FILED: October 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7527
(5:17-hc-02026-BR)

GRANT RUFFIN HAZE, III

Petitioner - Appellant

v.

KATY POOLE, Administrator, Scotland Correctional Institution

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Floyd, Judge Quattlebaum, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7527

GRANT RUFFIN HAZE, III,

Petitioner - Appellant,

v.

KATY POOLE, Administrator, Scotland Correctional Institution,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (5:17-hc-02026-BR)

Submitted: August 29, 2019 Decided: September 17, 2019

Before FLOYD and QUATTLEBAUM, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Grant Ruffin Haze, III, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Grant Ruffin Haze, III, seeks to appeal the district court's orders dismissing his 28 U.S.C. § 2254 (2012) petition and denying his discovery motion. These orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Haze has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

GRANT RUFFIN HAZE, III,
Petitioner,
v.
KATY POOLE,
Respondent.

Judgment in a Civil Case

Civil Case Number: 5:17-HC-2026-BR

Decision by Court.

This case came before the Honorable W. Earl Britt, Senior United States District Judge, for review of respondent's motion for summary judgment, and petitioner's motions for an evidentiary hearing, and to be relieved of the obligation to serve respondent with paper copies of filings.

IT IS ORDERED AND ADJUDGED that respondent's motion for summary judgment is granted, petitioner's motion for an evidentiary hearing is denied, petitioner's motion to be relieved of service obligations is denied, and petitioner's § 2254 petition is dismissed. A certificate of appealability is denied.

This Judgment Filed and Entered on December 4, 2018, with service on:
Grant Ruffin Haze, III 1113277, Scotland Correctional Institution, 22385 McGirts Bridge Rd., Laurinburg, NC 28353.
(via U.S. Mail)

Clarence J. DelForge , III, N. C. Dept. of Justice, P. O. Box 629, Raleigh, NC 27602-0629.
(via CM/ECF Notice of Electronic Filing)

December 4, 2018

/s/ Peter A. Moore, Jr.
Clerk of Court

By: _____
Deputy Clerk

A36

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:17-HC-2026-BR

GRANT RUFFIN HAZE, Petitioner, v. KATY POOLE, Respondent.	)	ORDER

This matter is before the court on respondent's motion for summary judgment, (DE # 18), and petitioner's motions for an evidentiary hearing, (DE # 28), and to be relieved of the obligation to serve respondent with paper copies of filings, (DE # 36). Petitioner filed a reply to respondent's answer, a memorandum in opposition to respondent's motion, and other supporting documents. (DE ## 39-43, 45, 46.) This matter is ripe for disposition.

I. BACKGROUND

The North Carolina Court of Appeals summarized the facts underlying petitioner's conviction and sentence as follows:

> Laura Jean Ackerson (the victim) and Grant Ruffin Hayes (defendant) met in March 2007. Thereafter, the two engaged in a domestic relationship, but never married. Two children were born of the relationship, and once defendant and the victim separated, a custody dispute over the children ensued. In late 2009, defendant met Amanda Hayes (Amanda) and they began dating. Defendant and Amanda married in April 2010 and moved into an apartment in Raleigh. The victim lived in Kinston.
>
> On 29 June 2010, the Lenoir County District Court entered a consent order giving temporary physical custody of the children to defendant during the week and to the victim on weekends. As part of their temporary arrangement, the parties agreed to a psychological evaluation by Dr. Ginger Calloway, a forensic psychologist. After evaluating the parties over a period of time, Dr. Calloway issued a report recommending that defendant and the victim share legal and

A18

physical custody of the children. Over defendant's objection, Dr. Calloway testified about the contents of her report at trial.

On 12 July 2011, defendant e-mailed the victim to suggest that she see the children for a mid-week visit. The victim drove to Raleigh on 13 July, texting defendant at 4:12 p.m., "I'm leaving the Wilson area now. I'll call when I get past the traffic. Where will you be in [an] hour or so?" The victim also called defendant, with the last outgoing call occurring at 4:59 p.m. near Crabtree Valley mall "going outbound toward [defendant's] apartment[.]" Chevon Mathes, the victim's friend and business partner, knew that the victim was going to Raleigh and expected a business related call from her at approximately 9:00 p.m., which she never received.

