

No. 16-2695

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

GEARY GILMORE,

Petitioner-Appellant,

v.

SHIRLEE HARRY, WARDEN,

Respondent-Appellee.

**FILED**  
Oct 18, 2017  
DEBORAH S. HUNT, Clerk

ORDER

Before: ROGERS, GRIFFIN, and KETHLEDGE, Circuit Judges.

Geary Gilmore petitions for rehearing en banc of this court's order entered on June 28, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

  
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Deborah S. Hunt, Clerk

**APPENDIX C**

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

GEARY GILMORE, )  
Petitioner-Appellant, )  
v. )  
SHIRLEE HARRY, Warden, )  
Respondent-Appellee. )

**FILED**  
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DEBORAH S. HUNT, Clerk

ORDER

Geary Gilmore, a Michigan prisoner proceeding pro se, applies for a certificate of appealability (COA) in his appeal from a district court's orders: (1) denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254; and (2) denying his motion to make additional findings under Federal Rule of Civil Procedure 52(b) and to alter and amend the judgment under Federal Rule of Civil Procedure 59(e).

In 1974, Gilmore and two co-defendants, Byron Smith and Jerome Holloway, were convicted of two counts of first-degree felony murder and two counts of kidnapping. The victims were two young boys, aged six and eight years old. Gilmore was sentenced to life imprisonment on each count. The Michigan Court of Appeals affirmed his convictions, *People v. Smith*, 252 N.W.2d 488 (Mich. Ct. App. 1977), and the Michigan Supreme Court denied leave to appeal. In 1982, the trial court vacated Gilmore's kidnapping convictions on double-jeopardy grounds. Gilmore filed a petition for federal habeas corpus relief, which the district court denied. This court affirmed. *Gilmore v. Koehler*, 709 F.2d 1502 (6th Cir.) (table), *cert. denied*, 461 U.S. 944 (1983).

In 2004, Gilmore filed motions in the trial court for relief from judgment and for an evidentiary hearing, which were denied. The state appellate and supreme courts denied leave to

appeal in form orders citing Michigan Court Rule 6.508(D). The trial court denied Gilmore's subsequent motion for reconsideration.

In 2008, Gilmore filed successive motions in the trial court for relief from judgment and an evidentiary hearing based on newly discovered evidence. In the meantime, Gilmore filed in this court a motion for authorization to file a second or successive federal habeas corpus petition. This court granted the motion for authorization. *In re Gilmore*, No. 08-1373 (6th Cir. Nov. 12, 2008). In January 2009, Gilmore filed his second habeas corpus petition in the district court. He also filed a motion to stay proceedings while he exhausted his claims in state court, which the district court granted.

In the meantime, in September 2008, the state trial court denied Gilmore's successive motions for relief from judgment and for an evidentiary hearing, as well as his motion for reconsideration. In January 2010, the Michigan Supreme Court remanded the case to the trial court to decide Gilmore's previously unaddressed motion to disqualify the trial judge. *People v. Gilmore*, 777 N.W.2d 175 (Mich. 2010) (Mem.). On remand, the trial court granted the motion to disqualify and vacated its previous order denying Gilmore's motion for reconsideration. The case was reassigned to a new judge.

On June 3, 2011, the new judge denied Gilmore post-conviction relief in a lengthy opinion. The judge also denied Gilmore's subsequent motion for reconsideration. The state appellate and supreme courts denied leave to appeal, citing Michigan Court Rule 6.502(G), which prohibits appeals from an order denying a successive motion for relief from judgment. See *People v. Gilmore*, 820 N.W.2d 790 (Mich. 2012); *People v. Gilmore*, No. 306437 (Mich. Ct. App. Oct. 28, 2011).

Thereafter, the district court reinstated Gilmore's second federal habeas corpus petition. Gilmore subsequently filed an amended petition, arguing that: (1) appellate counsel performed ineffectively by failing to raise nine issues in his direct criminal appeal that were clearly stronger than the five issues that counsel did raise; and (2) newly discovered evidence in the form of an affidavit by witness Dennis Elliot established that Gilmore was actually innocent. The state

moved for summary judgment, arguing that Gilmore's habeas petition was barred by the one-year statute of limitations, 28 U.S.C. § 2244(d). The district court granted the state's motion for summary judgment, but this court vacated and remanded the district court's order for further proceedings, finding that Gilmore's second habeas petition was timely. *See Gilmore v. Berghuis*, Nos. 13-2008/2548, p. 4 (6th Cir. Jan. 30, 2015).

