *People v Van Den Dreissche*, 233 Mich 38, 46 (1925); quoting *People v Shilitano*, 218 NY 161, 170 (1916).

1, 3, and 6-9 could be admissible, with the rest excluded as inadmissible hearsay. Ultimately, the only things that the McDonel and Jordan affidavits establish is that defendant's coconspirators are now trying to get him out of prison by claiming he was not present.[36]

But defendant's presence was established by Wilkie. Wilkie saw defendant chase and rob the dying victim. Further, defendant threatened Wilkie before he fled the scene. Nothing about the attempts of defendant's coconspirators to get him out can counter the simple fact that he was seen participating in the robbery and homicide by an outsider who was simply trying to help.

In light of Wilkie's testimony, defendant fails to show the fourth *Cress* factor, that "the new evidence makes a different result probable on retrial." The best that defendant can show is that his coconspirators are willing to commit perjury to try to get him out of prison.

Regardless, before either Jordan or McDonel admit to capital perjury on the record, both men should have the opportunity to consult with counsel.

Conclusion

Defendant is not entitled to relief. Defendant provides two affidavits, which mostly consist of inadmissible hearsay. The only portion of those that would be potentially admissible is the forty-five-year-late assertion by two of his coconspirators that he was not involved

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[36] The alleged conspiracy that the police wanted to go after defendant is constructed entirely of inadmissible hearsay.

in the murder. These witnesses are incredible. The delay is incredible. Their choreographed affidavits are incredible.

Furthermore, the affidavits are inadequate. Defendant was seen committing the robbery by a lay witness. Defendant is not entitled to a new trial based on his assertion of newly discovered evidence.

If this Court decides to hold an evidentiary hearing, both Jordan and McDonel should have a chance to consult counsel before they admit, on the record, to committing perjury.

II.

The People are only required to turn over material evidence under *Brady* and *Giglio*. Here, defendant complains that the People failed to disclose that two officers were acquitted of wrongdoing in unrelated cases. Defendant is not entitled to relief, because the information defendant discusses was inadmissible and immaterial.

Standard of Review

A defendant's proper claim of newly discovered evidence is scrutinized according to MCR 6.508(D)(3).[37] The defendant bears the burden of showing "good cause" for failing to raise the issue in a prior proceeding and "actual prejudice" arising from the issue at trial. On this issue, defendant fails both requirements.

Defendant's argument fails to show good cause for not raising this issue in prior pleadings because it relies on newspaper clippings that are decades old. Defendant could have raised this issue during any of his past motions or appeals. Accordingly, he has failed to show good cause for failing to raise this issue previously. Defendant cannot receive relief on an issue when he fails to show good cause for not previously raising that issue.

Discussion

Defendant has failed to allege or show good cause for failing to raise this issue in a prior pleading. This issue has been available—through publicly accessible sources—since the time of defendant's trial.

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[37] MCR 6.508(D)(3).

His failure to show "good cause" means that he cannot receive relief based on this issue.

Fortunately, defendant's failure to show good cause costs him little because this issue is meritless. Bizarrely, defendant is claiming that the People violated *Brady* and *Giglio* by failing to advise defendant that two of the police officers involved in his case were found not guilty in other, unrelated cases. Defendant clearly does not understand the purpose of *Brady* and *Giglio*.

The seminal case of *Brady v Maryland* stands for the proposition that the People may not suppress exculpatory material evidence.[38] The case of *Giglio v United States* simply expanded that concept to cover material evidence impacting a witness's credibility.[39] In any case where a defendant claims a *Brady* or *Giglio* violation, the first question is whether the evidence involved was "material." Evidence is material when its absence creates a trial that does not have a "verdict worthy of confidence."[40] In other words, material evidence must be able to impact the verdict of the trial. Accordingly, evidence that is inadmissible is not material under *Brady*.[41]

Attacking a witness's credibility through specific instances of conduct is explicitly disallowed under MRE 608(b). Furthermore, the exception found in MRE 609 is obviously inapplicable because it requires a conviction and the two specific instances of conduct that defendant is

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[38] *Brady v Maryland*, 373 US 83 (1963).
[39] *Giglio v United States*, 405 US 150 (1972).
[40] *People v Chenault*, 495 Mich 142, 157 (2014).
[41] See e.g. *Wood v Bartholomew*, 516 US 1 (1995).

discussing are acquittals. The mere fact that two officers involved in defendant's case were acquitted of charges in unrelated trials was not evidence of any kind in this case. Similarly, that evidence could not have been introduced to attack their character. Accordingly, the People did not suppress anything.

Furthermore, defendant's claim that McDonel was a police agent is made up by defendant out of whole cloth. Further, there was no suppression. Everything that happened between McDonel and the police was put on the record at trial. If defendant's attorney wanted to use it in any fashion, he could have done just that. But unlike defendant, trial counsel was educated in the law and understood that merely because one suspect agrees to call another suspect for the police, does not mean that first suspect magically becomes a police agent.

Defendant is not entitled to relief based on the People's failure to produce acquittal records or the made-up assertion that one of defendant's coconspirators was a police agent. Neither of these claims has any legal merit.

RELIEF

THEREFORE, the People request that this Honorable Court deny defendant's motion for relief from judgment.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief of Research, Training,
and Appeals

/s/ *Daniel E. Hebel*

DANIEL E. HEBEL (P73580)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 444-0529

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