In the early hours of 14 July, defendant bought goggles, trash bags, a reciprocating saw, blades, plastic sheeting, tarp, gloves, bleach, tape, and a lint roller at Wal–Mart and Target in Raleigh. Amanda called her daughter, Sha, later that morning, and Sha took the children to Monkey Joe's, a play center, in Raleigh for most of the day. On 16 July, defendant bought coolers and ice. He also rented a U–Haul trailer and indicated that his destination was Texas. Amanda called Sha and told her that she was going to Texas to see her sister, Karen Berry. Defendant, Amanda, and the children drove to Texas in the U–Haul and arrived at Ms. Berry's house in the late hours of 17 July or early in the morning of 18 July.

On 19 July, defendant bought gloves and bottles of acid from Home Depot. Surveillance cameras captured Amanda dumping some of the bottles in an area near Ms. Berry's residence. Ms. Berry's residence was also located near a creek that was often used for fishing. Ms. Berry testified that defendant and Amanda took her boat into the creek on the night of 19 July. When investigators later searched the creek, they found the victim's decomposed and dismembered body parts. The State's expert witness pathologists testified at trial that the victim's cause of death was "homicide by und[et]ermined means" or "undetermined homicidal violence."

Defendant returned the U–Haul trailer on 20 July and drove with Amanda and the children back to Raleigh. Mathes became concerned about the victim's disappearance and notified law enforcement. After launching an investigation, law enforcement officers searched defendant's apartment on 20 July. In addition to a bleach stain, missing furniture, and cleaning products, they also found lyrics to a song entitled, "Man Killer." The lyrics concerned the first-person killing of a woman by making her bleed and by strangulation. Over defendant's objection at trial, the trial court admitted the song lyrics into evidence.

The State also offered the witness testimony of Pablo Trinidad at trial. Trinidad testified that in July 2011, he was being held in the Wake County Detention Center on federal charges while defendant was being held in the same location for the murder charge. Trinidad stated that he met defendant because they were

> housed in the same area. One day, inmates saw defendant's case being discussed on television and wanted to harm him, but Trinidad diffused the situation. Trinidad testified that at some point after this incident, defendant told him that he called the victim and "lured" her to his apartment under the "false pretenses" of settling the custody dispute, "subdued" her with Amanda's help, strangled her, and drove out of state to dispose of the body.

State v. Hayes, 768 S.E.2d 636, 639–40 (N.C. Ct. App. 2015) (alterations in original).

On 16 September 2013, a jury found petitioner guilty of first degree murder, and the trial court sentenced him to life imprisonment without parole. Id. at 639. Petitioner appealed.

On appeal, petitioner argued that the trial court erred by: (1) "admitting Dr. Calloway's report into evidence and by allowing her to testify about the report[,]" id. at 640; (2) "allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[,]" id. at 643-44; (3) admitting Detective Jerry Faulk's testimony that Trinidad's prior statements to federal agents were consistent with Trinidad's prior statements to him (Faulk), id. at 645; (4) admitting the "Man Killer" lyrics into evidence, id. at 647; and (5) "manifesting a belief that it lacked discretion to allow the jury to review exhibits in the deliberation room and review a portion of a witness's testimony[,] id. at 648. The North Carolina Court of Appeals rejected each argument and held petitioner "received a fair trial, free from prejudicial error." Id. at 639. The North Carolina Supreme Court dismissed petitioner's appeal and denied his petition for discretionary review. State v. Haze, 776 S.E.2d 203 (N.C. 2015).