On remand, the district court denied Gilmore's habeas petition. The district court denied the ineffective-assistance-of-appellate-counsel (IAAC) claim on the merits and found the actual-innocence claim to be noncognizable on federal habeas review. The district court granted Gilmore's subsequent motion to amend his Rule 52(b) motion to correct typographical errors, denied his motion for additional findings and to alter or amend the judgment, denied Gilmore a COA, but granted Gilmore leave to proceed in forma pauperis on appeal.

Gilmore seeks a COA only as to the district court's denial of eight of his nine IAAC claims and his Rule 52(b) motion. He has waived review of his remaining claims by not addressing them in his application for a COA. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002).

This court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

#### A. *Ineffective Assistance of Appellate Counsel*

Gilmore's IAAC claim is addressed first. As an initial matter, Gilmore argues that he is entitled to plenary review of his IAAC claim because the trial court failed to reach its merits when denying his initial and successive motions for relief from judgment. Gilmore raised his IAAC claim in its entirety in his initial motion for relief from judgment. He later reasserted seven of the claim's nine sub-parts in an amended motion for reconsideration, which he filed

during the proceedings on his successive motions for relief from judgment. The district court “looked through” the Michigan Court of Appeals’ and the Michigan Supreme Court’s orders denying Gilmore’s requests for leave to appeal the trial court’s merits orders denying his initial and successive motions for relief from judgment and subjected the trial court’s orders to merits review under the Antiterrorism and Effective Death Penalty Act (AEDPA) standards. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3, 805 (1991).

When a federal claim is brought before a state court and the court denies relief, a presumption is invoked that “the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011). This presumption “also appl[ies] when a state-court opinion addresses some but not all of a defendant’s claims.” *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013). The presumption applies here where the trial court, in denying Gilmore’s initial motion for relief from judgment, found that he “has not demonstrated that his appellate counsel’s performance fell below an objective standard of reasonableness.” The presumption also applies to the trial court’s order denying Gilmore’s successive motions for relief from judgment, where, after reconsidering “the issues raised by [Gilmore] in his initial motion for relief from judgment,” the trial court denied Gilmore’s amended motion for reconsideration in its entirety.

In arguing that he is entitled to de novo review, Gilmore attempts to overcome the presumption that his IAAC claims were denied on the merits. He asserts that, when the trial court readdressed the IAAC claim presented in his amended motion for relief from judgment, the court merely adopted the state’s brief in opposition to his initial motion for relief from judgment, showing that the court did not independently review the claims. “[A]bsent some ‘indication or [Michigan] procedural principle to the contrary,’ [this court] must presume that an unexplained summary order is an adjudication ‘on the merits’ for AEDPA purposes.” *Werth v. Bell*, 692 F.3d 486, 493 (6th Cir. 2012) (quoting *Richter*, 562 U.S. at 99). Moreover, the district court found that, although the trial court’s statement of facts did seem to be a copy of the statement of facts submitted by the prosecutor, the trial court had in fact accurately summarized the trial

proceedings. Gilmore does not dispute this finding by the district court. Jurists of reason, therefore, could not debate the district court's conclusion that the trial court's orders denying Gilmore's initial and successive motions for relief from judgment were entitled to AEDPA deference—meaning that habeas relief will not be granted unless the adjudication of the claim resulted in an unreasonable application of federal law or an unreasonable determination of the facts based upon the evidence presented to the state courts. *See* 28 U.S.C. § 2254(d)(1), (2); *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

The standard for evaluating whether counsel performed ineffectively on appeal is the same as that set forth for trial counsel in *Strickland v. Washington*, 466 U.S. 668 (1984); *see also* *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010). *Strickland* requires a defendant to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. 466 U.S. at 687. Scrutiny of counsel's performance is highly deferential. *Id.* at 689. To show deficient performance, Gilmore "must demonstrate his appellate counsel made an objectively unreasonable decision by choosing to raise other issues . . . , meaning that [the unraised] issue 'was clearly stronger than issues that counsel did present.'" *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009) (quoting *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). To establish prejudice, Gilmore must show "a reasonable probability that, but for his counsel's unreasonable failure to [raise all of his habeas claims], he would have prevailed on appeal." *Robbins*, 528 U.S. at 285-86. "A reasonable probability is defined as 'a probability sufficient to undermine confidence in the outcome'; certainty of a different outcome is not required." *Hanna v. Ishee*, 694 F.3d 596, 613 (6th Cir. 2012) (quoting *Strickland*, 466 U.S. at 694). "Thus, analysis focusing solely on mere outcome determination, without attention to whether the proceeding was fundamentally unfair or unreliable, is defective." *Hanna*, 694 F.3d at 613 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)).

