

**THIRD JUDICIAL CIRCUIT COURT CRIMINAL DIVISION  
COUNTY OF WAYNE  
STATE OF MICHIGAN**

STATE OF MICHIGAN

HON. KEVIN J. COX  
Case No. 72-002229-02-FC

v

RICHARD PHILLIPS

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**OPINION AND ORDER GRANTING MOTION FOR RELIEF FROM JUDGMENT**

At a session of Court held at the Frank Murphy Hall of Justice  
in the City of Detroit, Wayne County, Michigan  
on: **8-8-2017**

This matter is before the Court on Defendant's renewed and supplemented motion for relief from judgment pursuant to MCR 6.500 *et seq.* The People filed a response and the Court held an evidentiary hearing. The Court has reviewed the pleadings, transcripts, and file and being otherwise fully advised in the premises, it is ordered that Defendant's motion is **GRANTED**.

**I. BACKGROUND**

Following a jury trial, Defendant Richard Phillips and his co-defendant, Richard Palombo, were found guilty of conspiracy to commit murder, MCL 750.157a, and first-degree premeditated murder, MCL 750.316, for the June 1971 death of Gregory Harris. On October 25, 1972 Defendant was sentenced to concurrent terms of life in prison for these convictions.

**A. Evidence at Trial**

According to the testimony of accomplice Fred Mitchell, in June 1971 Defendant Phillips and co-defendant Palombo met Mitchell at a bar and discussed killing Gregory Harris. Four days later, the men met at Mitchell's home and again discussed killing Gregory Harris. Three days after the meeting at Mitchell's home, Defendant and Palombo returned to Mitchell's home with another man named Pooch. Again, the men discussed the plan to kill Harris. Mitchell called Harris and asked him to meet the men at a local drug store on June 26, so they could go "pull a B & E."

On June 26, 1971 Harris picked up Defendant, Mitchell, and Palombo in his vehicle at the Davison Drug Store. The men drove to a second location and picked up Pooch. Then they dropped Mitchell off at a local bar, under the guise that he would be the look-out for the breaking and entering. Defendant, Palombo, Harris, and Pooch drove away while Mitchell waited at the bar. A few hours later, Defendant and Palombo came to the bar and spoke with Mitchell. Palombo told Mitchell that "the bill ha[d] been collected," which Mitchell understood to mean

that Harris had been killed. The men then went to Mitchell's home where Defendant and Palombo told Mitchell the details of what had occurred. They told Mitchell that they killed Harris in his vehicle in an alley.

Harris' wife testified that she went looking for Harris after he had failed to come home from the drug store on June 26, 1971. She found his vehicle the evening of June 27, 1971. She sat in the front seat of the vehicle and noticed red stains on the passenger side of the back seat. She reported her husband as missing the following morning.

On March 3, 1972 workers for the city of Troy found a decomposed body alongside the road. Harris's wife identified the clothing on the body as the clothing Harris was wearing on June 26, 1971. It was determined that Harris had been shot and that the bullets came from a .22 revolver.

One week after the disappearance, police arrested Mitchell and confiscated a .22 revolver from him. Mitchell was also arrested, for an unrelated crime, on March 15, 1972. The following day, he asked to speak with detectives and told them about the murder of Gregory Harris in the hopes of "getting off easy" in relation to an outstanding warrant he had.

As a result of the information Mitchell provided, Defendant and Palombo were charged in this case.

## **B. Procedural History**

On October 5, 1972 following trial, Defendant was found guilty of conspiracy to commit murder and first degree murder. On October 25, 1972 he was sentenced to life in prison for both counts.

It appears that Defendant appealed the conviction and sentence (docket number 15724). On May 23, 1974 following oral argument, the Court of Appeals affirmed the conviction and sentence. Defendant filed an application for leave to appeal with the Michigan Supreme Court, which was denied on August 27, 1975 (docket number 56175).

Defendant filed a delayed application for leave to appeal with the Court of Appeals which was denied on June 16, 1980 (docket number 45077). It appears that Defendant then unsuccessfully appealed to the Michigan Supreme Court (docket number 65418).