On 10 August 2016, petitioner, through counsel, filed motions to allow examination of Amanda's cell phone and to compel a television station to produce the video and audio of any stories aired during the last two weeks of July 2011 regarding the victim's disappearance. (DE # 1-7, at 1-15.) Several days later, petitioner, through counsel, filed a motion for appropriate relief ("MAR") seeking to set aside his conviction and a new trial, claiming (1) prosecutorial misconduct based on the interception of his legal mail and the presentation of unreliable witness

A20

testimony at trial and (2) ineffective assistance of trial counsel based on the failure to (a) counter the State's "narrative," (b) establish the victim's character for dishonesty, (c) establish witness Heidi Schumacher's lack of credibility, (d) obtain the presence of Shane Heist to testify, and (e) show that petitioner wrote and recorded "Man Killer" years prior to meeting the victim. (Id. at 16-39.) In January 2017, without holding an evidentiary hearing, the trial court denied these motions. (Id. at 49-53.) Petitioner, through counsel, then sought a writ of certiorari from the North Carolina Court of Appeals. (Id. at 54-61.) On 3 February 2017, the appellate court denied the petition. (Id. at 62.)

On 8 February 2017, petitioner, proceeding pro se, filed the instant 28 U.S.C. § 2254 petition. (DE ## 1, 1-1, 1-4.) Petitioner challenges his murder conviction based on prosecutorial misconduct and ineffective assistance of counsel. He requests an evidentiary hearing on his ineffective assistance of counsel claims, (DE # 28), and, based on a supplemental filing, appears to also seek an evidentiary hearing on his prosecutorial misconduct claims, (see DE # 33-1, at 3-58). Finally, petitioner requests to be relieved of the obligation to provide respondent with paper copies of future filings, instead allowing service by the court's electronic case filing system, and requests to receive the last page of his docket sheet monthly to confirm that the court receives any future filings. (DE # 36.)

Respondent seeks summary judgment on all of petitioner's claims.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986); Brandt v. Gooding, 636 F.3d 124, 132 (4th Cir.

A21

2011) ("Federal Rule of Civil Procedure 56 applies to habeas proceedings." (citation and internal quotation marks omitted)). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson, 477 U.S. at 250.

The standard of review for habeas petitions brought by state inmates, where the claims have been adjudicated on the merits in the state court, is set forth in 28 U.S.C. § 2254(d). That statute provides that habeas relief cannot be granted where a state court considered a claim on its merits unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or the decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). A state court decision is "contrary to" Supreme Court clearly established precedent if it either "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413 (2000). A state court decision "involves an unreasonable application" of Supreme Court precedent "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id.; see also White v. Woodall, 134 S. Ct. 1697, 1702-07 (2014).

A22

Section 2254(d)

> does not require that a state court cite to federal law in order for a federal court to determine whether the state court's decision is an objectively reasonable one, nor does it require a federal habeas court to offer an independent opinion as to whether it believes, based upon its own reading of the controlling Supreme Court precedents, that the [petitioner's] constitutional rights were violated during the state court proceedings.

Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir. 2000). Moreover, a determination of a factual issue made by a state court is presumed correct, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Congress intended the standard in the Antiterrorism and Effective Death Penalty Act of 1996 to be difficult to meet. See White, 134 S. Ct. at 1702; Harrington v. Richter, 562 U.S. 86, 102 (2011). "Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." Harrington, 562 U.S. at 103.

B. Prosecutorial Misconduct Claims

Petitioner claims that state prosecutors engaged in misconduct in two respects: first, they presented the testimony of unreliable witnesses, and second, they intercepted his legal mail. The court examines these claims in turn.

With regard to his first claim, petitioner contends that prosecutors knew, or should have known, a number of the State's witnesses "were testifying to inflammatory lies in order to portray [petitioner] as a violent sociopath, that [the victim] feared, and with a history of abusing and threatening [the victim]." (Pet., DE # 1, at 9.) In further support of the claim, petitioner points to supposedly false testimony the prosecution elicited about his winning custody of his and the victim's children by claiming the victim was a prostitute and drug user; petitioner and the victim having been married; and, the victim wanting to leave petitioner. (Id. at 9-20.)