On direct appeal, counsel argued that (1) the trial court erred by (a) denying a motion to sever Gilmore's trial, (b) admitting evidence that Gary Braceful, a person connected with the case, had been killed with the same gun used to kill the victims, and (c) admitting voiceprints of

the telephone calls demanding ransom and limiting the use of them by the jury; (2) the prosecutor made various improper comments during closing argument; and (3) a search warrant was improperly obtained. *See Smith*, 252 N.W.2d at 491-94. Gilmore asserts, however, that counsel should also have raised eight additional issues: (1) the trial court failed to properly swear in the jury; (2) the trial judge made improper comments that undermined the defense's theory of the case; (3) the trial judge denied Gilmore's right to cross-examination by failing to allow him to see notes used by a witness to refresh her memory; (4) the prosecutor knowingly used perjured testimony; (5) the prosecutor improperly used Gilmore's poverty as a motive for the crime; (6) the prosecutor improperly presented evidence of Gilmore's silence as substantive evidence of his guilt; (7) the prosecutor improperly presented evidence obtained pursuant to an invalid search; and (8) the trial court improperly instructed the jury on Gilmore's alibi.

*I. The trial court failed to properly swear in the jury.*

Gilmore argues that appellate counsel was ineffective for not arguing that the jury was not sworn in prior to trial. He asserts that, at the time of his trial and direct appeal, a finding that the jury was improperly sworn would have resulted in an automatic mistrial. *See People v. Allan*, 829 N.W.2d 319, 326-27 (Mich. Ct. App. 2013). The district court denied this claim because “[w]hether or not the claim would have found support under Michigan law at the time of his direct appeal, [Gilmore] cannot demonstrate that he has suffered prejudice under the *Strickland* standard . . . because his claim is without merit in light of the current state of the law.” Jurists of reason could not debate the district court's conclusion. In *Lockhart*, 506 U.S. at 370-72, defense counsel failed to make an objection during sentencing that was supported by case law that was subsequently overruled. *Id.* at 366. The court held that, although defense counsel's performance was deficient, *Strickland*'s “prejudice” requirement was not satisfied because, in light of current law, the result of the proceedings was not unreliable or fundamentally unfair. *Id.* at 370-72.

In *People v. Cain*, 869 N.W.2d 829, 840 (Mich. 2015), the Michigan Supreme Court held that the failure to swear in the jury would not result in plain error unless, under the facts of the

case, "leaving the error unremedied would constitute a miscarriage of justice, i.e., whether the fairness, integrity, or public reputation of the proceedings was seriously affected." The parties agree that the transcripts do not indicate whether the jury was sworn-in prior to trial. However, the trial record establishes that the jury in this case received the same types of instructions that the court in *Cain* held fulfilled the primary purposes of the oath. After closing arguments, the trial court instructed the jurors that they had "the responsibility and duty of assisting the court in the administration of justice," that they "must put aside all feeling of fear, favor, bias or prejudice," that they were to "look steadfastly and alone to the law and the evidence in the case, and return a verdict that is warranted by the law and the evidence." The trial court also instructed the jury regarding the presumption of innocence and reasonable doubt. Further, during opening statements, counsel emphasized to the jury the importance of listening to the evidence with impartiality. Accordingly, even assuming that the jury in this case was not properly sworn in, Gilmore has not established that the result of his trial was unreliable or fundamentally unfair. This sub-claim does not warrant a COA.

*II. The trial judge made improper comments that undermined the defense's theory of the case.*

Nor could jurists of reason debate the district court's denial of Gilmore's second sub-claim. Gilmore argues that comments by the trial court during trial were derogatory to the defense and prejudiced his ability to mount a defense. A judge's conduct may be characterized as biased or prejudiced only if "it is so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994). "Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Id.* at 555-56. In this case, the trial court did not display partiality and instructed the jury that any comments made by the court were not intended to indicate the court's view of the case or the guilt or innocence of the defendants. Because juries are presumed to follow the instructions given to them, *Washington v. Hofbauer*, 228 F.3d 689,

706 (6th Cir. 2000), Gilmore was not prejudiced by any statements made by the trial court, and this matter did not present a "clearly stronger" issue for appeal.

*III. The trial judge denied Gilmore's right to cross-examination by failing to allow him to see notes used by a witness to refresh her memory.*

Jurists of reason would also agree with the district court's denial of sub-claim three, wherein Gilmore alleged that counsel was ineffective by failing to raise on appeal the prosecutor's failure to make available in its entirety a document used by witness Carroll Payne to refresh her recollection. The record reflects that the prosecutor did make available the portion of the document on which Payne actually relied. Accordingly, Gilmore has not established that this issue was stronger than the issues counsel raised on appeal. *See* Mich. R. Evid. 612(c).

*IV. The prosecutor knowingly used perjured testimony.*

In sub-claim four, Gilmore asserted that counsel should have argued on appeal that the prosecutor allowed Payne to perjure herself at trial and then relied on her perjured testimony in closing argument. "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

At trial, Payne testified that she overheard an incriminating conversation between Gilmore and co-defendant Smith on December 4, 1973. Payne testified:

[Smith] said that, we have our names in the paper. We made the headlines. We are on the front page. He also said that, they found the bullet shells that we left beside the bodies of the two defendants [sic], of the two little boys. He said that they found, in the newspaper they told lies in the paper. He said that they were using a metal detector which found the bullet shells. He said they found the box, the bullet, the box container in which the bullets were in, in the garbage disposal. He did a lot of cursing. He said that the woman had the money to pay them and that she should have paid them and that the family only got what they deserved because they had the money and they should have paid the ransom.

Payne further testified that, in response to Smith's statements, Gilmore stated: "Man, I've been telling them all day that we had nothing to do with it, and now you come in here and blow it all."

Gilmore focuses on Payne's testimony that she overheard Smith say "they found the bullet shells that we left beside the bodies" and "they found the box, the bullet, the box container in which the bullets were in, in the garbage disposal." Gilmore claims that, if Payne were to be believed, Smith would have been talking about crime scene information that had not been made public as of December 4, 1973, about a police search of Gilmore's apartment that did not occur until December 5, 1973, the day after the alleged conversation, and about "a box" that "the [d]etective in charge of the search of Gilmore's apartment testified . . . was [n]ever found" there. Police did find, however, two shell casings in the garbage in Gilmore's apartment on December 5, 1973.

Reasonable jurists would not debate the district court's denial of this claim. The record supports the trial court's finding that Payne did not testify that Smith read aloud details of the investigation from the newspaper, but that the newspaper article had prompted Smith's statements about details of the crime that were within his own knowledge. Moreover, as the district court found, "Payne may or may not have accurately recalled the particular contents of Smith's incriminating statements . . . [but] Payne was not testifying about when and where pieces of evidence were actually found, she was merely relating her recollection of Smith's statements regarding the crime, which prompted an incriminating response by [Gilmore]." Further, Payne's testimony was subject to cross-examination and to comment from counsel during closing arguments. Credibility issues are properly resolved by the jury. *See Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

V. *The prosecutor improperly used Gilmore's poverty as a motive for the crime.*

In his next sub-claim, Gilmore argues that counsel should have argued on direct appeal that it was error for the trial court to allow, over objection, the prosecutor to elicit testimony from Gilmore regarding his poverty to show a motive for the crimes.

This IAAC claim is grounded in Michigan state law. *See Kissner v. Palmer*, 826 F.3d 898, 904 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 1081 (2017). Under Michigan law, a trial court has "considerable discretion in ruling on the relevance and materiality of argument coming

before it. Clearly, the trial court has broad discretion in exercising its judgment whether a particular line of inquiry or argument is to be allowed before the jury." *People v. Johnson*, 227 N.W.2d 523, 527-28 (Mich. 1975). In denying this claim, the trial court found that "the unique circumstances of this case made the issue of financial motive relevant and rendered the evidence of defendant's financial situation admissible." The trial court went on to find: "the references were brief, the trial was lengthy, and the prosecutor made no mention of [Gilmore's] employment during closing argument." Gilmore has not established that the trial court abused its discretion in admitting evidence of his financial situation. The failure of appellate counsel to advance a meritless claim is not constitutionally ineffective representation. *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999). Jurists of reason could not disagree with the district court's resolution of this claim.