In January 1992, Defendant filed a motion for relief from judgment on the basis of prosecutorial misconduct. He alleged that the prosecutor failed to disclose that Mitchell testified in exchange for receiving a reduced sentence on a difference case. On April 22, 1992 the trial court granted the motion, vacated the conviction, and ordered a new trial. On or around May 20, 1992 the prosecutor filed a complaint for superintending control asking the Court of Appeals to reinstate the conviction. On June 30, 1992 the Court of Appeals denied the complaint (152427). The prosecutor filed a motion for reconsideration. On July 20, 1993 the Court of Appeals granted the motion for reconsideration and vacated the trial court's order regarding conviction and sentence. The Supreme Court denied Defendant's application for leave to appeal on January 28, 1994 (in docket number 97369).

On March 31, 1997 Defendant filed a second motion for relief from judgment raising several issues. The trial court granted the motion based on one of the issues raised. The Court of Appeals reversed (docket number 298779).

It appears that no further action was taken until November 2, 2016 when Defendant renewed his 1997 motion and filed supplemental claims.

## II. ANALYSIS

Motions for relief from judgment are governed by MCR 6.500 *et seq.*<sup>1</sup> Under those rules, Defendant bears “the burden of establishing entitlement to the relief requested.” MCR 6.508(D). This Court cannot grant relief based on arguments that could have been raised on appeal or in a prior motion for relief from judgment unless Defendant demonstrates good cause for failing to previously raise the issue. MCR 6.508(D)(3). A defendant is obligated to demonstrate good cause regarding his failure to raise the issue in every prior appeal and motion for relief from judgment. *People v Clark*, 274 Mich App 248, 253; 732 NW2d 605 (2007). Additionally, the Court cannot grant relief unless Defendant also demonstrates actual prejudice. MCR 6.508(D)(3). Actual prejudice exists when “but for the alleged error, the defendant would have had a reasonably likely chance of acquittal,” or where “the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case.” MCR 6.508(D)(3)(b)(i); (iii).<sup>2</sup>

Defendant must demonstrate good cause for failing to previously raise the issues he now raises. He must demonstrate good cause for failing to raise the issues in his 1992 motion for relief from judgment. He must demonstrate good cause for failing to raise the issues in his appeals. Significantly, Defendant does not present good cause for failing to raise these issues in his 1992 motion for relief from judgment. He only asserts that he has good cause for failing to raise these issues on appeal because he had ineffective assistance of appellate counsel.

Ineffective assistance of appellate counsel can constitute good cause under MCR 6.508. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). To demonstrate that appellate counsel was ineffective, a defendant must satisfy the two-pronged test set forth in *Strickland v Washington*, 446 US 668; 100 S Ct 1932; 64 L Ed 2d 593 (1984); *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995). First, he must show that appellate counsel’s performance fell below an objective standard of reasonableness under professional norms. *Strickland*, 446 US at 688. Second, he must show that the defective performance was prejudicial. *Id.* There is a presumption that appellate counsel’s decision regarding what issues to argue is based on sound legal strategy. *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). An “appellate counsel’s decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance.” *Reed*, 449 Mich at 391.

<sup>1</sup> Although the rules for relief from judgment were promulgated after Defendant was convicted, they apply retroactively. See *People v Jackson*, 465 Mich 390, 399; 633 NW2d 825 (2001).

<sup>2</sup> This renewed motion for relief from judgment is Defendant’s second motion for relief from judgment. The first motion was adjudicated in 1992. MCR 6.502(G) provides that after August 1, 1995 a defendant may only file one motion for relief from judgment unless he relies on new evidence or a change in the law. Because this 1997 motion is Defendant’s first motion after August 1, 1995 he does not have to satisfy MCR 6.502(G).

In assessing whether appellate counsel was ineffective, this Court must view counsel's choices in light of the law as it existed when the appeal in this case was taken. See *People v Reed*, 198 Mich App 639, 648 n 8; 499 NW2d 411 (1993). "Action appearing erroneous from hindsight does not constitute ineffective assistance if the action was taken for reasons that would have appeared *at the time* to be sound . . . strategy to a competent criminal attorney." *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994) (emphasis added). This Court is bound to review appellate counsel's performance with deference to "counsel's perspective at the time" of the case. *Reed*, 198 Mich App at 648 n 8.

#### A. The Admission of Prior Consistent Statements

Defendant argues that he is entitled to relief because he was denied due process and a fair trial when evidence of Mitchell's prior consistent statements were admitted to bolster his credibility.

Defendant's argument is based on the following exchange that occurred between the prosecutor and Mitchell on direct-examination:

Q: And what did you tell [the officers]?

A: I told them that – about the killing of Gregory Harris.

Q: You told them essentially what you have told us today, is that correct?

A: Correct.

...

Q: All right. Do you remember testifying at a preliminary exam on April the 10<sup>th</sup> of this year?

A: Yes.

Q: And was your testimony substantially the same thing that you have told us today and that you have told the detectives on March 16<sup>th</sup>?

A: Yes.

During closing, the prosecutor stated "Mr. Mitchell gave that information on the 16<sup>th</sup> to the detectives from the 10<sup>th</sup> Precinct. He gave that information the next day to the homicide detectives, one of which has testified and been in the trial from its start. Then Mr. Mitchell also testified at a preliminary exam, giving substantially the same testimony."

Defendant argues that prior consistent statements were impermissible for bolstering a witness's credibility. See *People v Gardineer*, 2 Mich App 337, 340; 139 NW2d 890 (1966). There are two exceptions to this general prohibition.

Michigan permits the admissibility of prior consistent statements in order to rehabilitate an impeached witness if (1) the impeachment of the sworn testimony attacked the witness as having had a motive for changing or falsifying his testimony so as to have been of recent contrivance or fabrication, and (2) if the earlier consistent statement was given at a time prior to the existence of any fact which would motivate bias, interest, or corruption.

*Brown v Pointer*, 41 Mich App 539, 548; 200 NW2d 756 (1972).

The Court does not find that Defendant has demonstrated good cause. First, Defendant does not address why he did not raise the issue in his 1992 motion for relief from judgment. Additionally, Defendant has not demonstrated good cause for failing to raise the issue on appeal. The Court finds that appellate counsel was not ineffective in failing to raise the issue of the admission of these statements. Defendant did not object to these statements at trial. Because the issue was not raised in the trial court, the Court of Appeals would not have reviewed it absent a showing of clear injustice. *People v Ivy*, 11 Mich App 427, 431; 161 NW2d 403 (1968). And, Mitchell was impeached regarding his statements, such that evidence of his prior consistent statements, although premature, would have been permitted. Appellate counsel was not acting below professional norms in failing to argue that these statements constituted a clear injustice. Defendant has not demonstrated good cause for failing to raise this issue on appeal.

### **B. Prosecutorial Misconduct**

Defendant also asserts that he is entitled to relief because he was denied due process and a fair trial under federal law as a result of prosecutorial misconduct. He asserts that the prosecutor failed to disclose that Mitchell testified under an agreement not to be prosecuted for Harris' death or to receive a more lenient sentence in an unrelated case. Defendant acknowledges that this issue was previously adjudicated under Michigan law. He asserts, however, that he is not precluded from bringing this issue under MCR 6.508(D)(2) because he is raising it, for the first time, under federal law. *Napue v Illinois*, 360 US 264; 79 S Ct 1173; 3 L Ed 2d 1217 (1959); *Giglio v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972).

The Court finds that it is precluded from reviewing this issue pursuant to MCR 6.508(D)(2) because it was already decided against Defendant in the Court of Appeals' July 20, 1993 order. The argument Defendant raises, has two components: the legal analysis upon which the argument is based and the factual premise that the legal analysis is applied to. Here, Defendant asks the Court to apply a new legal analysis to the factual record relied upon in his 1992 motion for relief from judgment. However, the Court of Appeals determined that the factual record did not support a finding that there was an undisclosed agreement or prosecutorial misconduct. *Wayne County Prosecutor v Recorder's Court Judge*, unpublished per curiam opinion of the Michigan Court of Appeals, entered July 20, 1993 (Docket No. 152427). While the courts have not addressed the Federal cases Defendant now presents, the factual premise underlying his argument has been addressed and appeal and was decided against him. This Court cannot ignore the higher court's ruling nor cannot it determine under federal or state law that there was an error when a binding opinion held the record did not demonstrate that the alleged agreement existed.