To succeed on such a claim, under Napue v. Illinois, 360 U.S. 264 (1959), a defendant must show "the falsity and materiality of testimony and the prosecutor's knowledge of its falsity. Perjury offered under these circumstances is material if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Basden v. Lee, 290 F.3d 602, 614 (4th Cir. 2002) (internal quotation marks omitted) (citing United States v. Agurs, 427 U.S. 97, 103 (1976)).

As noted previously, petitioner raised this prosecutorial misconduct claim in his MAR. In reference to this claim, the trial court found that "[t]here is no credible evidence of any perjured or false testimony or inaccurate testimony material to the Defendant's guilt presented in this motion." (DE # 1-7, at 49.) The trial court further concluded "[t]he Defendant's flaw in this motion is due to the fact that the evidence of his guilt was and is substantial. As set for[th] in the Court of Appeals['] decision, there was 'abundant evidence of the Defendant's guilt.'" (Id. at 50.) The court agrees.

In an attempt to show that the trial court's decision on the claim was unreasonable, petitioner points to purported inconsistencies between various witnesses' testimony and other evidence. (See, e.g., DE # 33-1, at 29 ("Even with the truth of what happened on the record, prosecutor Holt continued to construct her false narrative with Heidi's lies. . . . Heidi said that Laura and I returned to N.C. . . . . Not only is this in conflict with [the victim's] records, it was also in conflict with Heidi's previous recall of events to Det. Hall . . . .").) Inconsistencies do not equate with falsehoods, let alone the prosecutors' knowledge of the falsehoods. See United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987) ("Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." (citation omitted)). Similarly, merely because petitioner disagrees with testimony, (see, e.g., DE

41, at 25-36 ("These unreliable witnesses not only gave jurors a false impression of [the victim's] mindstate [sic], but a false portrayal of me as a violent person whom [the victim] feared and wouldn't visit.")), does not make that testimony false.

Even if the prosecutors knowingly presented false testimony or failed to correct any testimony they knew was false, petitioner cannot show a reasonable likelihood that it affected the jury verdict. Setting aside the purportedly false testimony about which petitioner complains, strong evidence of petitioner's guilt remains. As the North Carolina Court of Appeals summarized,

> On Tuesday, 12 July, defendant e-mailed the victim and offered to let her see the children the next day. On occasion, the victim met defendant at Monkey Joe's, and less frequently, she went to defendant's apartment. Defendant's friend, Lauren Harris, was a manager at Monkey Joe's and allowed the children to play there free of charge. Harris testified that on 13 July, defendant did not bring the children to Monkey Joe's.
>
> Based on phone records and cellular data, defendant and the victim communicated throughout the day on 13 July. The final outgoing call made by the victim on her cell phone was to defendant while she was driving in a direction towards his apartment. Investigators ultimately discovered the victim's car in a nearby apartment complex, which was the location of defendant's prior residence.
>
> At approximately 2:30 a.m. on 14 July, defendant bought an abundance of cleaning materials and tools. Between 10:00–10:30 a.m. that morning, Sha, defendant's step-daughter, took the children to Monkey Joe's after receiving a call from Amanda. Sha remained with the children at Monkey Joe's until nearly 4:00 p.m. At 5:31 p.m., another surveillance video showed defendant at Target purchasing several containers of bleach, paper towels, two sets of gloves, electrical tape, and a lint roller. Amanda then asked Sha to bring her vacuum to their apartment, which she did by 6:00 p.m. Defendant also posted an ad on Craigslist to sell various items in his apartment.
>
> When law enforcement officers later searched defendant's apartment, they noticed a bleach stain on the carpet near the entrance and missing furniture. A load of trash collected from defendant's apartment dumpster also yielded a vacuum cleaner, toilet scrub brushes, bleach containers, respirator mask packaging, gloves, and a bleach-stained towel. DNA on a latex glove contained the victim's DNA profile.

