NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JERRY WORD, PETITIONER,

V.

JOHN CHRISTINSEN (WARDEN), RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI

APPENDIX-VOLUME I

Petitioner:

Jerry Word
8100 E. Jefferson, Apt. B-102
Detroit, Michigan 48214
(313) 407-9725
kellyjerry1952@gmail.com

Respondent:

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APPENDIX-A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-1401

JERRY WORD,

Petitioner-Appellant,

v.

JOHN CHRISTIANSEN, Warden,

Respondent-Appellee.

Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 21-1401

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY WORD, Petitioner-Appellant, v. JOHN CHRISTIANSEN, Warden, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

Jerry Word, a former Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, and the district court's order denying his motion for reconsideration. Word also moves to remand the case to the district court for an evidentiary hearing. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2015, a clerk at a hotel at which Word was staying called police and reported that she could see Word through his hotel-room window "waving a handgun and talking to himself." *People v. Word*, No. 334970, 2017 WL 6502944, at *1 (Mich. Ct. App. Dec. 19, 2017) (per curiam). Police arrived at the scene and one officer witnessed Word, through the window, "holding a handgun, thrusting forward with the handgun, and jumping around like he was nervous and jittery." *Id.* Officers knocked on Word's hotel room door and announced their presence, and officer Michael Raby testified that, when Word opened the door, he saw drug residue and

paraphernalia on a small table just inside the room. Once inside the room, officers found more drugs, bullet holes in the bedding, and a handgun. *Id.* A second officer, Kenneth Rochon, took photos of the entryway table, as well as photos of a second table, located in the back of the hotel room.

A jury convicted Word of two counts of possessing less than 25 grams of a controlled substance, three counts of possessing a firearm during the commission of a felony, and being a felon in possession of a firearm. *See id.* The trial court sentenced Word to one month to 10 years of imprisonment for each controlled-substance conviction, as well as the felon-in-possession conviction, and two years of imprisonment for each of the three felony-firearm convictions. *Id.* The Michigan Court of Appeals affirmed, *id.*, and the Michigan Supreme Court denied leave to appeal, *People v. Word*, 915 N.W.2d 470 (Mich. 2018) (mem.).

In October 2018, Word filed a § 2254 habeas petition raising two grounds for relief, but the district court dismissed the petition without prejudice because Word was pursuing post-conviction relief in state court. In February 2020, after his release from prison but while still on parole, Word filed another § 2254 petition. He also moved for an evidentiary hearing.

The district court denied Word's motion for an evidentiary hearing and denied habeas relief, concluding that his claims were meritless. It summarized Word's claims as follows:

> (1) Petitioner was denied the effective assistance of counsel at trial and on appeal,
>
> (2) the prosecutor and police committed misconduct by planting incriminating evidence and providing perjured testimony, and
>
> (3) the search of Petitioner's hotel suite violated his Fourth Amendment rights.

The district court explained that most of Word's claims were premised upon his contention that the officers who entered his hotel room lied when they testified that drug residue and paraphernalia were visible from outside of the open hotel-room door and that the officers planted evidence. It found that Word presented no reliable evidence to support these factual contentions, because the jurors viewed photographs of the table inside the doorway and were able to draw their own conclusions about the items resting on it. It also noted that four photographs that Word submitted

in support of his claims were "poor-quality copies" and that it was "impossible to discern what objects are cluttered on the table." The district court denied relief on the merits of Word's remaining claims and declined to issue a certificate of appealability.

Word moved to alter or amend the district court's judgment, arguing that the photographs that he submitted to the court were good-quality, color photographs and that the district court apparently had viewed only photocopies of his submitted documents. He contended that photographs of items found on the entryway table contradicted the officers' testimony about what they found on the table, and a series of photographs of the table in the back of the hotel room supported his claim that police planted evidence there. Word specified that he "never claimed that the officers planted evidence on the table in the doorway entrance"; he claimed only that they planted evidence in the rear bedroom.

The district court reviewed the color photographs submitted by Word but denied his motion for reconsideration, finding that the color photographs did not clearly and convincingly show that the state court relied upon an erroneous finding of fact in denying relief. The district court nevertheless granted a certificate of appealability with respect to Word's claims that "he was denied the effective assistance of counsel and that the prosecutor committed misconduct in connection with the alleged false testimony regarding what was in plain view from outside Petitioner's hotel room." This court denied Word's application to expand the certificate of appealability. *Word v. Christiansen*, No. 21-1401, slip op. at 7 (6th Cir. Nov. 4, 2021).

On appeal, Word reiterates his argument that officers Raby and Rochon testified falsely at both a pretrial hearing and at trial about what they found on the entryway table. He argues that the State committed prosecutorial misconduct by eliciting and failing to correct this false testimony and that his attorneys performed ineffectively by failing to challenge the testimony in the trial court and on appeal Word also argues that the district court erred in concluding that evidence found in his hotel room was admissible under the "plain view" and "exigent circumstances" exceptions to the warrant requirement. Those arguments are not properly before us because they exceed the scope of the certificate of appealability. *See* 28 U.S.C. § 2253(c)(1), (3); *Word*, No. 21-1401, slip op. at 7.

In an appeal from the denial of a habeas corpus petition, we review the district court's legal conclusions de novo and its factual findings for clear error. *Jackson v. Bradshaw*, 681 F.3d 753, 759 (6th Cir. 2012). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Satterlee v. Wolfenbarger*, 453 F.3d 362, 366 (6th Cir. 2006) (quoting *Norris v. Schotten*, 146 F.3d 314, 323 (6th Cir. 1998)). If the state court adjudicated a petitioner's claim on the merits, a federal court may not grant habeas relief unless the state court's adjudication resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

The ineffective-assistance and prosecutorial-misconduct claims that have been certified on appeal are premised upon Word's contention that officers Raby and Rochon falsely testified about what they found on the entryway table when Word opened the hotel room door. At the preliminary examination, Raby testified that, when Word opened the door, he "could see right in front of the door in—in plain view . . . a crack pipe, I could see Chore Boy and I could see a—a corner tie of [what] looked like it had a white, powdery substance in it." He described Chore Boy as "like steel wool but it's like a . . . copper color." Raby's trial testimony was consistent with his preliminary-hearing testimony, and, when the prosecutor used a projector to display photographs of the entryway table, Raby pointed out the items that he listed. Defense counsel asked Raby about these items on cross-examination, and he maintained that he saw them on the entryway table. Rochon, who photographed the entryway table, used a laser pointer to identify, in one of his photographs, a scale and white powder that he believed to be cocaine. He also testified that he saw a crack pipe on the entryway table but, after taking a closer look at the photograph that he was being shown, rescinded that testimony.

