IN THE UNITED STATES
SUPREME COURT

DEONTAE TRAVOHN DAVIS,
Petitioner,

V

COA NO: 17-2153

DUCAN McCLAREN,
Respondent,

Mr. Deontae T. Davis #584827
In Pro Per
Kinross Correctional Facility
4533 W. Industrial Park Drive
Kincheloe, MI 49788

MOTION TO EXTEND TIME TO FILE PETITION
-FOR A WRIT OF CERTIORARI
PURSUANT TO RULE 13(5)

Mr. Deontae T. Davis #584827 6.18.18

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1. NOW COMES, Petitioner Davis, In Pro Per, ask this court to GRANT this motion for motion to extend time to file Petition, and further states:

2. Petitioner has most recently sought relief in the United States Court Of Appeals For The Sixth Circuit.

3. On April 3rd, 2018 Petitioner Motion For Certificate Of Appealability was denied.

4. Petitioner has had a very hard time researching and constructing his Petition for Writ Of Certiorari. Petitioner is not and Legal writer and is a Layman at law, ultimately unable to access Legal information at this present Prison institution, at a steady pace.

5. Petitioner received surgery on his mouth removing a wisdom tooth, because of mis-prescribed medication complications landed Petitioner in the War Memorial Hospital for and extended stay. Complications from the surgery and Medication continues to be a

hurdle in preventing Petitioner from prevailing on research and completion of Certiorari.

WHEREFORE, Petitioner Davis asks this honorable Court to extend time to file Certiorari, For the reasons stated above as well extend time to file as much as possible.

Respectfully Submitted,

Mr. Deontae T. Davis #584827 6-18-18

Mr. Deontae T. Davis #584827
Kinross Correctional Facility
4533 W. Industrial Park Dr.
Kincheloe, MI 49788

No. 17-2153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEONTAE TRAVOHN DAVIS,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
DUNCAN MACLAREN, Warden,	)	
	)	
Respondent-Appellee.	)	
	)	
	)	

Deontae Travohn Davis, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Davis has filed an application for a certificate of appealability, a motion to proceed in forma pauperis, and a motion for the appointment of counsel.

Davis was sentenced to life imprisonment with the possibility of parole after being convicted of one count of conspiracy to commit first-degree premeditated murder, seven counts of attempted murder, one count of placing offensive or injurious substances in or near real or personal property, one count of conspiracy to commit arson of a dwelling house, and one count of arson of a dwelling house. The Michigan Court of Appeals affirmed Davis's convictions and sentence. *People v. Davis*, No. 290131, 2010 WL 2507029 (Mich. Ct. App. June 22, 2010). Davis appealed, and the Michigan Supreme Court remanded the case back to the state appellate court to determine whether the trial court erred in allowing the admission of a co-defendant's statement through the preliminary examination testimony of another witness. *People v. Davis*, 790 N.W.2d 401 (Mich. 2010) (mem.). On remand, the Michigan Court of Appeals determined

that the admission of the statement was not plain error and affirmed Davis's convictions and sentence. *People v. Davis*, No. 290131, 2011 WL 921656 (Mich. Ct. App. Mar. 17, 2011). The Michigan Supreme Court denied leave to appeal. *People v. Davis*, 800 N.W.2d 78 (Mich. 2011) (mem.).

Davis then filed a petition for a writ of habeas corpus, arguing that there was insufficient evidence in support of his conspiracy to commit first-degree murder and his attempted murder convictions; his Double Jeopardy rights were violated; the cumulative effect of errors violated his right to a fair trial; his right to a public trial was violated; the trial court lacked jurisdiction; the trial court gave erroneous jury instructions; his right to present a defense was violated when the trial court failed to address his request for the appointment of a handwriting expert; his Sixth Amendment rights were violated when the trial court denied his request for substitution of counsel; he received ineffective assistance of trial and appellate counsel; the prosecutor engaged in misconduct; and his confrontation rights were violated. The district court denied the § 2254 petition, declined to issue a certificate of appealability, and denied leave to appeal in forma pauperis. Davis now seeks a certificate of appealability on his insufficient-evidence claims, his Double Jeopardy claim, his handwriting-expert claim, his substitute-counsel claim, his ineffective-assistance claims, his prosecutorial-misconduct claims, his confrontation claims, and his claim that the trial court gave an erroneous jury instruction when the trial court impermissibly vouched for the credibility of a prosecution witness. Davis has waived review of the issues that he raised in the district court but did not raise in his application for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(3); *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002).