A25

> On 18 July 2011, Detective James Gwartney, who was investigating the victim's disappearance, contacted defendant for possible leads. Despite being at Ms. Berry's house in Texas, defendant told Detective Gwartney that he was in Raleigh[1] and provided inconsistent information about his interaction with the victim on 13 July.
>
> Ms. Berry testified that defendant and Amanda took her boat out into the nearby creek on the night of 19 July and were gone for a "couple of hours." Ultimately, divers found a torso, portions of a leg, and a head in the creek, which were later determined to have been the victim's body parts. Ms. Berry also testified that Amanda told her that she was "covering for [defendant]." Just before defendant and his family left the Berry residence, Amanda's niece, who lived at Ms. Berry's house in Texas, observed defendant and overheard him stating, "I don't need an alibi, I was with my family[.]"
>
> At trial, the State's expert witness pathologists could not determine the exact cause of death due to the decomposed remains, but concluded that the victim's death was caused by "homicide by undetermined means." They testified that strangling or stab wounds to the neck area could have caused the victim's death. . .
>
> .

Hayes, 768 S.E.2d at 643 (alterations in original).

Because petitioner cannot show prosecutors knowingly used (or failed to correct) false testimony or a reasonable likelihood that any false testimony affected the jury verdict, the trial court's decision on petitioner's related MAR claim was not contrary to, nor an unreasonable application of, clearly established federal law, and respondent's motion for summary judgment on petitioner's first claim of prosecutorial misconduct will be allowed.

Petitioner's second prosecutorial misconduct claim concerns the purported interception of his legal mail. According to petitioner, while he was in pre-trial detention, the Wake County Sheriff's Department intercepted some of his legal mail and provided it to prosecutors, thereby violating his rights to effective assistance of counsel and due process.

---

[1] Petitioner characterizes Detective Gwartney's testimony about petitioner being in Raleigh as a "lie." (Pet.'r's Decl., DE # 39, at 63.) However, petitioner goes on to explain what he supposedly told Gwartney and claims Gwartney misunderstood "because he's stupid or the reception was bad." (See id. at 63-64.) Because petitioner implicitly acknowledges that Gwartney misinterpreted what was supposedly said, rather than in fact lie, the court includes this evidence in its consideration of evidence supporting petitioner's guilt.

"It is a violation of the Sixth Amendment for a government agent to intercept a criminal defendant's communication with his defense attorney and provide intercepted information to the prosecutor such that it prejudices the defendant in his criminal case." Brown v. Gulash, No. 07-CV-370-JPG-PMF, 2011 WL 2516765, at *1 (S.D. Ill. June 23, 2011) (citing Weatherford v. Bursey, 429 U.S. 545, 558 (1977); Guajardo–Palma v. Martinson, 622 F.3d 801, 805–06 (7th Cir. 2010)). "It also violates the Sixth Amendment to prevent a criminal defendant from speaking candidly and confidentially with his counsel free from unreasonable government interference." Id. (citing Geders v. United States, 425 U.S. 80, 88–89 (1976), among other cases). Furthermore, "prosecutorial misconduct may so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v. Miller, 483 U.S. 756, 765 (1987) (citations and internal quotation marks omitted) (alteration in original); see also Parker v. Matthews, 567 U.S. 37, 45 (2012).

Here, about one week prior to trial, trial counsel raised the mail interception issue at a motions hearing. At that hearing, the prosecution acknowledged some of petitioner's legal mail had been intercepted by jail staff and provided to the prosecution. (DE # 20-9, at 258.) Trial counsel expressed concern that if petitioner were to testify, the prosecution might cross-examine him about information from the mail. (Id. at 257-58.) However, the prosecutor represented to the court that neither prosecutor had read the legal mail and immediately upon recognizing it was legal mail, put it in a folder and gave it to trial counsel. (Id. at 258-59.) Also, in response to the trial court's question, the prosecutor further represented that the State did not have any mail from petitioner to his attorneys which might be a basis to impeach him and stated that the prosecution

did not intend to ask petitioner any questions about the mail. (Id.) As such, the trial court concluded, "If it comes up I'll deal with it, but apparently . . . it's not an issue." (Id. at 259.)