To establish prosecutorial misconduct based on perjured testimony, Word must show that material testimony was actually false and that the prosecutor knew that the testimony was false. *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). To show that counsel was

ineffective, he must prove that counsel's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

Word relied on photographs of the entryway table to support his claim that officers Raby and Rochon testified falsely, arguing that the photographs do not depict what the district court said they do. Based on a clear, color photograph of the entryway table, which the district court embedded in its order denying reconsideration, the district court concluded that Word did not clearly and convincingly show that the officers lied. Word now argues that the substance that the district court labeled as drugs or drug paraphernalia are "nothing but cigarette ashes that had been wet and dried out, and a cigarette butt rolled up and broke off from its filter." He also disputes that the photograph shows "chore boy" and points out that Rochon rescinded his testimony about seeing a crack pipe in a photograph of the entryway table once he was shown a closer view of that table. But the district court applied the proper legal standard, *see* 28 U.S.C. § 2254(e)(1), and, after reviewing the picture, we are not "left with the definite and firm conviction that" the district court erred in concluding that the picture did not clearly and convincingly contradict the officers' testimony about what they saw on the entryway table, *Satterlee*, 453 F.3d at 366 (quoting *Norris*, 146 F.3d at 323).

Because Word did not show that officers Raby and Rochon testified falsely, he failed to establish prosecutorial misconduct. He also did not show that his attorneys performed ineffectively, because any argument regarding the presentation of false testimony would have lacked merit. The photographs of the scene were shown to the jury and did not obviously contradict either officers' testimony. And because the record conclusively shows that Word is not entitled to habeas relief, the district court did not abuse its discretion by denying his request for an evidentiary hearing. *See Muniz v. Smith*, 647 F.3d 619, 625 (6th Cir. 2011).

Accordingly, we **DENY** Word's motion to remand for an evidentiary hearing and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX-B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JERRY WORD,

Petitioner,

Case No. 2:20-cv-10352
Hon. Victoria A. Roberts

v.

JOHN CHRISTIANSON,

Respondent.
_____/

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, (2) DENYING MOTION FOR EVIDENTIARY HEARING (ECF No. 20), (3) DENYING CERTIFICATE OF APPEALABILITY, AND (4) DENYING PERMISSION TO APPEAL IN FORMA PAUPERIS.

Jerry Word ("Petitioner") filed this habeas case under 28 U.S.C. § 2254. Petitioner was convicted after a jury trial in the Oakland Circuit Court of one count of possession of a controlled substance – less the 25 grams of cocaine or heroin, MICH. COMP LAWS § 333.7403(2)(a)(v), possession of a firearm during the commission of a felony, MICH. COMP LAWS § 750.227b, and felon in possession of a firearm. MICH. COMP LAWS § 750.224f. He was sentenced to one month to ten years for the narcotics and felon in possession offenses and a consecutive two years for the felony-firearm offense. Petitioner was released on parole on July 3, 2019.

Petitioner raises three claims in his habeas petition: (1) Petitioner was denied the effective assistance of counsel at trial and on appeal, (2) the prosecutor and police committed misconduct by planting incriminating evidence and providing perjured testimony, and (3) the search of Petitioner's hotel suite violated his Fourth Amendment rights. Because the claims are without merit the Court will deny the petition. The Court will also deny Petitioner a certificate of

Following his conviction and sentence, Petitioner filed a claim of appeal in the Michigan Court of Appeals. His appellate counsel filed a brief on appeal, raising the following claims:

> I. Did the search of Appellant's hotel room violate his right against unreasonable search and seizure and did the trial court err in denying suppression of the evidence.
>
> II. Whether Appellant's convictions should be reversed because Appellant reported a breakdown in the attorney client relationship and requested appointment of new counsel and the trial judge failed to inquire adequately into the breakdown in the relationship and abused her discretion in refusing to appoint new counsel.

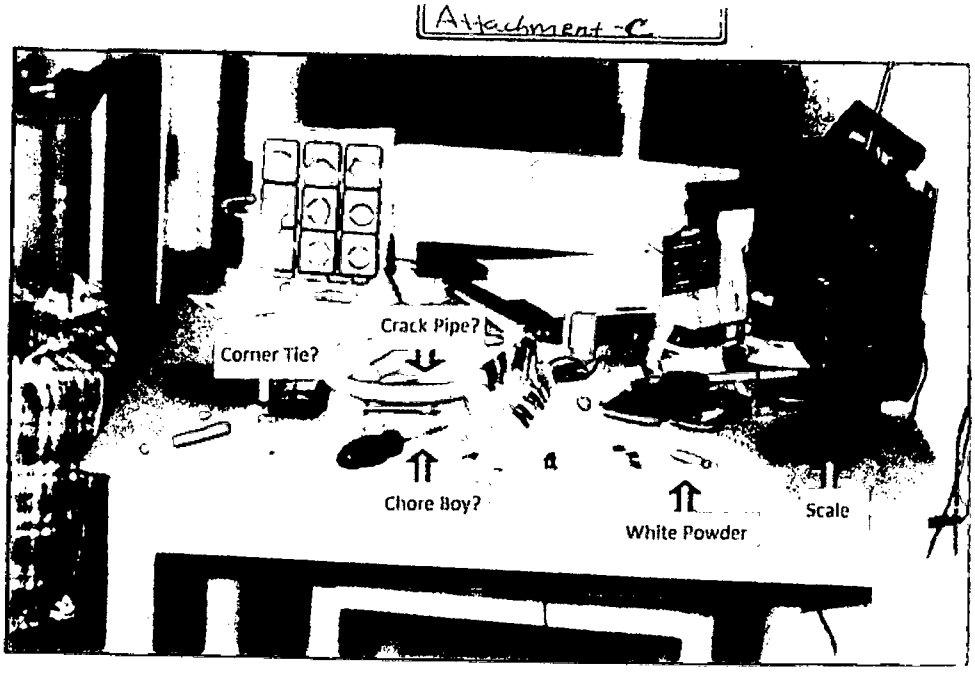
Petitioner also filed his own supplemental pro se brief, raising an additional two claims:

> III. Appellant was denied his constitutional right to due process of law and right to counsel under both the constitutions of the United States of America and the State of Michigan where trial counsel failed to adequately represent the appellant and acted in collusion with the prosecution during the criminal process.
>
> IV. Appellant was denied his constitutional rights under both the constitutions of the State of Michigan and the United States of America through prosecutorial misconduct where the prosecution obtained fraudulent charges; used perjured testimony; suborned and acquiesced perjury; planted evidence, and was in collusion with Appellant's trial counsel in his criminal prosecution.

On December 19, 2017, the Michigan Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. *Word*, 112017 WL 6502944, at *7. Petitioner filed an application for leave to appeal in the Michigan Supreme Court, raising the claims that he raised in the Court of Appeals. The application was denied by form order. *People v. Word*, 915 N.W.2d 470 (Mich. 2018) (Table).

Petitioner then filed his first federal habeas petition in 2018. While that case was pending, Petitioner filed a motion for relief from judgment in the trial court, raising the following claims:

> I. Defendant was denied his right to protection from illegal search and seizure by means and conduct of fraud and fraud upon the court by the prosecution, the Southfield Police, and his court appointed trial counsel.
>
> II. Defendant was denied his Sixth Amendment right to effective assistance of appellate counsel where court appointed counsel failed to submit proper factual



(Motion, Attachment C, ECF No. 23, PageID.2415) (Judge's Copy)

Of the several photographs submitted by Petitioner, the one embedded above is the closest shot of the table nearest the front door. Another photo taken slightly farther back shows that this is the table that was just inside the front door to the hotel suite. The yellow tags have been added by the Court. The photograph generally depicts a very cluttered table. Five cell phones are clearly visible. A scale is also clearly visible below the radio, and it is an easily identifiable by anyone familiar with narcotics cases. There is a possible corner tie that can be seen below the two cell phones on the left side of the table. There is a possible glass crack pipe just visible above the front lip of what appears to be a white plate or tray in the center of the table. There is the suggestion of copper-colored chore boy, just barely discernable below the shaft of the screwdriver. Or perhaps the photo depicts burnt chore boy positioned slightly further away from the screwdriver. In any event, much of the surface of the table is dusted with what appears to be a white powdery substance.

disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

III. Analysis

All of Petitioner's claims are founded on the allegation that police officers lied about what they saw when they confronted him in the doorway to his hotel suite. Petitioner asserts that none of the drugs or drug paraphernalia found in his suite was visible from the hallway, as claimed by the officers. He asserts that the officers planted powdered cocaine and moved incriminating evidence from elsewhere in the suite to create a post-hoc justification to search the suite.

Petitioner's first claim asserts that both his trial and appellate counsel were ineffective for failing to use his factual allegations to support his Fourth Amendment and prosecutorial misconduct claims. His second claim asserts that the police and prosecutor committed misconduct by falsely claiming that the contraband was visible from the doorway and for planting additional evidence on the table. His third claim asserts that his Fourth Amendment rights were violated when the police lacked a warrant or exigent circumstances to search his hotel suite following his arrest in the hallway.

Petitioner asserts that it was not until after he was released on parole on July 3, 2019, and after his direct appeal was complete, that he finally obtained evidence to support the factual allegations underlying his claims through a FOIA request. (See Petitioner's Reply Brief, ECF No. 18, PageID.2179). But what Petitioner submitted to the Court are four extremely poor-quality maximum-contrast black-and-white photocopies of unlabeled photographs. (See Reply Brief, ECF No. 18, PageID.2221-24.)

The first two photos are close-up views of a small, cluttered table. The Court can identify what is perhaps a scale, a radio, what appears to be a lighter, something that looks like a pill bottle,

(Id.) The jury saw the actual photographs during the examination of the two officers and could see for themselves what was depicted on them. (ECF No. 13-11, PageID.517, 534).

In light of this record, Petitioner has failed to establish the factual predicate for his legal claims. Contrary to his allegations, there is no indication that the police planted evidence on the table by the door to his hotel suite after his arrest. Instead, the record shows that the jury was shown the actual photographs of the table during trial, and two police witnesses used laser pointers to indicate where the items of contraband were on the table. The four extremely poor-quality copies supplied by Petitioner do not contradict the trial record. Indeed, it is impossible to discern what objects are cluttered on the table, and there are areas of the table completely obscured by the high-contrast quality of the copies.

Petitioner's legal claims fall without a factual basis to support them. Petitioner's prosecutorial misconduct claim requires, among other things, for him to show that the prosecutor knew the officers' testimony to be false. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). Petitioner presented nothing to the state courts, and he has proffered nothing to this Court, showing that the officers' testimony was false. Indeed, their testimony was based upon photographs that were presented to the jury, who could determine for themselves what was on the table. Petitioner's ineffective assistance of trial counsel claim requires Petitioner to prove that his counsel performed deficiently and that his performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). But, again, Petitioner presented nothing to the state courts nor this Court showing that there was any basis to object to or challenge the officers' testimony or that there existed a stronger basis for the motion to suppress. The same thing holds true for Petitioner's appellate counsel. "[T]he failure to make futile objections does not constitute ineffective assistance." *Altman v. Winn*, 644 F. App'x 637, 644 (6th Cir. 2016). Finally, even assuming review of Petitioner's underlying Fourth

substitute counsel on the first morning of trial. Petitioner was represented at trial by his fourth appointed attorney. The trial court's denial of his request for a fifth attorney suggested that Petitioner's request was motivated by a desire to delay proceedings. (ECF No. 13-10, PageID.334-35.) The rejection of the last-minute request did not violate Petitioner's Sixth Amendment rights. See, e.g., *United States v. Whitfield*, 259 F. App'x. 830, 834 (6th Cir. 2008); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981).

Petitioner also raised a claim in his initial habeas petition regarding a discrepancy in the weight of the drugs measured by the police and then later at the police lab. But as the Michigan Court of Appeals reasonably found, the discrepancy is explained by the fact that the police weighed the drugs in their packaging, whereas the lab weighed the drugs without the packaging. *Word*, 2017 WL 6502944, at *5.

Petitioner claimed in his original petition that his counsel was ineffective for requesting a jury instruction on the lesser charge of simple possession. It is difficult to fault trial counsel for urging the jury to consider a lesser offense, however, that was based entirely on Petitioner's own testimony in which he admitted that the narcotics were his, but that he planned to use them for himself and not sell them. (ECF No. 13-11, PageID.498-99, 502, 505.) Counsel is not ineffective for presenting a defense that comports with the defendant's testimony. See, e.g., *Burks v. Haas*, 2018 WL 6696674, 2018 U.S. Dist. LEXIS 215564, *18 (E.D. Mi Dec. 20, 2018).

As none of Petitioner's claims merit relief, the petition will be denied.

IV. Certificate of Appealability

In order to appeal the Court's decision, Petitioner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2). The applicant is required to show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JERRY WORD,

Petitioner,

Case No. 2:20-cv-10352
Hon. Victoria A. Roberts

v.

JOHN CHRISTIANSON,

Respondent.
_____/

JUDGMENT

IT IS ORDERED that:

(1) The petition for writ of habeas corpus is **DENIED**;

(2) A certificate of appealability is **DENIED**; and

(3) Permission to appeal in forma pauperis is **DENIED.**

Dated at Detroit, Michigan, this 4th, day of January, 2021.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/ Linda Vertriest
DEPUTY CLERK

APPROVED:

s/ Victoria A. Roberts
Victoria A. Roberts
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JERRY WORD,

Petitioner,

Case No. 2:20-cv-10352
Hon. Victoria A. Roberts

v.

JOHN CHRISTIANSON,

Respondent.
_____/

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION [ECF No. 23]

On January 4, 2021, the Court denied Petitioner Jerry Word's application for a writ of habeas corpus. The Court denied the petition, in large part, because the extremely poor-quality photocopies of trial exhibit photographs submitted to the Court did not contradict the trial testimony of police officers, the central factual predicate for all of Petitioner's legal claims.

Before the Court is Petitioner's motion for reconsideration. Petitioner claims that the original color photographs indisputably show the police officers' testimony to be false. The Judge's copy of the motion for reconsideration includes copies of the much better-quality color photographs. After careful consideration of the newly available exhibits, the Court nevertheless denies Petitioner's motion for reconsideration.

Pursuant to Local Rule 7.1(h), a party seeking reconsideration must demonstrate (i) a "palpable defect" by which the court and the parties have been "misled," and (ii) that "correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1(h)(3). A "palpable defect" is an error that is "obvious, clear, unmistakable, manifest or plain." *United States v. Cican*, 156 F. Supp. 2d 661, 668 (E.D. Mich. 2001).

Petitioner's legal claims are all based on the factual predicate that police officers lied about what was in plain view inside his hotel suite when Petitioner answered the door. He claims that because no incriminating evidence was in plain view, the warrantless search of his suite was illegal, the prosecutor wrongfully elicited false testimony from the officers, and defense counsel was ineffective for failing to better contest the search on this basis.

The Michigan Court of Appeals, however, found that police legally searched Petitioner's hotel suite on based on two alternative grounds. First, the state court found that the plain-view exception to the warrant requirement applied:[1]

> The plain-view exception to the warrant requirement is applicable here because before even entering the room, an officer observed several incriminating items in plain view, including a crack pipe, a chore boy, and a corner tie containing what appeared to be narcotics. The incriminating nature of narcotics and narcotics paraphernalia was also immediately apparent. Similarly, while searching defendant's room for other occupants or victims, Officer Raby discovered the other narcotics and narcotics paraphernalia lying in plain view.

People v. Word, 2017 WL 6502944, at *2 (Mich. App., 2017).

Second, the state court found that the exigent circumstances exception to the warrant requirement was met:[2]

> Police were called to the hotel when the desk clerk viewed defendant in his room, waiving a gun, and talking. The officers also viewed defendant holding the gun, thrusting it forward, and jumping around like he was nervous and jittery. While outside defendant's room, they heard several thuds, "banging noise," and a "deep thud kind thing," which Officer Clark explained that it was like "you hit a pillow or something or you hit something that's like a body hit kind of thing." The officers had sufficient reason to conclude that the room might contain an injured or threatened individual in need of immediate rescue and so, their entry was not improper. While in the room, Officer Raby observed crack cocaine, a crack pipe,

[1] The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent. *Horton v. California*, 496 U.S. 128 (1990).

[2] Warrants are not required where "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

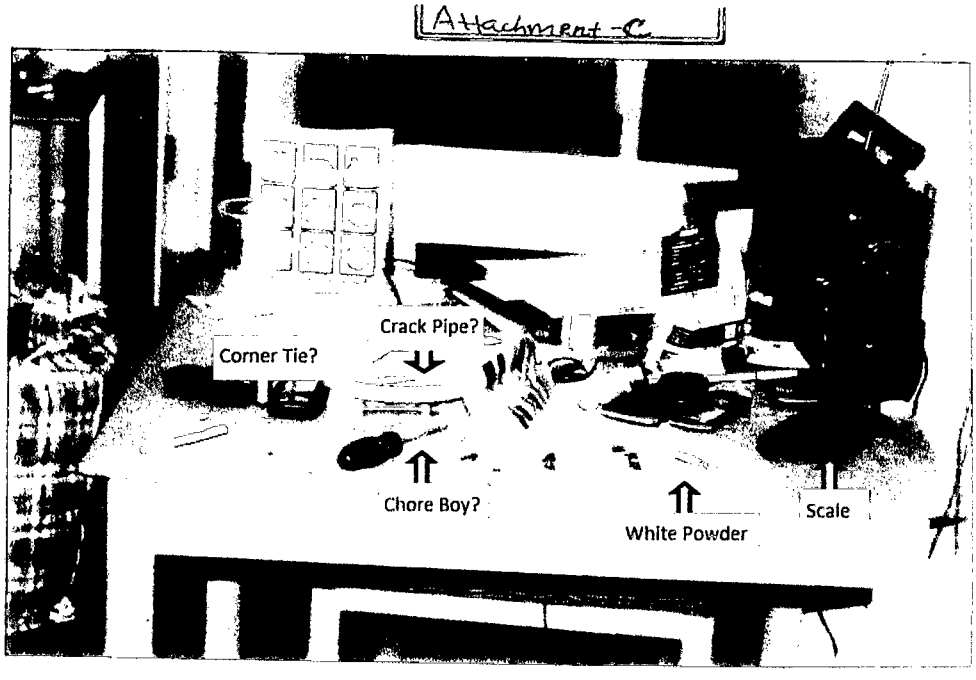
> baking soda, and a pillow with bullet holes and powder burns in plain view.4 The officers' actions fell within the exigent circumstances and plain view exceptions to the warrant requirement. Accordingly, the trial court did not err by failing to suppress the evidence obtained from defendant's hotel room.

Id., 2017 WL 6502944, at *3.

The color photographs attached to the motion for reconsideration are purportedly the same ones used at trial by the prosecutor during the testimony of the police officers. Petitioner contends that the photographs show that none of the items of contraband testified to by the police officers can be seen on the table that was visible from the hallway. Certainly, the color photographs allow the Court to better evaluate the merits of this allegation than the poor photocopies.

Nevertheless, the Court is not persuaded that the photographs are as exculpatory as Petitioner suggests. At trial, officer Michael Raby testified that when Petitioner answered the door, he could see a table on the wall just inside the suite. (ECF No. 13-10, PageID.415.) The prosecutor first showed him a photograph of the room taken from the entrance that depicted a table. (Id., PageID.415-16.) The prosecutor then showed him a close-up of the table – and the Court will assume it is the photo embedded below. (Id., PageID.416.) Raby used a laser pointer to indicate for the jury where the photo depicted a crack pipe, chore boy (used as a filter in a crack pipe), and a corner tie. (Id. PageID.416-17.) Raby indicated the chore boy was "by the screwdriver," but it was hard to see in the photo because it was almost the same color as the table. (Id., PageID.417.) Officer Kenneth Rochon similarly used a laser pointer to indicate for the jury where the close-up photo depicted a scale, cell phones, white powder, and Petitioner's driver's license. (Id., PageID.439.)

Petitioner asserts that the color photographs clearly show that none of these items were on the table. While the color photos are certainly much better than the copies previously reviewed by the Court, they do not constitute "clear and convincing evidence" that the officers lied:



(Motion, Attachment C, ECF No. 23, PageID.2415) (Judge's Copy)

Of the several photographs submitted by Petitioner, the one embedded above is the closest shot of the table nearest the front door. Another photo taken slightly farther back shows that this is the table that was just inside the front door to the hotel suite. The yellow tags have been added by the Court. The photograph generally depicts a very cluttered table. Five cell phones are clearly visible. A scale is also clearly visible below the radio, and it is an easily identifiable by anyone familiar with narcotics cases. There is a possible corner tie that can be seen below the two cell phones on the left side of the table. There is a possible glass crack pipe just visible above the front lip of what appears to be a white plate or tray in the center of the table. There is the suggestion of copper-colored chore boy, just barely discernable below the shaft of the screwdriver. Or perhaps the photo depicts burnt chore boy positioned slightly further away from the screwdriver. In any event, much of the surface of the table is dusted with what appears to be a white powdery substance.

To be sure, even the much better-quality photo leaves the Court unsure as to what is depicted on the table. But where a habeas petitioner seeks to undermine factual findings by a state court, he must do so with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Wofford v. Woods*, 969 F.3d 685, 698-99 (6th Cir. 2020). The photos do not clearly and convincingly show that the police lied about what was in plain view when they looked into Petitioner's hotel suite from the doorway. The Court cannot conclude based on its review of the photos that they "clearly and convincingly" show that the officers lied about what they show or about what they saw. Petitioner has therefore not undermined the factual predicate supporting the Michigan Court of Appeals' conclusion that the search of his hotel suite was legal because officers observed several incriminating items in plain through the doorway.

Moreover, even if Petitioner successfully undermined the plain-view rationale, the Michigan Court of Appeals also found that the warrantless search was justified by the exigent-circumstances exception. Independent of whether police saw incriminating evidence when Petitioner opened the door, a hotel clerk told officers that through the window to the suite he had seen Petitioner in his room waiving a gun and talking. Responding officers looked through the same window and saw Petitioner holding a gun and jumping around. Then, while standing outside his doorway, officers heard thuds and other sounds suggesting that someone inside might be in danger. Even if incriminating evidence was not visible from the doorway, the state court reasonably concluded that "officers had sufficient reason to conclude that the room might contain an injured or threatened individual in need of immediate rescue." *Word*, 2017 WL 6502944, at *3.

Accordingly, Petitioner has not shown that the poor-quality black-and-white photocopies of the photographs erroneously led the Court to deny the petition for writ of habeas corpus. Accordingly, Petitioner's motion for reconsideration is **DENIED**.

SO ORDERED.

s/ Victoria A. Roberts
Hon. Victoria A. Roberts
United States District Judge

Dated: 3/22/2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JERRY WORD,

Petitioner,

Case No. 2:20-cv-10352
Hon. Victoria A. Roberts

v.

JOHN CHRISTIANSEN,

Respondent.
_____/

OPINION AND ORDER GRANTING CERTIFICATE OF APPEALABILITY AND PERMISSION TO APPEAL IN FORMA PAUPERIS

This Court issued an opinion and order denying the petitioner's application for a writ of habeas corpus. Petitioner moved for reconsideration, and the Court denied he motion. (ECF Nos. 23 and 24.) Before the Court are Petitioner's motion for a certificate of appealability and motion to proceed on appeal in forma pauperis. (ECF No. 26.)

Pursuant to Rule 11 of the Rules Governing Section 2254 Proceedings:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.
>
> Rule 11, Rules Governing Section 2254 Proceedings.

28 U.S.C. § 2253(c)(1)(A) and F.R.A.P. 22(b) state that an appeal from the district court's denial of a writ of habeas corpus may not be taken unless a certificate of appealability (COA) is issued either by a circuit court or district court judge. If an appeal is taken by an applicant for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not issue. F.R.A.P. 22(b). To obtain a certificate

of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a district court denies a habeas petition a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In the present case, for reasons stated in greater detail in the opinion denying Petitioner's motion for reconsideration, though the Court rejected Petitioner's claims about what could be viewed by police officers from his hotel room's entrance, reasonable jurists could debate the result. The Court will therefore grant a certificate of appealability with respect to Petitioner's claims that he was denied the effective assistance of counsel and that the prosecutor committed misconduct in connection with the alleged false testimony regarding what was in plain view from outside Petitioner's hotel room.

A court may grant IFP status to appeal if it finds that an appeal is being taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. 24(a). "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. *Foster v. Ludwick*, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002). The Court finds that an appeal can be taken in good faith and Petitioner may proceed in forma pauperis on appeal. *Id.*

Accordingly, it is **ORDERED** that a certificate of appealability and permission to appeal in forma pauperis are **GRANTED**.

s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

DATED: May 5, 2021

APPENDIX-C

Appendix- 12

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY WORD,

Defendant-Appellant.

UNPUBLISHED
December 19, 2017

No. 334970
Oakland Circuit Court
LC No. 2015-254122-FH

Before: METER, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of possession of a controlled substance less than 25 grams (cocaine and heroin), MCL 333.7403(2)(a)(v),[1] three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to one month to 10 years' imprisonment for each of the controlled substance convictions and the felon-in-possession conviction, and two years' imprisonment for each of the three felony-firearm convictions. For the reasons discussed below, we affirm.

I. FACTS

Defendant was arrested during the early morning hours of April 2, 2015, after the night clerk at a Holiday Inn Express, at which defendant had been staying, called the police to report that she saw defendant, through a window at another room, waving a handgun and talking to himself. Southfield Police Officer, Christopher Clark, testified that when he arrived at the hotel, he saw defendant through the window, holding a handgun, thrusting forward with the handgun, and jumping around like he was nervous and jittery. When other officers arrived at the hotel, they went to defendant's room, knocked on his door, and announced their presence. When defendant opened the door and stepped into the hallway, Officer Michael Raby saw a small table

[1] Defendant was initially charged with the manufacture or delivery of less than 50 grams of a controlled substance (cocaine), MCL 333.7401(2)(a)(*iv*), but the jury ultimately convicted defendant of possession of less than 25 grams of a controlled substance (cocaine).

in defendant's room on which he saw a crack pike, white powder and a "chore boy"[2] When defendant stepped into the hallway, Officer Raby entered the room to check for anyone who had been harmed or threatened by defendant and to make sure that there was no other armed individual in the room. While walking through the room, Officer Raby saw other drugs and paraphernalia in plain view at a second location. These included: crack cocaine, a second crack pipe, and a container of baking soda that held a glass tube in it. He also saw that the pillow had what appeared to be bullet holes. He then searched the bed coverings where he found additional bullet holes and a handgun.

In all, the police found six grams of powder cocaine, two grams of crack cocaine, and six grams of heroin. The police also found $4,941 in defendant's possession.

Defendant testified at trial. In his testimony, he stated that he began using crack cocaine in 2014, during a period of marital difficulties with his ex-wife, and that eventually, he moved out of his home and began living in various hotels. Defendant admitted that the items taken from his room at the hotel belonged to him, including a crack pipe. He confirmed that the "corner ties" in the room belonged to him, and that he had some cocaine in his room, however, he disputed ownership of one of the corner ties by stating that it was "questionable." Defendant testified that the glass tube in the box of baking soda was a "cigar tool," but he stated that he used it "to cook up some cocaine in that." He further testified that although he had a gun in his room, he did not intend to commit a crime with the gun.

II. FOURTH AMENDMENT SEARCH AND SEIZURE

On appeal, defendant first contends that the trial court erred by denying his motion to suppress the evidence collected from his room at the hotel because the police searched his room without first obtaining a search warrant. Under the circumstances of this case, we find no constitutional violation.[3]

"The Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution protect against *unreasonable* searches and seizures." *People v Barbarich*, 291 Mich App 468, 472; 807 NW2d 56 (2011). "Generally, searches or seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional." *Id.* "Thus, in order to show that a search was legal, the police must show either that they had a warrant, or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement."

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[2] Officer Raby explained that a "chore boy" was "like steel wool but it's like copper in color." According to the officer it is "used like a filter for the crack pipe. You put the chore boy in and put the rock in on top of that so that the rock doesn't fall through into the pipe and --[.]"

[3] "We review de novo the circuit court's ultimate ruling on a motion to suppress evidence. However, we review its factual findings for clear error." *People v Barbarich*, 291 Mich App 468, 471; 807 NW2d 56 (2011) (citation omitted). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted).

People v Davis, 442 Mich 1, 10; 497 NW2d 910 (1993). Further, "an occupant of an [sic] hotel or motel room is also entitled to the Fourth Amendment protection against unreasonable searches and seizures." *Id.* citing *Stoner v California*, 376 US 483, 489-490; 84 S Ct 889; 11 L Ed 2d 856 (1964).

Two recognized warrant exceptions apply in this case. The first applicable exception is the plain view doctrine which "allows a police office to seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminating." *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). "An item is obviously incriminatory, meaning its incriminating nature is immediately apparent, if without further search the officers have probable cause to believe the items are seizable." *People v Mahdi*, 317 Mich App 446, 462; 894 NW2d 732 (2016) (quotation marks and citation omitted).

The plain-view exception to the warrant requirement is applicable here because before even entering the room, an officer observed several incriminating items in plain view, including a crack pipe, a chore boy, and a corner tie containing what appeared to be narcotics. The incriminating nature of narcotics and narcotics paraphernalia was also immediately apparent. Similarly, while searching defendant's room for other occupants or victims, Officer Raby discovered the other narcotics and narcotics paraphernalia lying in plain view.

The Michigan Supreme Court has held that "immediately apparent means that without further search the officers have probable cause to believe the items are seizable." *People v Champion*, 452 Mich 92, 102; 549 NW2d 849 (1996) (quotation marks and citation omitted). The plain view exception to the warrant requirement allowed the police to seize the items from defendant's room. The officers were not required to be absolutely certain that the items were being used to commit a crime before seizing them. A reasonably prudent person, viewing the totality of the circumstances, could conclude that the items were being used in the commission of a crime. According, the items were properly seized.

The second applicable exception is the exigent circumstances exception which requires probable cause that the premises to be searched contains evidence or suspects and that the circumstances constituted an emergency leaving no time for a warrant. *Davis*, 442 Mich at 24. To qualify under the exception, "[t]he police must . . . establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *People v Snider*, 239 Mich App 393, 408; 608 NW2d 502 (2000) (citation omitted).

Police were called to the hotel when the desk clerk viewed defendant in his room, waiving a gun, and talking. The officers also viewed defendant holding the gun, thrusting it forward, and jumping around like he was nervous and jittery. While outside defendant's room, they heard several thuds, "banging noise," and a "deep thud kind thing," which Officer Clark explained that it was like "you hit a pillow or something or you hit something that's like a body hit kind of thing." The officers had sufficient reason to conclude that the room might contain an

injured or threatened individual in need of immediate rescue and so, their entry was not improper. While in the room, Officer Raby observed crack cocaine, a crack pipe, baking soda, and a pillow with bullet holes and powder burns in plain view.[4] The officers' actions fell within the exigent circumstances and plain view exceptions to the warrant requirement. Accordingly, the trial court did not err by failing to suppress the evidence obtained from defendant's hotel room.

III. RIGHT TO COUNSEL

Defendant next contends that he was constructively denied the assistance of counsel when the trial court denied his request for substitution of counsel on the first day of trial. He argues that he was entitled to substitute counsel because there had been a complete breakdown in the relationship between defendant and defense counsel, and the trial court failed to inquire into the breakdown of the relationship. We disagree.[5]

The federal and State constitutions grant the right to counsel in all criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20. While an indigent defendant is guaranteed the right to counsel, a defendant is not necessarily guaranteed the attorney of his or her choice. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), and is not entitled to substitution of appointed counsel merely because the defendant is dissatisfied with appointed counsel. *People v Bradley*, 54 Mich App 89, 95; 220 NW2d 305 (1974). However, a defendant is entitled to substitution of defense counsel if the discharge of the first attorney is for (1) good cause and (2) does not disrupt the judicial process. *People v Buie (On Remand)*, 298 Mich App 50, 67; 825 NW2d 361 (2012).

Good cause may exist when (1) the defendant and appointed counsel develop a legitimate difference of opinion regarding a fundamental trial tactic, (2) there has been a breakdown in communication and in the attorney-client relationship, or when (3) defense counsel has shown a lack of diligence or interest. *People v McFall*, 309 Mich App 377, 383; 873 NW2d 112 (2015). A defendant's mere lack of confidence in counsel or general unhappiness in counsel is not sufficient to establish good cause. *Id.* "Counsel's decisions about defense strategy, including what evidence to present and what arguments to make, are matters of trial strategy, and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel." *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011) (citations omitted).

On the first day of trial, defense counsel informed the court that defendant had some complaints that came up the day before trial. Specifically, counsel told the court that defendant

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[4] Officer Raby explained that baking soda was "used in the manufacturing of crack cocaine."

[5] A trial court's decision regarding a defendant's request for substitution of appointed counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A trial court abuses its discretion if its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

wanted the case remanded to the district court for a new preliminary examination because according to defendant, the officer who testified during the preliminary examination perjured himself when he testified about the quantity of the drugs recovered from defendant's hotel room.[6] However, as counsel pointed out, the discrepancy was without material legal significance because each of the possible quantities of the controlled substances fell within the charged amounts. Counsel advised the court that he was fully prepared to try the case. The court informed defendant that the discrepancy is not a ground to remand the case back to the district court, rather, counsel could attack the officer's credibility during cross-examination. Thereafter, the following exchange occurred:

> [*Defendant*]. Technically, your Honor, I really wouldn't like to have [defense counsel] as my attorney because he has not discussed the case with me. He has not indicated what defenses we're going to be using and how those defenses are going to be used. And he hasn't been that cooperative with me.
>
> *The Court.* Well, [defendant], this would be the fourth attorney that I've appointed for you. You've found fault with every attorney.
>
> [*Defendant*]. No, no, I didn't.
>
> *The Court.* Well, enough so that either you asked them to be dismissed or they asked to be dismissed.
>
> [*Defendant*]. They asked—yeah, they asked to be dismissed.
>
> *The Court.* [Defense counsel], from my perspective, has done an excellent job. The motion that he has brought have been right on point. And so, I'm not going to appoint yet another attorney to represent you. We're here. We're ready to go. So we'll pull a panel right now.
>
> [*Defendant*]. Okay, your Honor. Well, let the record reflect that I'm being tried with an attorney that I do not want.
>
> *The Court.* The record will reflect that.

When defendant asserted that his counsel did not discuss the case with him, did not indicate what defenses were going to be used, and had not been cooperative with him, the trial

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[6] Defense counsel explained that he had just learned that defendant filed a motion for remand to the district court for a new preliminary examination on the basis that there was a discrepancy regarding the total mass of the seized narcotics between Officer Rochon's preliminary examination testimony and the findings of the toxicology lab. However, counsel explained that he did not believe that discrepancy was relevant because defendant was charged with possessing less than 25 grams of cocaine and heroin, and manufacturing less than 50 grams of cocaine, and either measurement of mass did not impact those charges.

court was obligated to "hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusions." *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973). In the present case, the court did not determine whether defendant's allegations were true and did not ask trial counsel to address the concerns. Rather, the court dismissed the request on the grounds that three other attorneys had previously been appointed for defendant, and that defense counsel had done "an excellent job." However, "[a] judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside. *Ginther*, 390 Mich at 442. This is especially so where, as will be discussed in the treatment of defendant's standard IV brief, trial counsel proceeded to adequately represent defendant, was familiar with the facts of the case, thoroughly cross examined witnesses, and acted diligently to protect defendant's rights.[7]

IV. STANDARD 4 BRIEF

A. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant contends that trial counsel was ineffective for failing to consult defendant on trial strategy, for failing to obtain discovery from the prosecution, for failing to object to the admission of evidence during trial, and for arguing to the jury that defendant was guilty during his closing arguments. These arguments are without merit.[8]

A criminal defendant has the fundamental right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Schrauben,* 314 Mich App 181, 190; 886 NW2d 173 (2016). "To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.*

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[7] Defendant also contends on appeal that he was constructively denied the assistance of counsel. A constructive denial of counsel occurs when "counsel is provided but does nothing, that is, no actual assistance for the accused's defence [sic] is provided, in that counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . ." *People v Mitchell*, 454 Mich 145, 154; 560 NW2d 600 (1997), citing *United States v Cronic*, 466 US 648, 654, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (quotation marks and citation omitted). Given counsel's performance, this argument is without merit.

[8] To preserve a claim of ineffective assistance of counsel, a defendant must file a motion for a new trial or a *Ginther*[8] hearing to develop a record to support the claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Because defendant did not move for a new trial, nor did he request a *Ginther* hearing, our review is limited to the mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012).

Defendant argues that his trial counsel failed to consult with him regarding his case, but he has not provided any support for this claim with an offer or proof in form of an affidavit, nor has he explained how his counsel's actions prejudiced him. Rather, defendant has merely restated the grounds for his trial request for substitution of counsel. Therefore, defendant has failed to carry his burden to demonstrate that his trial counsel was ineffective in this regard. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Additionally, defendant argues that his trial counsel was ineffective for: (1) failing to obtain discovery in order to allow defendant to examine the narcotics seized from his room, (2) failing to obtain "toxicology reports" developed by the prosecution's expert witnesses, and (3) failing to object to the admission of the seized narcotics into evidence and the associated testimony of Officer Raby and Southfield Police Officer Kenneth Rochon concerning the discovery and collection of that evidence. Defendant asserts that the police provided perjured testimony during his trial regarding the quantity of narcotics seized from his room at the hotel.

Defendant has failed to explain how he was prejudiced or how his trial counsel erred by failing to pursue defendant's theory regarding the total mass of the narcotics. Indeed, the source of the discrepancy between the two measurements was revealed during trial, as Officer Rochon testified that he measured the narcotics seized from defendant's room in their packaging, and that the toxicology lab measured only the narcotics. Additionally, although defendant testified that the powder cocaine seized from his room did not belong to him, he admitted that the other drugs taken from the room, including the crack cocaine, belonged to him. Considering that defendant was ultimately convicted of possessing less than 25 grams of cocaine and had admitted during trial that he possessed a crack cocaine rock, defendant has failed to demonstrate how he was prejudiced by counsel's failure to pursue defendant's theory that the powder cocaine did not belong to defendant.

Defendant also argues that trial counsel's request for an instruction on possession of a controlled substance as an alternative to the manufacturing/delivery charge prejudiced him because he was convicted of that alternative charge. Defendant relies on *People v Gridiron (On Rehearing)*, 190 Mich App 366, 369-370; 475 NW2d 879 (1991), amended 439 Mich 880 (1991). However, that case does not support his claim. In *Gridiron*, counsel's request for an instruction on the alternative charge of possession was held ineffective because "there exists no rational reason why a defendant charged with possession with intent to deliver would want an instruction on simple possession unless a simple possession conviction would carry a lesser penalty." *Gridiron*, 190 Mich App at 369 (quotation marks and citation omitted). In defendant's case, the lesser included offense of possession did carry a lesser penalty. Possession of a controlled substance provides for a maximum penalty of four years' imprisonment, MCL 333.7401(2)(a)(*v*), while the manufacture of a controlled substance carries a maximum penalty of 20 years' imprisonment, MCL 333.7401(2)(a)(*iv*).

In a related argument, defendant contends that he was denied the effective assistance of counsel because trial counsel stated during closing arguments that defendant was guilty of some charges. However, this approach was a reasonable strategy and was successful.

In his testimony, defendant admitted that the crack cocaine, the crack pipe, the push rod, corner ties from a baggie with residue on it baking soda, and a cigar tool recovered from the

room belonged to him. He also admitted to cooking cocaine in the hotel room and smoking it with the crack pipe. Defendant asserted that he intended to personally use the rock of crack cocaine found in the hotel. Defendant also admitted that the effect of the drugs causes him to be "somewhat deranged" and admitted having the gun. During closing arguments, trial counsel argued that defendant was guilty of possession of less than 25 grams of cocaine, not manufacturing of less than 50 grams of cocaine, because defendant had no intent to sell the crack cocaine to other people. Counsel also argued that defendant was also guilty of possession of heroin and felon-in-possession but was not guilty of felony-firearm because defendant was not in a proper state of mind at that time, and thus, he could not knowingly possess a firearm. Accordingly, defendant's trial counsel's losing argument was in accord with defendant's trial testimony and resulted in an acquittal on the manufacturing charge. Defendant has not shown that counsel's actions were not sound trial strategy.

B. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor secretly colluded with defendant's trial counsel to secure defendant's convictions, and the prosecutor used false evidence and perjured testimony during trial. We disagree.[9]

The role and responsibility of a prosecutor is to seek justice, not merely to convict. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's opportunity for a fair trial can be jeopardized when a prosecutor turns from this responsibility by interjecting issues broader than the guilt or innocence of the accused. *Id.* at 63-64. Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Dobek*, 274 Mich App at 63.

The only evidence defendant provides in support of his claim that the prosecutor and his trial counsel colluded with one another is that trial counsel did not object to the admission of the evidence taken from defendant's room. Defendant contends that because the collusion between his trial counsel and the prosecutor was the result of a secret agreement, there is little evidence of collusion in the record. Beyond failing to demonstrate that his trial counsel improperly colluded with the prosecutor, defendant's contention disregards the actions trial counsel undertook to undermine the prosecution's case. Defendant's trial counsel moved to suppress the evidence collected from defendant's room at the hotel, adequately represented defendant's interests by his thorough cross examination of the witnesses, and argued successfully to the jury that defendant

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[9] Where issues of prosecutorial misconduct are preserved, this Court reviews them de novo to determine whether the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Because defendant failed to object to the alleged prosecutorial errors, we review the unpreserved issues for plain error affecting defendant's substantial rights. *Id.* If plain error is shown, reversal is only warranted when it resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

was not guilty of manufacture or delivery of a controlled substance; rather, consistent with defendant's testimony, that defendant was guilty of possession of controlled substance. We find no record evidence of any collusion between the prosecutor and trial counsel.

Similarly, we find no merit in defendant's contention that the prosecutor used false evidence and false testimony because there was inconsistent testimony regarding the total mass of narcotics recovered from defendant's room during the preliminary examination and during the trial. "It is well established that 'a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. . . .' " *People v Smith*, 498 Mich 466, 475-476; 870 NW2d 299 (2015) (citation omitted). However, it is defendant's burden to demonstrate that the evidence or testimony was in fact false. See *People v Bass*, 317 Mich App 241, 272; 893 NW2d 140 (2016) (holding that the defendant failed to show that the testimony elected by the prosecution was actually false). "Although an inconsistent prior statement may be a mechanism to impeach a witnesses' credibility at trial, it is not definitive evidence that the trial testimony is false." *Id.* at 275.

Notably, during the preliminary examination, Officer Rochon testified that a total of 14 grams of narcotics were recovered from defendant's room. A report completed by the police toxicology lab stated there was a lesser quantity. During trial, Officer Rochon explained that the discrepancy resulted from his measuring the narcotics in their packaging while the toxicology department measured the narcotics alone. Defendant has provided no evidence to support his claim that the narcotics evidence was false other than the aforementioned inconsistent testimony regarding the total mass of the narcotics. Therefore, defendant's claim of false evidence and testimony fails because he has failed to carry his burden to demonstrate that the evidence or testimony was in fact false.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

APPENDIX-D

Order

Michigan Supreme Court
Lansing, Michigan

July 27, 2018

157345 & (72)

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157345
COA: 334970
Oakland CC: 2015-254122-FH

JERRY WORD,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the December 19, 2017 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to compel is DENIED.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 27, 2018

Clerk

p0723

Additional material from this filing is available in the Clerk's Office.