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the state courts have adjudicated the petitioner's claims on the merits, the

relevant question is whether the district court's application of 28 U.S.C. § 2254(d) to those claims is debatable by jurists of reason. *See id.* at 336-37. However, if the district court has rejected a claim on procedural grounds, the petitioner must show both that jurists of reason would find the district court's procedural ruling debatable and that jurists of reason would find it debatable whether the petition states a valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's insufficient-evidence claims. When reviewing insufficient-evidence claims, a court must first determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). And on habeas review, even if the federal court concludes that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, the court must defer to a state appellate court's sufficiency determination if it is not unreasonable. *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). Michigan law provides that to prove conspiracy to commit first-degree murder, "it must be established that each of the conspirators have the intent required for murder and, to establish that intent, there must be foreknowledge of that intent." *People v. Hamp*, 312 N.W.2d 175, 180 (Mich. Ct. App. 1981). Attempted murder requires proof "that the defendant intended to bring about a death," *People v. Long*, 633 N.W.2d 843, 848 (Mich. Ct. App. 2001), and intent to kill may be inferred from a defendant's actions, *People v. Ng*, 402 N.W.2d 500, 504 (Mich. Ct. App. 1986). While Davis asserts that there was insufficient evidence in support of his conspiracy to commit first-degree murder and his attempted murder convictions, the evidence included testimony that Davis and his co-defendants planned to set a car in a garage on fire and then shoot anyone who came out of the house to escape the fire, that Davis brought gasoline, and that he helped set the car on fire. *Davis*, 2010 WL 2507029, at *2. In light of this evidence, it was plainly reasonable for the state court to conclude that a rational trier of fact could convict Davis

of conspiracy to commit first-degree murder and attempted murder. Accordingly, reasonable jurists would not debate the district court's resolution of these claims.

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that the trial court impermissibly vouched for the credibility of a prosecution witness. "[A] habeas petitioner's claimed error regarding 'jury instructions must be so egregious that [it] render[ed] the entire trial fundamentally unfair.'" *Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1078 (6th Cir. 2015) (quoting *White v. Mitchell*, 431 F.3d 517, 533 (6th Cir. 2005)). Therefore, the petitioner must show that the instruction "by itself so infected the entire trial that the resulting conviction violate[d] due process." *Hanna v. Ishee*, 694 F.3d 596, 620 (6th Cir. 2012) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). Despite Davis's assertions to the contrary, the trial court did not vouch for the credibility of a prosecution witness. Instead, the trial court explicitly stated that the jury should consider an accomplice's testimony more cautiously than the testimony of an ordinary witness. The trial court also informed the jury that they should consider whether "the accomplice's testimony [was] falsely slanted to make the defendant seem guilty" and whether the accomplice was influenced by a promise "that he [would] not be prosecuted, or promised a light sentence or allowed to plead guilty to a less serious charge." Because the trial court did not bolster the credibility of the prosecution witness and instead called into question the credibility of his testimony, Davis's trial was not rendered fundamentally unfair. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that his right to present a defense was violated when the trial court failed to address his request for the appointment of a handwriting expert. While indigent defendants have a constitutional right to the "basic tools of an adequate defense or appeal," *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)), there is no clearly established right to the appointment of non-psychiatric expert witnesses or court appointed investigators, *see Babick v. Berghuis*, 620 F.3d 571, 579 (6th Cir. 2010).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that his Sixth Amendment rights were violated when the trial court denied his request for substitution of counsel. When considering the denial of a request for substitute counsel, this court considers (1) the timeliness of the motion, (2) the adequacy of the state court's inquiry into the petitioner's complaint, (3) whether the conflict is so great that it resulted in a total lack of communication that prevented an adequate defense, and (4) a balancing of the petitioner's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice. *Henness v. Bagley*, 644 F.3d 308, 321 (6th Cir. 2011). While Davis did request new counsel based on an asserted lack of communication and diligence, Davis failed to identify any specific conflicts with his appointed counsel and provided vague or unspecifc answers to the trial court when it attempted to ascertain Davis's problems with trial counsel. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that he received ineffective assistance of trial counsel. Davis argues that trial counsel lacked a trial strategy, failed to investigate alibi witnesses, and did not spend any time investigating. To prove ineffective assistance of counsel, a habeas petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In habeas proceedings, the district court must apply a doubly deferential standard of review: "[T]he question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Davis is unable to show that counsel acted unreasonably or that he was prejudiced by counsel's failure to investigate because he has failed to identify any alibi witnesses or any other additional evidence that counsel should have pursued. *See Hutchison v. Bell*, 303 F.3d 720, 748 (6th Cir. 2002). Additionally, while Davis broadly asserts that counsel lacked a trial strategy, he has failed to rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 669. In light of