Petitioner raised the issue again in his MAR. In denying that motion, the trial court stated:

> The Defendant presents no causal connection between any interception of his legal mail and the jury verdict. That claimed violation was clearly of record on the direct appeal in this case and was not raised. No information received in this manner was reviewed by the Prosecutors and none was presented to the jury.

(DE # 1-7, at 50.) This determination was neither contrary to, nor an unreasonable application of, clearly established federal law, nor a decision based on an unreasonable determination of the facts.

Having raised the issue pre-trial, trial counsel was well aware of the interception of some of petitioner's legal mail. In fact, trial counsel states upon "learn[ing] that items of mail from [petitioner] were not making it to me and that letters labeled legal mail from me to [petitioner] were not being treated as such," they "terminated any mail correspondence" and "I continued to regularly meet with [petitioner]." (DE # 28-1, at 19.) Thus, the interception of some pieces of petitioner's legal mail did not prevent him from communicating with his counsel. Also, it did not interfere with the effective preparation of his defense or otherwise prejudice him. With reference to one such piece—a letter from petitioner to counsel instructing him to examine Amanda's Blackberry device to retrieve missing date/time information—this court has recognized that the interception of that mail did not prevent counsel from effectively attempting to rebut the State's theory that petitioner had lured the victim to his apartment to kill her. (DE # 35, at 4-5.) Most importantly, there is no evidence in the record that the prosecution (or law enforcement) read the intercepted legal mail and used information therein against petitioner.

Petitioner appears to rely on two cases, Black v. United States, 385 U.S. 26 (1966), and

O'Brien v. United States, 386 U.S. 345 (1967), to support his claim that this instance of misconduct automatically warrants a new trial, without consideration of whether the prosecutors examined or used any inadmissible evidence. (See Pet., DE # 1, at 27-28.) Any reliance on these cases is misplaced. The Supreme Court has rejected the notion that these cases establish a per se violation of the defendant's Sixth Amendment right to counsel occurs when a government agent has intruded upon attorney-client communications. See Weatherford, 429 U.S. at 550-52.

Based on the foregoing, the court will grant respondent's motion for summary judgment on his other prosecutorial misconduct claim.

C. Ineffective Assistance of Counsel Claims

Petitioner's remaining claims are based on ineffective assistance of counsel. To succeed on such a claim, under the familiar standard set forth in Strickland v. Washington, 466 U.S. 668, a state prisoner seeking habeas corpus relief must

> show both that his counsel provided deficient assistance and that there was prejudice as a result.
>
> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."
>
> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."
>
> "Surmounting *Strickland's* high bar is never an easy task." An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive

post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question 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, 562 U.S. at 104–05 (citations omitted).

Petitioner asserts in his § 2254 petition that his trial counsel were ineffective by:

1. Failing to impeach prosecution witness Heidi Schumacher's testimony in several aspects and to establish her lack of credibility;
2. Not challenging the State's narrative that the victim lived in fear of petitioner;
3. Not challenging the State's narrative that petitioner feared losing custody of his children to the victim;
4. Not countering the State's narrative that the victim was excited about getting full custody of the children;
5. Failing to establish the victim's dishonest character;
6. Failing to obtain the presence of Shane Heist to testify; and,
7. Failing to show that petitioner wrote and recorded the song "Man Killer" years before he met the victim.[2]

[2] In his motion for an evidentiary hearing, petitioner cites two additional ineffective assistance of counsel claims,

(DE ## 1-1, at 1-27; 1-4, at 3-8.)