Moreover, the Court is precluded from reviewing this issue because Defendant does not demonstrate good cause for failing to raise it in his 1992 motion for relief from judgment.

### **C. Perjured Testimony**

Defendant asserts that he is entitled to relief because his conviction was obtained through false and perjured testimony. Defendant asserts that the trial court previously found that Mitchell had made an agreement with the prosecutor and received leniency in this and another case in exchange for his testimony. Defendant asserts that this contradicts Mitchell's testimony that he had not received any benefit for testifying.

The Court finds that it is precluded from reviewing this issue pursuant to MCR 6.508(D)(2) because it was already decided against Defendant in the Court of Appeals' July 20, 1993 order. As noted above, the Court of Appeals specifically rejected the conclusion that Mitchell received any sort of leniency in exchange for his testimony.

#### **D. Fifth Amendment Right Not To Testify<sup>3</sup>**

Defendant asserts that he is entitled to relief because he was denied a fair trial when, during closing arguments, the prosecutor drew attention to the fact that he did not testify. The "Fifth Amendment . . . in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence . . ." *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965). Defendant's argument is based on the following statement made by the prosecutor:

The defendants are always sitting throughout the trial in front of the jury, and there is always, no matter what the charge, a certain amount of sympathy or emotion built up either from the defendants themselves sitting there or possibly from family being brought in to testify on minor details in front of the jury. And the prosecution has the burden of keeping the deceased somewhat alive in the minds of the jury . . . in a murder case, of course, if you want to refer to him as my client, the client of the people, he cannot take the stand for he is no longer breathing.

The Court does not find that Defendant has demonstrated good cause for failing to raise the Fifth Amendment issue on appeal. Appellate counsel's decision not to argue that the statement was improper did not fall below professional norms. The prosecutor's comment did not reference, either directly or indirectly, Defendant's decision not to testify. See *People v Alexander*, 17 Mich App 497; 169 NW2d 652 (1969). It only addressed the victim's inability to testify. *Griffin v California*, which Defendant relies upon, is distinguishable. In that case, the prosecutor expressly stated in closing that "[t]he defendant won't" testify. *Griffin v California*, 380 US 609, 611; 85 S Ct 1229 (1965). Here, no comment was made about Defendant. Moreover, because the comment did not violate Defendant's Fifth Amendment right not to testify, the Court finds that Defendant has not demonstrated actual prejudice.

#### **E. Jury Instructions**

Defendant also asserts that he is entitled to relief because he was denied due process and a fair trial because the trial court erroneously instructed the jury on several legal points. Specifically,

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<sup>3</sup> There is some question as to whether this issue was previously decided against the Defendant by the Court of Appeals when it addressed his appeal of the conviction and sentence. This would also prohibit this Court from reviewing the issue. MCR 6.508(D)(1). In the court file, there is an attachment to the People's petition for superintending control filed with the Court of Appeals in 1992. The attachment appears to be an opinion of the Court of Appeals that was issued in Defendant's appeal for docket number 15981. In the opinion, the Court of Appeals quotes the same portion from the prosecutor's closing argument that is raised here. The Court goes on to write that "Defendants argue that the statement was an impermissible comment on the failure of defendant Phillips to take the stand. We disagree with this argument."

Defendant asserts that the jury was not properly instructed on aiding and abetting, premeditation and deliberation, intent to kill, and implied malice.

Again, Defendant does not address good cause for failing to raise this issue in his 1992 motion for relief from judgment. Defendant asserts that he has good cause for failing to argue that the instructions were erroneous on appeal. He asserts that appellate counsel was ineffective.

In determining whether appellate counsel was ineffective in failing to argue that the court erred in instructing the jury, this Court must look to the law as it was at the time of the appeal. When Defendant took his appeal, unless there was a showing of manifest injustice, appellate courts would not review errors regarding instructions that had not been objected to. *People v Jackson*, 21 Mich App 132, 132; 175 NW2d 41 (1970). Manifest injustice existed where there were “omissions to instruct or errors in instructing on basic and controlling issues.” *Id.* Because Defendant did not object to the instructions at trial, appellate counsel would have had to demonstrate that the errors were based on omissions or were regarding basic and controlling issues in order to obtain review. Moreover, appellate courts looked to the instructions as a whole to see whether they misled the jury. *Id.*

### 1. Aiding and Abetting

Defendant asserts that the trial court inadequately instructed on aiding and abetting. Defendant asserts that the trial court gave no instructions as to what constituted aiding and abetting.

The trial court instructed the jury as follows:

If you believe from the competent testimony . . . and that you believe that these two men aided and abetted each other in an unlawful, deliberate and premeditated way, and then killed Gregory Harris, that would be murder in the first degree . . . if you find that they committed [first-degree murder] who pulled the trigger, because if they were working in concert, one aiding and abetting the other, the aider and abettor is just as guilty as the man who pulled the trigger. That’s the law in this state. And in 1929 that law was passed by the state legislature. They abolished what was known as the principal’s law, and the aider and abettor – there is no longer any aiders and abettors in a crime. They are all principals if one aided and abetted the other.

Reviewing the instructions as a whole, the Court does not find that appellate counsel’s performance fell below an objective standard of reasonableness. At the time this case was tried, the law provided that “an aider and abettor is one who helps another to commit an act with the intention and purpose of rendering such help to him and with the knowledge on his part (implied or actual) that the one whom he aids and helps contemplates the commission of the act, the doing of which the aider and abettor not only consents to but also encourages, councils or assists in the doing of it.” *People v Harper*, 39 Mich App 134, 141; 197 NW2d 338 (1972) quoting *Alexander v Commonwealth*, 147 SW2d 401 (1941). Here, the trial court stated that the jury would have to find that the men aided and abetted each other “in an unlawful, deliberate and premeditated way” and that they were “working in concert.” These instructions provide a reasonable understanding

that there must have been some assistance which was intentional, done with the purpose of committing murder, and with the knowledge that the other actor planned on committing a murder. Appellate counsel did not err in omitting this issue from appeal, particularly in light of the of review.

## **2. Intent to Kill**

Defendant asserts that the trial court's instructions regarding malice aforethought erroneously allowed the jury to convict Defendant of first-degree murder without requiring that he possess the requisite intent to kill. Defendant argues that the trial court instructed the jury that malice, includes "every . . . unlawful and unjustifiable motive." At the time Defendant was tried, malice aforethought was defined as the "intention to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense to manslaughter." *People v Morrin*, 31 Mich App 301, 310-11; 187 NW2d 434 (1971).

Reading the instructions as a whole, the court does not find that appellate counsel was ineffective in failing to raise this issue on appeal. In the instructions, the court stated that there must be sufficient time to allow the mind to "calculate . . . the intent of the killing." The court stated a little later, that there is an "execution of the intent to take life."

## **3. Premeditation and Deliberation**

Defendant asserts that the trial court erroneously instructed the jury on premeditation and deliberation. The trial court instructed the jury as follows:

in murder in the first degree there must be premeditation and deliberation and malice aforethought and such a lapse of time as will give the mind time to calculate the purpose and the intent of the killing. . . . So in order for a killing to constitute murder in the first degree there must be premeditation, that is, you must premeditate, you must think about it, you must deliberate and then form malice aforethought.

Based on a review of the record, the Court does not find that appellate counsel was ineffective in failing to raise this issue on appeal. The instructions conformed to the law. "To premeditate is to think about beforehand [and] to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Morrin*, 31 Mich App 301, 329-30; 187 NW2d 434 (1971). Here, the trial court instructed the jury on premeditation: the trial court stated that "you must premeditate, you must think about it." The trial court also described deliberation: the court stated that under first-degree murder, the mind must "calculate the purpose and the intent of the killing." Because the instructions conformed to the law, appellate counsel did not act below a reasonable standard in failing to argue them on appeal, and Defendant was not prejudiced by counsel's performance.

## **4. Sandstrom Error**

Defendant argues that the jury was improperly instructed on malice, because the court instructed that "malice is implied from any deliberate or cruel act against another, however, sudden."



Defendant argues that this is in violation of the principle set forth in *Sandstrom v Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979).

*Sandstrom* was decided after this case became final. Because *Sandstrom* was decided after Defendant appealed his conviction and sentence, he has good cause for failing to raise it on appeal. However, Defendant does not present good cause as to why this argument was not raised in his 1992 motion for relief from judgment. Because Defendant does not present good cause for failing to raise this specific issue in his prior motion for relief from judgment, the Court cannot consider it.

#### **F. Ineffective Assistance of Counsel**

Defendant asserts that he is entitled to a new trial because his trial counsel was ineffective. Defendant asserts that trial counsel was ineffective for failing to object to the Prosecution's reliance upon Mitchell's prior consistent statements. Defendant also asserts that trial counsel was ineffective for failing to object to the jury instructions provided by the Court.

Defendant has failed to demonstrate good cause. First, Defendant does not address why he failed to raise these issues in his 1992 motion for relief from judgment. Moreover, Defendant has failed to demonstrate that appellate counsel was ineffective for failing to raise these issues on appeal. This Court is bound to review appellate counsel's performance with deference to "counsel's perspective at the time" of the case. *Reed*, 198 Mich App at 648 n 8. In order to show good cause—that appellate counsel was ineffective in failing to argue that trial counsel was ineffective—Defendant must show that a reasonable appellate attorney would have argued that trial counsel's performance was ineffective. *Reed*, 449 Mich at 390.

When Defendant's appeal was pending, the legal analysis regarding whether trial counsel was ineffective was different from the standard used today. In 1972, when determining whether trial counsel was ineffective, appellate counsel would have had to consider the matter under the "sham trial" standard, which provided that:

relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. . . . The sham trial standard focuses attention on the entire representation of the accused by his lawyer. . . . The constitutional right to counsel does not guarantee an accused person that his lawyer will not make a big mistake. The constitution guarantees only that the accused person will enjoy representation by an attorney adequately equipped by his training in the law to undertake the case and who will diligently, conscientiously and honestly represent the accused person.

*People v DeGraffenreid*, 19 Mich App 702, 711; 173 NW2d 317 (1969). Thus, in determining whether appellate counsel's performance fell below professional norms when failing to argue

that trial counsel was ineffective, the Court must determine whether a reasonable appellate attorney would have argued that trial counsel's performance resulted in a "sham trial."

### **1. Prior Consistent Statements**

Defendant argues that trial counsel was ineffective for failing to object when the prosecutor introduced Mitchell's prior consistent statements on direct examination before Mitchell was impeached. As noted above, while premature, the statements would have been admissible because Mitchell was impeached—albeit after the statements were introduced. In light of the high standard appellate counsel would have had to satisfy in order to demonstrate that trial counsel was ineffective, the Court finds that appellate counsel was not ineffective for failing to raise this issue.

### **2. Jury Instructions**

Defendant also asserts that trial counsel was ineffective for failing to object to certain jury instructions. As noted above in section II.E, a review of the instructions as a whole demonstrate that they did not mislead. Trial counsel's failure to object to them does not give rise to a sham trial. Appellate counsel was not acting below a reasonable standard of professional norms for failing to argue that trial counsel was ineffective. This Court cannot say that counsel's failure to object, resulted in a sham trial.

### **G. New Evidence**

Defendant asserts that he is entitled to a new trial because of newly discovered evidence. Defendant presents the transcript from codefendant Palombo's 2010 hearing before the parole board in which he testified that Defendant was not involved in the murder of Gregory Harris.

Preliminary, the Court notes that pursuant to MCR 6.502(F) Defendant is permitted to supplement his 1997 motion for relief from judgment, which due to unadjudicated issues was still pending before the Court.

Additionally, because this testimony was part of a 2010 proceeding, it could not have been presented on appeal or in Defendant's 1992 motion for relief from judgment Defendant need not demonstrate good cause or actual prejudice. However, Defendant must show that he is entitled to a new trial.

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.

*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). The Court finds that Defendant has met the criteria established in *Cress*.

The first prong of the test set forth in *Cress* requires that the evidence that is presented be newly discovered. The People assert that Palombo's testimony is not newly discovered evidence, but is merely "newly available" evidence, which does not warrant a new trial. The People rely on the decision in *People v Terrell*, 289 Mich App 553; 797 NW2d 684 (2010). That case makes clear that in the context of codefendant statements, the statement is not considered newly discovered, but is only considered newly available, when the defendant knew or should have known of the evidence during trial. *Id.* "The key to deciding whether evidence is newly discovered or only newly available is to ascertain when the defendant found out about the information." *Id.* In *Terrell*, the Court of Appeals rejected a defendant's claim that a codefendant's post-trial statement regarding the crime was newly discovered evidence. In that case, the defendant was alleged to have shot the victim. The codefendant was the getaway driver. After trial, the codefendant testified that while defendant fought with the victim, he did not shoot the victim. The court noted that defendant should have known that the codefendant could have offered this testimony regarding his role in the charged crime: the defendant and codefendant had known each other since childhood, they were close friends, and they were both present during the time of the crime. *Id.*

Here, the Court finds that Palombo's testimony is newly discovered evidence. Unlike the circumstances in *Terrell*, Defendant did not know and had no reason to know at the time of trial that Paolombo could have provided eyewitness testimony of the murder. Defendant testified that he did not know Palombo before trial and that the two did not discuss the case. Defendant further testified that because he was not present during the murder and because Palombo asserted his innocence, Defendant could not have known that Palombo could have provided eyewitness testimony about the murder. The Court has listened to the testimony of Defendant and finds it credible. Defendant was unaware that Palombo could have provided this information at trial. Palombo's testimony is newly discovered.

The second prong of the test in *Cress* requires that the newly discovered evidence not be cumulative. The evidence must not be "of the same kind [and] to the same point [as evidence presented] at trial." *People v Grisson*, 492 Mich 296, n 41; 821 NW2d 50 (2012). Here, there was no evidence presented at trial from any eyewitness to the actual murder. Palombo's testimony is not cumulative.

The third prong requires that Defendant demonstrate that he could not, with reasonable diligence, have discovered and presented the evidence at trial. When "a defendant is *aware* of evidence before trial, he or she is charged with the burden of using *reasonable diligence* to make that evidence available and produce it at trial." *People v Rao*, 491 Mich 271; 815 NW2d 105 (2012). "[W]hat constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case. . . . [W]hen the evidence is claimed to be unavailable because of a codefendant's assertion of the Fifth Amendment privilege, reasonable diligence might include requesting a severance or pursuing other procedural remedies to admit the testimony." *People v Rao*, 491 Mich 271, 283-84; 815 NW2d 105 (2012). As noted above, the Court finds that Defendant was unaware of Palombo's potential testimony at the time of trial and there is no indication that he should have known of the potential testimony. Accordingly, Defendant was under no obligation to use due diligence to procure this testimony.

Regarding the fourth prong, the Court finds that Palombo's testimony makes a different result probable on retrial. Palombo's testimony purports to provide an eyewitness account of the murder that contradicts the testimony of Fred Mitchell. And as Defendant notes, Palombo's testimony is consistent with the physical evidence in this case.

### III. ORDER

For the foregoing reasons, the Court finds that Defendant is not entitled to relief based on the issues initially raised in his 1997 motion for relief from judgment. However, the Court finds that Defendant is entitled to a new trial based on his supplemental claim of newly discovered evidence. Accordingly, it is ordered that Defendant's motion is **GRANTED**. Defendant's 1972 murder and conspiracy convictions are vacated. Defendant is granted a new trial.



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Hon. Kevin J. Cox  
Circuit Court Judge