the double deference due under *Strickland* and § 2254, reasonable jurists could not disagree with the district court's rejection of Davis's ineffective-assistance claim. *See Harrington*, 562 U.S. at 105.

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that he received ineffective assistance of appellate counsel when counsel failed to adequately investigate a prosecution witness's recantation. To show ineffective assistance when appellate counsel presents one argument instead of another, "the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present.'" *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). The Michigan Court of Appeals rejected this claim on the merits because Davis failed to establish that a different result was likely on retrial. *Davis*, 2010 WL 2507029, at *5. Because "this court views with great suspicion the recantation testimony of trial witnesses in postconviction proceedings," reasonable jurists could not disagree with the district court's determination that the state court's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law. *Brooks v. Tennessee*, 626 F.3d 878, 897 (6th Cir. 2010).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that the prosecutor engaged in misconduct when he improperly appealed to the jury's civic duty. Specifically, Davis asserts that the prosecutor improperly appealed to the jury's civic duty by stating "[t]hat is why you get paid the big money as jurors, is to find defendants guilty as charged in these matters." "Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible." *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991). Because the prosecutor's statement referred only to "the general community need to convict guilty people," reasonable jurists could not disagree with the district court's rejection of this claim. *United States v. Lawrence*, 735 F.3d 385, 433 (6th Cir. 2013) (quoting *Hicks v. Collins*, 384 F.3d 204, 219 (6th Cir. 2004)).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that the prosecutor engaged in misconduct when he misrepresented facts by arguing that Davis had threatened a witness. But during preliminary examination testimony, the witness explicitly stated that Davis threatened him. Because the prosecutor's statement was supported by the record, reasonable jurists could not disagree with the district court's rejection of this claim. *See United States v. Henry*, 545 F.3d 367, 378 (6th Cir. 2008).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that the prosecutor engaged in misconduct when he attempted to inflame the passions of the jury. Davis argues that the prosecutor attempted to inflame the passions of the jury by asking them to imagine what would have happened if the victims were unable to testify because the defendants successfully killed them. "[A] prosecutor illicitly incites the passions and prejudices of the jury when he calls on the jury's emotions and fears-rather than the evidence-to decide the case." *Johnson v. Bell*, 525 F.3d 466, 484 (6th Cir. 2008). The prosecutor made the remarks while arguing that Davis and his co-defendants acted with the necessary mental state to be convicted of conspiracy to commit first-degree murder. Because the prosecutor did not ask the jury to decide the case on the basis of sympathy, reasonable jurists could not disagree with the district court's rejection of this claim. *See Clarke v. Warren*, 556 F. App'x 396, 407 (6th Cir. 2014).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that the prosecutor engaged in misconduct by offering unsworn testimony as evidence. Despite Davis's assertions to the contrary, the trial court did not admit unsworn testimony as evidence, but instead allowed the admission of the testimony to refresh a witness's recollection and to impeach him. Because "[a] prosecutor may rely in good faith on evidentiary rulings made by the state trial judge and make arguments in reliance on those rulings," reasonable jurists could not disagree with the district court's rejection of this claim. *Cristini v. McKee*, 526 F.3d 888, 900 (6th Cir. 2008).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that the prosecutor engaged in misconduct when he alluded to Davis's post-arrest silence. References to a defendant's post-*Miranda* silence used to impeach his credibility violate the defendant's Fourteenth Amendment right to due process. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). However, an isolated reference to the exercise of a defendant's right to remain silent does not deprive a defendant of his right to a fair trial when the silence is not emphasized or exploited. *United States v. Weinstock*, 153 F.3d 272, 280-81 (6th Cir. 1998). Here, the prosecutor did not mention Davis's silence but only noted that one of Davis's co-defendants chose to speak with the police, This oblique reference to Davis's silence did not violate his right to a fair trial. Accordingly, reasonable jurists could not disagree with the district court's rejection of this claim.