Petitioner raised these same claims in his MAR. (DE # 1-7, at 24-38.) In rejecting the claims, the trial court found, in relevant part:

> During the course of the trial Defendant expressed no dissatisfaction with the professional representation by his Defense attorneys. He did not put the Court on notice of any disagreement with the Defense tactics. The Defendant elected not to testify. During the trial it was clear to the Court that Defendant was directing his own defense.
>
> . . . .
>
> This motion is a classic example of a Defendant, after a trial and an adverse verdict, reading through the trial transcript and thinking of ways he contends his lawyers could have done a better job. That is not sufficient to show ineffective assistance of counsel in violation of the standards set forth in Strickland vs. Washington 466 U.S. 668(1984).
>
> Defendant has failed to show that his defense attorneys at trial engaged in a defense that was unreasonable under the circumstances and that Defendant was prejudiced by any inadequate performance.
>
> The Defendant's flaw in this motion is due to the fact that the evidence of his guilt was and is substantial. As set for[th] in the Court of Appeals['] decision, there was "abundant evidence of the Defendant's guilt." The attorney conduct in this case did not adversely affect the outcome of this trial.
>
> . . . .
>
> . . . . The Defendant received a fair trial, free of prejudicial error. He was represented by competent Defense attorneys who provided effective assistance of counsel. The Defendant was provided an enormous amount of discovery prior to trial and, in the discretion of the court, was represented by TWO well qualified lawyers who are highly regarded by their professional peers and are well experienced in cases such as this matter.
>
> The speculative, unsupported claims by the Defendant in this motion are an affront to the outstanding manner in which both defense counsel performed their professional obligations in this case.

---

one based on trial counsel's failure to examine Amanda's cell phone due to the interception of his legal mail and the other based on trial counsel's failure to obtain news stories about the victim's disappearance to use to impeach Trinidad. (DE # 28, at 2; see also id. at 11.) As for the former claim, the court has analyzed it as a prosecutorial misconduct claim (based on petitioner's characterization of the claim in his § 2254 petition (see DE # 1, at 21)); however, even if it is considered an independent ineffective assistance of counsel claim, the court's analysis in this section equally applies. As for the latter claim, petitioner did not raise that claim in his § 2254 petition. Although he filed a post-conviction motion to compel production of the news stories in state court, he did not raise an ineffective assistance of counsel claim based on the failure to obtain the news stories in his MAR and thus has not exhausted this substantive claim in the state court as 28 U.S.C. § 2254(b)(1)(A) requires.

(Id. at 49-51.)

Petitioner argues that he is entitled to an evidentiary hearing in this court on his ineffective assistance of counsel claims because 28 U.S.C. § 2254(e) does not bar a hearing and because the trial court did not fully and fairly consider the four affidavits he submitted in support of his MAR. (See DE # 28, at 6-9, 19-22.) Assuming § 2254(e) does not bar an evidentiary hearing (as petitioner contends),[3] petitioner is not automatically entitled to one. See Fullwood v. Lee, 290 F.3d 663, 681 (4th Cir. 2002). Petitioner still must establish one of the factors identified in Townsend v. Sain, 372 U.S. 293, 313 (1963):

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. & n.7.

Furthermore, if the state court adjudicated the merits of petitioner's ineffective assistance of counsel claims, this court's review of those claims is limited to the record before the state court. See Cullen v. Pinholseter, 563 U.S. 170, 181 (2011). As such, "any evidentiary hearing in federal court is unwarranted, as new evidence adduced during such a hearing could not be considered in making the determination" of whether the state court's decision is contrary to or an unreasonable application of clearly established law. Williams v. Stanley, 581 F. App'x 295, 296 (4th Cir. 2014) (citing Cullen, 563 U.S. at 183-84).

In claiming he is entitled to an evidentiary hearing in this court, petitioner makes much of

[3] "Section 2254(e)(2) restricts a federal court's ability to hold an evidentiary hearing, but those restrictions apply only when the habeas petitioner 'has failed to develop the factual basis of a claim in State court proceedings.'" Gordon v. Braxton, 780 F.3d 196, 204 (4th Cir. 2015).

the fact that the trial court did not hold a hearing to examine the affidavits he filed with his MAR or mention them in the order denying the MAR. He also quotes from isolated portions of the trial court's order apparently to suggest that the trial court's resolution of his ineffective assistance of counsel claims was not an adjudication on the merits.

In North Carolina, the court is not required to hold an evidentiary hearing on claims raised in a MAR in all instances. See N.C. Gen. Stat. § 15A-1420(c)(1)-(4); State v. McHone, 499 S.E.2d 761, 763 (N.C. 1998) ("[I]t does not automatically follow that, because defendant asserted violations of his rights under the Constitution of the United States, he was entitled to present evidence or to a hearing on questions of fact or law."). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed 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, 562 U.S. at 99.

Although the trial court did not cite to or otherwise explicitly reference the affidavits filed in support of the MAR, the court disagrees with petitioner's contentions that the trial court did not consider them and that the trial court's determination of his ineffective assistance of counsel claims was not supported by the record, was materially incomplete, or should not be accorded any deference. In his MAR, petitioner presented the same ineffective assistance of counsel claims he raises in his § 2254 petition. In denying the MAR, the trial court recognized petitioner "offer[ed] no new evidence," i.e., evidence not available at the time of trial and to trial counsel. (DE # 1-7, at 49.) Petitioner is correct that the affiants did not sign the subject affidavits until August 2016, nearly three years after trial. However, the information contained in the affidavits was available at the time of trial and, as trial counsel's affidavit confirms, available to him, (see DE # 28-1, at 18-25).

As further support for his contention that the trial court's determination of his ineffective assistance of counsel claims is not supported by the record, petitioner points to the following statement of the trial court when it denied the MAR: "'The Defendant is merely second guessing, speculating, offering conjecture and his own opinion without additional supporting evidence.'" (DE # 28, at 7 (quoting DE # 1-7, at 49).) First, one could reasonably conclude that the trial court made this statement in reference to petitioner's prosecutorial misconduct claim, as the court's immediately preceding statement provides, "There is no credible evidence of any perjured or false testimony or inaccurate testimony material to the Defendant's guilt presented in this motion." (DE # 1-7, at 49.) Second, another reasonable interpretation of the trial court's statement is that the evidence petitioner filed with his MAR does not support his claims. This court declines to conclude that the trial court did not consider the affidavits and therefore finds that the state court adjudicated the merits of petitioner's ineffective assistance of counsel claims and an evidentiary hearing is not warranted.[4]

Given the underlying record in this case, it was not unreasonable for the trial court to conclude that trial counsel did not perform deficiently or that petitioner did not suffer prejudice.[5] Therefore, the court will grant respondent's motion for summary judgment on petitioner's ineffective assistance of counsel claims and deny petitioner's motion for an evidentiary hearing.

D. Petitioner's Motion Regarding Future Filings

Petitioner requests that he be allowed to rely on the court's electronic case filing system to serve respondent with future filings. (DE # 36.) A recent standing order of this court, effective 1 December 2018 and in furtherance of soon-to-be effective amendments to Federal

[4] Petitioner has not made an independent argument as to why an evidentiary hearing on his prosecutorial misconduct claims is warranted.

[5] Even if the court considers the affidavit of petitioner's trial counsel, (DE # 28-1, at 18-25), which was not before the trial court, the court's conclusion does not change.

Rule of Civil Procedure 5, permits unrepresented litigants to serve registered users of the electronic case filing system upon the system's generation of a notice of electronic filing. See No. 18-SO-5 (E.D.N.C. Nov. 27, 2018). Accordingly, petitioner's motion for relief in this regard is moot. As for petitioner's request to be provided monthly with the last page of his docket sheet, the court declines to impose such a burden on the Clerk's office, particularly in light of the fact that this order resolves this proceeding.

III. CONCLUSION

For the foregoing reasons, respondent's motion for summary judgment is GRANTED, petitioner's motion for an evidentiary hearing is DENIED, petitioner's motion to be relieved of service obligations is DENIED, and petitioner's § 2254 petition is DISMISSED. A certificate of appealability is DENIED. See 28 U.S.C. § 2253(c); Miller-el v. Cockrell, 537 U.S. 322, 335-36 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). The Clerk is DIRECTED to serve petitioner with a copy of this order and to close this case.

This 4 December 2018.

W. Earl Britt
Senior U.S. District Judge