VI. *The prosecutor improperly used evidence of Gilmore's silence as substantive evidence of his guilt.*

Gilmore next argues that appellate counsel was ineffective in failing to argue that the state's use of his post-*Miranda*<sup>1</sup> silence as substantive evidence of his guilt violated his constitutional rights. He asserts that the prosecutor (1) improperly questioned Jacqueline Wesley, who was with him at the time of his arrest, about his silence in response to police questioning about an empty holster on his back and (2) commented on his silence in closing argument. References to a defendant's post-*Miranda* silence used to impeach his credibility violate his Fourteenth Amendment right to due process. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). "[T]he *Doyle* rule has no application unless the defendant has remained silent and could be considered to have done so in reliance on the implied assurances of the *Miranda* warnings." *United States v. Crowder*, 719 F.2d 166, 172 (6th Cir. 1983) (en banc). Further, post-arrest statements made before warnings are given may be commented on by the prosecutor. See *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam).

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

At trial, the prosecutor asked Wesley what happened when the police arrived at an apartment to arrest Gilmore. She testified that Gilmore "went to the front room and he came back and then he said 'Dammit, the police,' and he said, 'Byron [Smith] snitched.'" Gilmore then approached Wesley with a pistol and said "Bitch, if you say one word . . . I'll kill you." Wesley testified that the police forced their way into the apartment and "surrounded [Gilmore]." The police asked Gilmore about the pistol because he had an empty holster tucked into his waistband, and he did not respond. The prosecutor again asked Wesley: "What happened when the police inquired about the pistol?" Wesley responded that Gilmore "didn't say anything at that point."

Reasonable jurists would not debate the district court's rejection of Gilmore's claim that appellate counsel performed ineffectively when he failed to challenge the prosecutor's questions to Wesley about the gun. First, as the district court found, it is not clear from the trial transcripts whether Gilmore had been informed of his Fifth Amendment right to remain silent at the time he was asked about the pistol. The police are permitted to ask questions of a suspect necessary to protect themselves or the public from immediate danger prior to informing the suspect of his Fifth Amendment rights. *See New York v. Quarles*, 467 U.S. 649, 657 (1984). Moreover, even if Gilmore had been informed of his Fifth Amendment rights, as he claimed in a 2004 affidavit, jurists of reason would agree with the district court's conclusion that the questions regarding the whereabouts of the pistol were inconsequential. Prior to trial, the parties stipulated that the pistol found in the apartment with Gilmore was not the murder weapon. In closing rebuttal argument, the prosecutor stated:

Even though he sat on this stand, Geary Gilmore sat on this stand and said under oath that he was going to go to the police, the very next day and tell them what he knew about this bad thing that [Gary] Braceful had done, what did he do when police came to him? Did he tell them? The only thing that he did say was something to Jackie Wesley "Damn, Byron snitched. Don't say one word, bitch, or I will kill you." This is a person who had nothing to do with it. While he was saying those words to Jackie Wesley, he is pointing a gun at her. But it wasn't his gun according to him. Then he did have the empty holster in his belt. A gun, undisputed testimony. He told Jackie Wesley again on the way to the police station not to say anything. Why would he do that? Why didn't he tell her to tell

the truth that [Gary] Braceful did it? Why? Because [Gary] Braceful did not do it. Are these the words and acts of an innocent man? Hardly.

Although Gilmore argues that the prosecutor was improperly commenting on his silence, Gilmore testified at trial that he told the police that he was not involved in the crimes. "A defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson v. Charles*, 447 U.S. 404, 408 (1980). To the extent that Gilmore asserts that he made that statement to the police before being informed of his Fifth Amendment rights, he still has failed to show that this claim was stronger than the claims counsel raised on appeal. The challenged argument concerned statements that Gilmore made to Wesley, not to the police. *Doyle* therefore was not implicated. Reasonable jurists would not debate the district court's denial of this sub-claim.

VII. *The prosecutor improperly used evidence obtained pursuant to an invalid search.*

Gilmore next asserts that appellate counsel performed ineffectively by failing to argue that the search warrant used to search his apartment was based upon an affidavit containing false statements. On appeal, counsel challenged the search warrant on different grounds. The district court denied this sub-claim, finding that it was based on *Franks v. Delaware*, 438 U.S. 154 (1978), and other Fourth Amendment cases decided by the Supreme Court after Gilmore's direct appeal. "[N]onegregious errors such as failure to perceive or anticipate a change in the law . . . generally cannot be considered ineffective assistance of counsel." *Alcorn v. Smith*, 781 F.2d 58, 62 (6th Cir. 1986). Gilmore asserts, however, that counsel could have challenged the validity of the search warrant affidavit based on the law as it existed at the time of his appeal.

Even assuming that appellate counsel could have raised the Fourth Amendment challenge that Gilmore advocates, Gilmore has not shown that this issue was clearly stronger than those counsel did raise. The trial court rejected Gilmore's Fourth Amendment claim on the merits when it denied his amended motion for reconsideration. Gilmore has not established that the trial court's decision was based upon an unreasonable determination of the facts or application of federal law. *See* 28 U.S.C. § 2254(d). This sub-claim does not warrant a COA.

*VIII. The trial court improperly instructed the jury on Gilmore's alibi.*

In his final IAAC sub-claim, Gilmore asserts that appellate counsel performed ineffectively by failing to argue that the trial court committed plain error by failing to give an adequate jury instruction regarding his alibi defense.

The trial court gave the jury the following instruction:

In this case, defendants Byron Smith and Geary Gilmore claim the defense of alibi. Alibi is a Latin word, meaning elsewhere. Simply stated it means that these defendants claim they were at another place at the time of the commission of the crime charged.

I must caution you in this regard since the circumstances are somewhat unique. Let me illustrate. If a defendant were charged with a burglary on a certain date at a certain time and he introduced testimony that he was out of state for example, at the time, we are confronted with the classical type of alibi.

In the case at bar, however, since the crime of kidnapping is an ongoing offense and defendants Byron Smith and Geary Gilmore testified they were at the 14<sup>th</sup> Street apartment when the two boys were present, the issue of alibi departs from the classic variety.

Notwithstanding, the defense is valid and the defendants Byron Smith and Geary Gilmore assert they were not at the 14<sup>th</sup> Street apartment in connection with any kidnapping and were elsewhere than the 14<sup>th</sup> street apartment during most of the time and elsewhere than Romulus[, Michigan] during the commission of the murder.

Alibi may fail, ladies and gentlemen, as a substantive defense yet serve to raise a reasonable doubt. The burden of proving alibi is not upon the defendants, since as you know, the people must prove the defendants were at the place where the offense is alleged to have been committed and were the ones who committed it.

Under Michigan law, “[a]n instruction to the jury concerning the defense of alibi must clearly explain that this defense offers two avenues of relief for the defendant.” *People v. Erb*, 211 N.W.2d 51, 55 (Mich. Ct. App. 1973). One avenue is founded on clear proof of the alibi. The other is founded on reasonable doubt that the defendant was present at the time that the crime was committed. *Id.* However, a trial court is not required to give the perfect instruction; rather, the instruction need only “adequately advise[] the jury that, should any reasonable doubt exist as to the presence of the defendant at the scene of the crime, he should be acquitted.” *Id.*

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The trial court found that the instruction was more than adequate to explain to the jury that the defense of alibi provided two avenues of relief. Gilmore has not established any error in that conclusion. This sub-claim does not deserve encouragement to proceed further.

*IX. Rule 52(b) Motion*

Rule 52(b) provides that “[o]n a party’s motion . . . the court may amend its findings—or make additional findings—and may amend the judgment accordingly.” As is relevant to his COA application, Gilmore argued in his Rule 52(b) motion that the district court misconstrued some of his arguments and improperly relied upon the trial court’s factual findings. But, as set forth above, the district court appropriately applied AEDPA deference to the trial court’s factual findings. Moreover, the district court reviewed the trial record and determined that the trial court’s factual findings were accurate. Jurists of reason could not debate the district court’s denial of Gilmore’s Rule 52(b) motion.

Accordingly, Gilmore’s application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

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