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that the prosecutor engaged in misconduct when he noted that a witness's testimony was mostly not in evidence in this case because of the rules of evidence. Even if the prosecutor's remark was improper, the trial court instructed the jury that the lawyers' statements and arguments are not evidence. Because "[j]urors are presumed to follow instructions," reasonable jurists could not disagree with the district court's rejection of this claim. *United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011).

Reasonable jurists would not find it debatable whether the district court erred in rejecting Davis's claim that his confrontation rights were violated when the trial court declared Travis Crowley unavailable and then admitted Crowley's preliminary examination testimony. The Confrontation Clause prohibits the prosecution from substituting former testimony for live testimony unless the prosecution demonstrates that the witness is unavailable for trial. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). A witness is unavailable for full and effective cross-examination when he refuses to testify, even when the refusal is punishable as contempt. *United States v. Bourjaily*, 781 F.2d 539, 544 (6th Cir. 1986); *see Green v. MacLaren*, No. 17-1249, 2017 WL 3973956, at *2 (6th Cir. Aug. 2, 2017). While Davis asserts that he did not have an

adequate opportunity to cross-examine Crowley at his preliminary examination, this court has held that "there is no clearly established federal law holding that cross-examination at a preliminary hearing is insufficient for Confrontation Clause purposes." *Weissert v. Palmer*, 699 F. App'x 534, 539 (6th Cir. 2017) *petition for cert. denied*, (Feb. 20, 2018) (No. 17-7278). Because Davis had an adequate opportunity to cross-examine Crowley and Crowley refused to testify, reasonable jurists would not debate the district court's resolution of these claims. *See Hamilton v. Morgan*, 474 F.3d 854, 858 (6th Cir. 2007).

Reasonable jurists could not disagree with the district court's determination that Davis's remaining claims are procedurally defaulted. This court has determined that a habeas petitioner procedurally defaults a federal claim in state court when:

> (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; *and* (4) the petitioner cannot show cause and prejudice excusing the default.

Peoples v. Lafler, 734 F.3d 503, 510 (6th Cir. 2013) (quoting *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010)). Davis's Double Jeopardy claim was raised for the first time in a second motion for relief from judgment. The trial court dismissed that motion pursuant to Michigan Court Rule 6.502(G), which forbids successive motions for relief from judgment absent a retroactive change in the law or newly discovered evidence. We have held that Rule 6.502(G) is an adequate and independent state ground for denying review of a federal constitutional claim. *See Morse v. Trippett*, 37 F. App'x 96, 106 (6th Cir. 2002). Because Davis failed to present this claim in accordance with a state procedural rule, and the state court enforced the rule, reasonable jurists would not disagree with the district court's determination that Davis's Double Jeopardy claim was procedurally defaulted. *See Peoples*, 734 F.3d at 510-11. While Davis argued on direct appeal that his confrontation rights were violated when the trial court allowed the admission of Caprice Mack's out-of-court statements through the preliminary examination testimony of an unavailable witness, Davis failed to object to the admission of the statements. Because Michigan law provides that a criminal defendant must preserve claims for appeal by

making an objection in the trial court, the Michigan Court of Appeals determined that the claims were not preserved for appellate review and reviewed them only for plain error. *Davis*, 2011 WL 921656, at *2-3. Because plain error review is not equivalent to a review on the merits, reasonable jurists would not disagree with the district court's determination that these claims are procedurally defaulted. *See Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006).

If a claim is procedurally defaulted, federal habeas review "is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "[P]risoners asserting [actual] innocence as a gateway to [procedurally] defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). In support of his claim of actual innocence, Davis has attached an affidavit from a prosecution witness recanting his trial testimony. Because recantation testimony is viewed with great suspicion, the affidavit does not establish Davis's actual innocence. *See Carter v. Mitchell*, 443 F.3d 517, 539 (6th Cir. 2006). Accordingly, reasonable jurists would not disagree with the district court's determination that failure to consider Davis's claims would not result in a fundamental miscarriage of justice.

Accordingly, we **DENY** the application for a certificate of appealability and **DENY** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk