FILED: April 24, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7431
(1:18-cv-00163-FDW)

THOMAS LEE BRENNAN

Petitioner - Appellant

v.

ERIC A. HOOKS, Attorney General of the State of North Carolina

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge Rushing, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: May 4, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7431
(1:18-cv-00163-FDW)

THOMAS LEE BRENNAN

Petitioner - Appellant

v.

ERIC A. HOOKS, Attorney General of the State of North Carolina

Respondent - Appellee

MANDATE

The judgment of this court, entered March 24, 2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

FILED: March 24, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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(1:18-cv-00163-FDW)

THOMAS LEE BRENNAN

Petitioner - Appellant

v.

ERIC A. HOOKS, Attorney General of the State of North Carolina

Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7431

THOMAS LEE BRENNAN,

Petitioner - Appellant,

v.

ERIC A. HOOKS, Attorney General of the State of North Carolina,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Frank D. Whitney, Chief District Judge. (1:18-cv-00163-FDW)

Submitted: February 20, 2020 Decided: March 24, 2020

Before GREGORY, Chief Judge, RUSHING, Circuit Judge, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Thomas Lee Brennan, Appellant Pro Se.

PER CURIAM:

Thomas Lee Brennan seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (2018) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2018). 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) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). 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. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Brennan has not made the requisite showing. Accordingly, we deny Brennan's motions for appointment of counsel and for 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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:18-cv-00163-FDW

THOMAS LEE BRENNAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**ORDER**
	)	
ERIK A. HOOKS,	)	
	)	
Respondent.	)	
	)	

THIS MATTER is before the Court upon Respondent's Motion for Summary Judgment (Doc. No. 4) seeking denial of Petitioner Thomas Lee Brennan's pro se Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, (Doc. Nos. 1, 1-1).

I. BACKGROUND

Petitioner is a prisoner of the State of North Carolina who, after a jury trial in Haywood County Superior Court, was found guilty of possession with intent to manufacture, sell or deliver methamphetamine, possession of marijuana, and possession of drug paraphernalia. The NCCOA summarized the evidence at trial as follows:

> [O]n 2 April 2014, two detectives—Phillips and Beck—with the Haywood County Sheriff's Office were assigned to the Unified Narcotics Investigative Team, a multi-agency team focused on narcotics in Haywood County. In response to complaints regarding heavy traffic and "high activity" at 116 Barefoot Ridge, the detectives set up surveillance near that address, sitting in an unmarked law enforcement vehicle and wearing plainclothes. Detective Phillips was familiar with the address: "[I]t was the residence of Robert Guinn, who we have had several ongoing cases with narcotics. . . ." Detective Phillips testified that at 5:00 p.m. that day,[1] he observed a white Chevy Tahoe parked on the backside of the residence. After about five minutes, the Tahoe left the residence and came to the intersection of Barefoot Ridge and Poison Cove Road. The driver turned his head in the direction of the officers' vehicle and sat at the intersection for 20 to 30 seconds. When the vehicle turned

[1] After refreshing his recollection, Detective Phillips corrected this testimony, and testified that his and Detective Beck's surveillance of the house began at 7:30 p.m., not 5:00 p.m. (Trial Tr. 117, Resp't's Ex. 18 Vol. II, Doc. No. 5-19.)

onto Poison Cove Road, the detectives pulled away from their point of surveillance and followed the Tahoe. "[A]utomatically when he saw us coming behind the vehicle [the driver] began riding the brake." As the Tahoe approached New Clyde Highway, the Tahoe and the law enforcement vehicle were both traveling at 20 to 30 miles an hour when the Tahoe "just abruptly turned left," causing Detective Beck to slam on his brakes to keep from rear-ending the Tahoe. The detectives conducted a traffic stop of the Tahoe for making an unsafe turn without signaling. The Tahoe pulled over near a tobacco barn. Detective Phillips's testimony about defendant's behavior during the stop included the following:

> [Defendant] was acting very erratic. His hands were shaking. He was very nervous. He would speak really loud and speak real soft and, I mean, just shaking nervous. . . . I could see his eyes. His eyes looked like his pupils were very constricted about the size of a pinhead. Just with my training and experience, that's somebody who appears to be under the influence of a substance. Since I didn't smell alcohol, me being a narcotics detective, I thought it was going to be—or he was going to be impaired of some kind of narcotic.

Detective Phillips requested defendant's consent to search the vehicle, but defendant refused. Defendant was ordered to exit the vehicle and was informed that a K–9 unit was en route. Upon arrival, the K–9 officer "hit on the rear of the vehicle." Inside the vehicle in the center console between the front seats, officers discovered a bag of marijuana and in the cargo area of the rear, two digital scales, along with a golf-ball sized ball of crystallized methamphetamine weighing 8.75 grams.

State v. Brennan, 786 S.E.2d 433, 2016 WL 1745101, at *2 (N.C. Ct. App. 2016) (unpublished table decision) (footnote added). The evidence at trial showed that Phillips and Beck initiated the traffic stop at 7:34 p.m. on April 2, 2014, and called for the canine unit at 7:52 p.m., which arrived on the scene at 8:00 p.m. (Trial Tr. 105, Resp't's Ex. 18 Vol. II, Doc. No. 5-19.) Petitioner was arrested at 8:23 p.m. (Trial Tr. 106, id.)

Prior to trial, counsel filed a motion to suppress the evidence seized during the search of the vehicle. (Pre-trial Mots. Tr. 3, Resp't's Ex. 18 Vol. I, Doc. No. 5-19.) The court denied the motion as untimely filed pursuant to N.C. Gen. Stat. §§ 975(b), 976. (Id. at 14.)

After the jury returned its verdicts, Petitioner pled guilty to attaining the status of habitual felon. The trial court sentenced Petitioner to an active term of 84 to 113 months. Judgment was

entered on February 12, 2015.

Petitioner filed a pro se notice of appeal, which was not accepted due to defects in the notice. See Brennan, 786 S.E.2d 433, 2016 WL 1745101, at *2. Thereafter, however, appellate counsel filed a petition for writ of certiorari on Petitioner's behalf, which the North Carolina Court of Appeals ("NCCA") granted. The NCCA affirmed Petitioner's judgment on May 3, 2016. See id. at *4. Petitioner did not seek discretionary review in the North Carolina Supreme Court.

After filing multiple pro se and counseled post-conviction motions pursing collateral relief from judgment in the state courts, Petitioner filed the instant pro se federal habeas Petition in this Court on June 2, 2018. He raises the following grounds for relief: 1) trial counsel was ineffective for filing an untimely motion to suppress; 2) appellate counsel was ineffective for failing to argue trial counsel's ineffective performance related to the motion to suppress; and 3) appellate counsel was ineffective for failing to perfect a timely appeal. Respondent has filed a Motion for Summary Judgment (Doc. No. 4) and Petitioner has responded (Doc. No. 7).

II. LEGAL STANDARD

The habeas statute at 28 U.S.C. § 2254 states that a district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The federal court's power to grant habeas relief is limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) 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 (2) resulted in 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). The "contrary to" and "unreasonable application" clauses contained in § 2254(d)(1) are to be given independent meaning—in other words, a petitioner may be entitled to habeas corpus relief if the state court adjudication was either contrary to or an unreasonable application of clearly established federal law.

AEDPA's standard is intentionally "difficult to meet." White v. Woodall, 572 U.S. 415, 419 (2014) (internal quote and citation omitted). " '[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of th[e Supreme] Court's decisions.' " Id. (quoting Howes v. Fields, 565 U.S. 499, 505 (2012)) (internal quote and citation omitted) (first alteration in the original).

A state court decision can be "contrary to" clearly established federal law in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." Williams v. Taylor, 529 U.S. 362, 405 (2000) (plurality opinion). "And an 'unreasonable application of' [clearly established Federal law] must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." Woodall, 572 U.S. at 419 (quoting Lockyer v. Andrade, 538 U.S. 63, 75–764 (2003)) (alteration added). "Rather, '[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Woodall, 572 U.S. at 419-420 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

III. DISCUSSION

A defendant seeking relief based on ineffective assistance of counsel must meet two components: "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

> The court must evaluate the conduct from counsel's perspective at the time, and apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance, in order to eliminate the distorting effects of hindsight. In all cases, the petitioner'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.

Porter v. Zook, 898 F.3d 408, 434 (4th Cir. 2018), cert. denied, 139 S. Ct. 2012 (2019) (quoting Christian v. Ballard, 792 F.3d 427, 443 (4th Cir. 2015) (citations and internal quotation marks omitted)).

In order to show prejudice, "the petitioner must . . . show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Richardson v. Branker, 668 F.3d 128, 139 (4th Cir. 2012) (quoting Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, and the likelihood of a different result must be substantial, not just conceivable[.]" Id. at 139–40 (citations, alteration, and internal quotation marks omitted) (emphasis in original). On habeas review, this Court's inquiry "is limited to whether the [state] court's ineffective assistance determination was contrary to or an unreasonable application of Supreme Court precedent or an objectively unreasonable factual determination." Williams v. Stirling, 914 F.3d 302, 312 (4th Cir. 2019), as amended (Feb. 5, 2019).

A. Traffic Stop and Search of Vehicle

Petitioner claims trial counsel was ineffective for filing an untimely motion to suppress

evidence seized during what he contends was "an illegal [traffic] stop and prolonged search and seizure of" his vehicle. (§ 2254 Pet. 6, Doc. No. 1-1). He also claims appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal. Petitioner raised these claims in his December 13, 2017 MAR. (Dec. 13, 2017 MAR, Resp't's Ex. 13, Doc. No. 5-14.) The MAR court summarily denied the claims on the merits. (Jan. 11, 2018 MAR Order, Resp't's Ex. 14, Doc. No. 5-15.)

"Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Richter, 562 U.S. at 98. "This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." Id. In such a situation, the habeas court "must determine what arguments or theories . . . could have supported[ ] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Id. at 102.

The pivotal question in Petitioner's case "is whether the state court's application of the Strickland standard was unreasonable." Richter, 562 U.S. at 101. Here, the MAR court could have decided that Petitioner had failed to show there was a reasonable probability that the trial court would have suppressed evidence seized from the search of his car, had trial counsel filed a timely motion to suppress. See Strickland, 466 U.S. at 694.

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' under the Fourth Amendment." United States v. Bowman, 884 F.3d 200, 209 (4th Cir. 2018) (quoting Whren v. United States, 517 U.S. 806, 809 (1996)) (internal quotation marks omitted). "An automobile stop, therefore, is subject to the reasonableness requirement of the Fourth Amendment."

Bowman, 884 F.3d at 209 (citing Whren, 517 U.S. at 810 ("An automobile stop is . . . subject to the constitutional imperative that it not be 'unreasonable' under the circumstances."). A traffic stop is reasonable if: "(1) the stop was 'legitimate at its inception,' United States v. Hill, 852 F.3d 377, 381 (4th Cir. 2017), and (2) 'the officer's actions during the seizure were reasonably related in scope to the basis for the traffic stop,' United States v. Williams, 808 F.3d 238, 245 (4th Cir. 2015) (internal quotation marks omitted)." Bowman, 884 F.3d at 209.

"An officer's initial 'decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.'" Id. (quoting Whren, 517 U.S. at 810). Here, the MAR court reasonably could have concluded Detectives Phillips and Beck had probable cause to stop Petitioner for a traffic violation based upon their uncontradicted trial testimony that after driving erratically for several minutes, including repeatedly pumping his brakes, hanging his head out of the window to look in the side view mirror, neglecting to watch the road in front of him, slowing down twice as if preparing to turn, then speeding back up and proceeding straight, Petitioner made an abrupt turn without activating his turn signal, causing Beck to slam on his brakes to avoid rear-ending Petitioner's vehicle.

"[A] seizure that is 'lawful at its inception can nevertheless violate the Fourth Amendment because its *manner* of execution unreasonably infringes' on rights protected by the Fourth Amendment." Bowman, 884 F.3d at 209 (quoting United States v. Jacobsen, 466 U.S. 109, 124 (1984) (emphasis added)). "A lawful traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete [the] mission' of issuing a warning ticket." Bowman, 884 F.3d at 209-210 (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)). "The permissible duration of a traffic stop 'is determined by the seizure's mission—to address the traffic violation that warranted the stop,' meaning that it may 'last no longer than is necessary to effectuate that purpose.'" Bowman, 884 F.3d at 210 (quoting Rodriguez v. United States, 135

S.Ct. 1609, 1614 (2015) (alteration and internal quotation marks omitted)). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Bowman, 884 F.3d at 210 (quoting Rodriguez, 135 S.Ct. at 1614) (internal quotation marks omitted). "Ordinary tasks incident to a traffic stop include 'inspecting a driver's identification and license to operate a vehicle, verifying the registration of a vehicle and existing insurance coverage, and determining whether the driver is subject to outstanding warrants.'" Bowman, 884 F.3d at 210 (quoting Hill, 852 F.3d at 382). "A dog sniff around the vehicle's perimeter . . . [to] detect[ ] narcotics 'is not an ordinary incident of a traffic stop.'" Bowman, 884 F.3d at 210 (quoting Rodriguez, 135 S.Ct. at 1615) (alterations added).

"The Fourth Amendment permits an officer to conduct an investigation unrelated to the reasons for the traffic stop as long as it '[does] not lengthen the roadside detention.'" Bowman, 884 F.3d at 210 (quoting Rodriguez, 135 S.Ct. at 1614 (alteration added); citing Hill, 852 F.3d at 382 ("While diligently pursuing the purpose of a traffic stop, officers also may engage in other investigative techniques unrelated to the underlying traffic infraction . . . only as long as that activity does not prolong the roadside detention for the traffic infraction.")). "For instance, police during the course of a traffic stop may question a vehicle's occupants on topics unrelated to the traffic infraction, see Arizona v. Johnson, 555 U.S. 323, 333 . . . (2009), or perform a dog sniff around the outside of a vehicle, see Caballes, 543 U.S. at 409, . . . as long as the police do not 'extend an otherwise-completed traffic stop in order to conduct' these unrelated investigations, Williams, 808 F.3d at 245. " Bowman, 884 F.3d at 210. "[I]in order 'to extend the detention of a motorist beyond the time necessary to accomplish a traffic stop's purpose, the authorities must either possess reasonable suspicion [of ongoing criminal activity] or receive the driver's consent.'" Id. (quoting Williams, 808 F.3d at 245–46 (internal quotation marks omitted)) (alterations added).

"To show the existence of reasonable suspicion, 'a police officer must offer specific and articulable facts that demonstrate at least a minimal level of objective justification for the belief that criminal activity is afoot.'" Bowman, 884 F.3d at 213 (quoting United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008)) (additional citation and internal quotation marks omitted). " 'Reasonable suspicion is a commonsense, nontechnical standard,' [United States v. Palmer, 820 F.3d 640, 650 (4th Cir. 2016)] (internal quotation marks omitted), 'that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,' [Ornelas v. United States, 517 U.S. 690, 695 (1996)] (internal quotation marks omitted)." Bowman, 884 F.3d at 213. "In reviewing police action, courts must look at whether the evidence as a whole establishes reasonable suspicion rather than whether each fact has been individually refuted, remaining mindful of 'the practical experience of officers who observe on a daily basis what transpires on the street.'" Id. (quoting Branch, 537 F.3d at 336–37 (internal quotation marks omitted)). "The reasonable suspicion standard is less demanding than the probable cause standard or even the preponderance of evidence standard." Bowman, 884 F.3d at 213 (citing Illinois v. Wardlow, 528 U.S. 119 (2000)).

The MAR court reasonably could have concluded that Phillips's and Beck's uncontradicted testimony offered "specific and articulable facts that demonstrate[d] at least a minimal level of objective justification for the belief that" Petitioner had drugs in the car. Bowman, 884 F.3d at 213. Those facts could have included the following: Phillips was an experienced investigative and undercover narcotics officer; while Phillips was obtaining Petitioner's driver's license and other information incident to the traffic stop, Petitioner exhibited behaviors and characteristics that Phillips recognized from his training and experience as signs of drug impairment, including nervousness, fidgetiness, shaking hands, constricted pupils, argumentativeness, and alternately speaking loudly and very softly; Phillips did not smell alcohol

when speaking to Petitioner; Petitioner told Phillips that his shaky hands and fidgetiness were side effects of a history of heavy crack cocaine use; prior to the traffic stop, Phillips and Beck had been surveilling the residence of an individual Phillips knew to be involved in the drug trade; Phillips and Beck observed Petitioner leave that residence; Petitioner saw Phillips's and Beck's surveillance car when it was parked near the residence; after Beck pulled onto the road and began following him, Petitioner drove erratically; and after Beck initiated the traffic stop, Petitioner rolled up his windows, got out of his car and approached the detectives' car before either had gotten out of their vehicle, which the detectives characterized as uncommon or abnormal behavior during a traffic stop.

In sum, it would not have been unreasonable for the MAR court to conclude that based upon the totality of the circumstances, Phillips and Beck had reasonable suspicion to believe Petitioner had drugs in his car and that such reasonable suspicion justified extending their seizure of Petitioner and his vehicle and calling a K-9 unit to sniff around the vehicle's perimeter. See Bowman, 884 F.3d at 213. It would not have been unreasonable, then, for the MAR court also to conclude that the dog's positive alert gave Phillips and Beck probable cause to search the car. See, e.g., United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) ("When the dog 'alerted positive' for the presence of drugs, the officer was given probable cause for the search that followed.").

Accordingly, "there is at least one theory that could have led a fairminded jurist to conclude that [a timely-filed] suppression motion would have failed." Richter, 562 U.S. at 102. Consequently, Petitioner has not demonstrated that the MAR court's application of the Strickland standard was unreasonable when it denied his claim that trial counsel was ineffective for filing an untimely motion to suppress. See id. at 101; Strickland, 466 U.S. at 694. Respondent is entitled to summary judgment on Petitioner's ineffective assistance of trial

counsel claim.

It should go without saying that Petitioner likewise has failed to demonstrate that the MAR court's application of the Strickland standard was unreasonable when it denied his claim that appellate counsel was ineffective for refusing to challenge trial counsel's effectiveness on direct appeal. See id. As appellate counsel explained in a letter to Petitioner, he did not argue that trial counsel was ineffective for filing an untimely motion to suppress, because:

> Under Fourth Amendment law, the officers were justified in pulling you over based on your erratic driving, especially the fact that you made a sudden turn without signaling, which caused them to slam on their brakes. The officers could pull you over because they had reasonable suspicion that a traffic violation had occurred.
>
> Once you were pulled over, the officers observed your behavior. They testified that you appeared intoxicated by drugs. They noticed what they claimed was your nervous manner, your shaking hands, and you constricted pupils. They also knew you had just come from Robert Guinn's house, which they said was known for drugs. In addition, the officers said you told them you were a drug user. All of this information gave the officers reasonable suspicion of a drug offense. Thus, they could hold you until a drug dog could arrive and sniff your car. That is exactly what Rodriguez requires. Under that case, officers cannot hold a motorist at a traffic stop in order to conduct a dog sniff, unless there is reasonable suspicion of a drug crime.

(Sept. 3, 2015 David Weiss Let., Resp't's Ex. 11 at 12, Doc. No. 5-12.)

Appellate counsel need not raise on appeal every non-frivolous issue requested by a defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983); see also Smith v. Murray, 477 U.S. 527, 535 (1986); Evans v. Thompson, 881 F.2d 117, 124 (4th Cir. 1989) (declaring that counsel pursued sound strategy when he "determined what he believed to be petitioner's most viable arguments and raised them on appeal.") Winnowing out weaker arguments to press forward with more important points is part of effective appellate advocacy. See Jones, 463 U.S. at 751–52. Prejudice can be shown by demonstrating that " 'counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.' " Bell v. Jarvis, 236 F.3d 149, 180 (4th Cir. 2000) (quoting Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994)).

Appellate counsel's letter demonstrates he understood Fourth Amendment law related to search and seizures, was familiar with the Supreme Court's Rodriguez decision, was familiar with the details of Phillips's and Beck's uncontradicted testimony about Petitioner's behavior prior to and after the stop, and made a reasoned decision not to pursue an ineffective assistance of trial counsel claim on direct appeal because he believed it would be unsuccessful. For the reasons previously discussed, the MAR court could have agreed with appellate counsel's assessment. There is, then, at least one theory that could have led a fairminded jurist to conclude that there was no reasonable probability of success on appeal based upon a claim that trial counsel was ineffective for failing to file a timely motion to suppress. See Richter, 562 U.S. at 102; Strickland, 466 U.S. at 694. Consequently, Respondent is entitled to summary judgment on this claim.

B. Failure to Perfect a Timely Appeal

Petitioner claims in cursory fashion that appellate counsel was ineffective for failing to perfect a timely direct appeal. (§ 2254 Pet. 5.) This claim is unexhausted, as Petitioner failed to raise it in the state courts. Respondent has not raised the exhaustion defense, so the Court addresses the claim de novo.

The record shows that Petitioner filed a pro se notice of appeal, and due to defects in the notice, appellate counsel filed a certiorari petition to ensure that Petitioner received his appeal. See Brennan, 786 S.E.2d 433, 2016 WL 1745101, at *2. Because the NCCOA granted certiorari and gave Petitioner appellate review, this issue is moot. There could be no professional dereliction creating a reasonable probability of a different result under Strickland, because the NCCOA in fact granted Petitioner appellate review. Id. Accordingly, Respondent is entitled to summary judgment on this claim.

IT IS, THEREFORE, ORDERED that:

1. Respondent's Motion for Summary Judgment (Doc. No. 4) is **GRANTED**;
2. The Petition for Writ of Habeas Corpus (Doc. Nos. 1, 1-1) is **DENIED**; and
3. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability as Petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 474, 484 (2000) (holding that when relief is denied on procedural grounds, a petitioner must establish both that the correctness of the dispositive procedural ruling is debatable, and that the petition states a debatably valid claim of the denial of a constitutional right).

SO ORDERED.

Signed: September 23,

Frank D. Whitney
Chief United States District Judge

Legal Standard

The Habeas Statue at 28 U.S.C. § 2254 States that a district Court "Shall Entertain an application for a Writ of Habeas Corpus in Behalf of the person in Custody pursuant to the Judgement of a state Court only on the Ground He is in custody in Violation of the Constitution or laws of the united States.

The Sixth amendment of the united States Constitution has the right to effective assistants of Counsel.

In mr. Brennan's case his trial attorney failed unreasonably to comply with Statutory requirements for a motion to Suppress and therefore failed to Suppress the key evidence.

On appeal his attorney unreasonably failed to address and include mr. Brennan's trial atty's ineffective assistants Claim on appeal.

Legal Standard

The Fourth Amendment of the United States Constitution Protect the right of the people against unreasonable Searches, the Seizure of a person Driver beyond the scope of [a] traffic stop without his consent or reasonable articulable Suspicion is illegal. a traffic stop is legal if:

1) the stop was legitimate at its inception;

2) the actions During the Seizure were related in scope to reason of the Stop.

Here on april 2nd 2014 undercover drug Detectives pulled mr. Brenan over for a minor traffic Violation and immediately abandoned the purpose of the Stop.

Legal Standard

at trial Detectives Testified that they immediately followed mr. Brennan Down the Side of a mountain at a Distants of 10' feet at speeds from 20 to 30 miles per hour. The legal distants (distance) is "one car length per 10 m.P.H." This was an unsafe and intimidating distants (distance). officers Testified mr. Brennan Tapped his Breaks (brakes) ~~Hundreds~~ Dozens of times. This Testimony Questions "if the stop was legitimate at its inception or probable officers also Testified they observed mr. Brennan was nervous, His pupils restricted, and His Hand was shaking. mr. Brennan also said he suffered from Severe Nerve Damage but officers failed ~~to~~ to give mr. Brennan a Sobriety Test just assuming he was impaired because it justified their Seizure of mr. Brennan, Violating his right against unreasonable Seizure.

In Rebuttal To Judge F. D. Whitney's Opinion 5-26-2020

Case 1:18-CV-00163-F.D.W. 9/23/19

On 9-23-2019 Judge F.D.W. ruled on Mr. Thomas Brennan's Habeas Petition filed June 2, 2018, In his opinion "The M.A.R. court could Have reasonably concluded that Phillips and Beck's uncontradicted Testimony offered "at least a minimal level of objective justification for the belief that" Petitioner Had drugs in the car.

Again the petitioner reasserts the police did not act diligently in investigating the traffic violation and extended the scope and Duration without the necessary reasonable suspicion to Do So.

The NCCOA Summerized the Evidence as Follows:

On-4-2-14 Detectives of the Haywood County Sherriff's office were Surveilling a residence ~~at~~ 116 Barefoot Ridge, The

Detectives observed a chevy Tahoe leave the residence. Detectives immediately followed. Detectives Testified they followed at one car length at Between 20 and 30 m.P.H. Detectives Testified the driver pumped his Breaks hundreds of Times while looking Back at them. The vehicle Then Turned into a church and Turned his Signal on During the turn almost causing officers to hit the Tahoe. Mr. Brennan Parked at the Tabacco Barn Store and immediately exited the vehicle moving towards officers. Detectives asked defendant Back into vehicle. officer Phillips asked mr. Brennan permission To Search the vehicle Mr. Brennan refused. officer phillips asked mr. Brennan why he was shaking mr. Brennan informed Detective Phillips He suffered permanent nuerologist injuries. at this Point officers made mr. Brennan Exit Vehicle and Stand

Beside the store. Officers never returned to the purpose of the stop "Turning w/out Signaling".

Legal Standard

The 4th Amendment of the U.S. Constitution protects the right of the people against unreasonable Searches. The Seizure of [a] driver beyond the scope of [a] Traffic stop is legal if:

1) The stop was legitimate at its inception;

2) The actions During the Seizure were related in Scope and reason for the stop;

Here on april 2nd 2014 officers Beck and Phillips followed mr. Brennan Down a mountain road at a Distants of one car length at speeds of 20 to 35 miles per hour, which is an illegal and intimidating. these officers were in a late unmarked Sedan. these officers were in street clothes nothing that would not

lead mr. Brennan to believe they were police officers, mr. Brennan attempted to allow them to pass several times before signaling and turning into a store called "The Tabacco Barn," mr. Brennan parked and prepared to go in the store. "That's when Detectives activated their lights, mr. Brennan was startled by these officers unproffesional practices. He had recently been shot and suffered severe nerve Damage, when asked mr. Brennan said as much. mr. Brennan was asked if he did Drugs. He told officers he had in the past. officers sought permission to search mr. Brennan's Vehicle which he Denied permission, at this point no further investigation for the reason for the Seizure "Turn w/out Signaling or mr. Brennan's alledged impairment was executed." Officer Beck nor Phillips were certified to Submit Field Sobriety Tests,

these facts prove that these officers violated mr. Brennan's 4th amendment rights.

The Sixth amendment of the united States Constitution guarantees the right to effective assistants of counsel.

Here Trial atty. J. Song Filed a late incomplete motion to Suppress Violating mr. Brennan's rights

Here appellate atty. A. Vess failed to include Trial atty. J. Songs ineffective assistants in mr. Brennan's 2015 appeal.

mr. Brennan was fatally prejudiced and Seeks Relief. If these atty's Had acted reasonably mr. Brennan would Have Been Better off at trial or appeal, the Mar. Court would Have granted a Hearing.

Exhibit A

A. Yes.

Q. What happened next?

A. Whenever I got close enough to the vehicle, about a car length behind it as we were following it, the driver was repeatedly tapping the brakes. It almost looked like the caution light were on he was tapping the brakes so many times. He had his head out the window staring back at us in my vehicle, not watching the road in front of him. At that time I could tell -- I identified the driver.

Q. Okay. Were you familiar with a Mr. Thomas Brennan?

A. I was.

Q. And were you able to identify who that was at that time?

A. Yes.

Q. And how far behind his vehicle was your vehicle?

A. A car length.

Q. All right. And were you familiar with Mr. Brennan?

A. Yes.

Q. Is Mr. Brennan in the courtroom today?

A. Yes.

Q. Will you just identify him for the court and the jury by describing what he's wearing and where he's seated.

A. He's wearing a white shirt and sitting beside Mr. Song.

Q. What happened next?

A. Headed back towards Clyde on Poison Cove. He turned left.

Q. Okay. And what did you do in response to that action?

A. I pulled out behind him.

Q. And why did you decided to follow that vehicle?

A. Leaving the known narcotics house and his actions when he pulled up to the stop sign, not being able to decide whether he wanted to come right towards us or turn left.

Q. Do you know whether or not the person in that vehicle could see you from that person's position, if you know?

A. I'm sure he could.

MR. SONG: Objection, Your Honor.

THE COURT: I'll sustain it as to the form of the question.

BY MR. JONES:

Q. You testified you couldn't make out the hands and the face of that person, is that right --

A. Right.

Q. -- at the stop sign?

Were you able to see the front of that person's face?

A. I could see the person in the vehicle. I couldn't tell you who it was by name at that point in time. I could see the wheels turn back and forth.

Q. And you followed the vehicle; is that right?

Ex - A

Q. Although you were in an unmarked car?
A. Yes.
Q. Not in your uniform?
A. I don't wear a uniform.
Q. He made a left onto Poison Cove Road and started heading towards downtown Clyde?
A. Yes.
Q. And you started following immediately, did you not?
A. I did.
Q. You stayed about one car length behind him?
A. That's correct.
Q. The speed limit right there where you first start following the SUV is 35 miles per hour?
A. I believe it is.
Q. Until you get to the city limit and the speed reduces down to 25 miles an hour?
A. (No audible response.)
Q. I need the answer, sir.
A. I'll agree with you.
Q. I'm sorry?
A. I'll agree with you.
Q. Yes?
A. Yes.
Q. All right. Now, that's right before you get to Shook Street, isn't it?

A. The right before you get to Shook Street?

Q. Uh-huh. Where the speed reduces down to 25 miles an hour.

A. I'm not sure.

Q. Now, is the reduction in the speed of the SUV from 35 down to 25 miles an hour, is that incident to the change in the posted speed limit?

A. I don't think so.

Q. Now, how many times would you estimate that the SUV tapped on its breaks?

A. Well over a dozen.

Q. Well over a dozen, but less than two dozen?

A. I'm not sure. I didn't count them exactly.

Q. But definitely not in the hundreds?

A. I'm just going to say numerous times. I don't know exactly.

Q. That's fine. Thank you.

Despite the fact the driver was looking in his rearview mirror or the side mirror to see who's following him so closely, he was able to maintain his speed?

A. He maintained a very slow speed, yes.

Q. 25 miles an hour?

A. It varied.

Q. And he was able to maintain his lane control maintain his lane control, was he not?

MR. SONG: Your Honor, if I may just say one more thing --

THE COURT: Yes, sir.

MR. SONG: -- about what Mr. Brennan mentioned.

(Mr. Song and the defendant confer briefly.)

MR. SONG: Right before the -- close to the date of the offense, right before it, Mr. Brennan was, I believe, at his mother's residence and she pulled a gun on him and actually shot him in the arm.

THE DEFENDANT: No, she was going to commit suicide, and I grabbed the gun.

MR. SONG: Oh, I'm sorry. She was going to commit suicide in front of him; he grabbed the gun; the gun discharged, and then hit him in the arm. And it left a scar.

THE DEFENDANT: (Indicating.)

MR. SONG: Your Honor, that certainly did not help with Mr. Brennan's mental state.

THE DEFENDANT: And then she shot herself.

THE COURT: All right, sir.

MR. JONES: Mr. Song, would you stipulate that your client is a level III with 7 points for felony sentencing purposes?

MR. SONG: I do.

MR. JONES: If I may approach, we have executed a different sentencing worksheet.

THE COURT: Yes.

(Mr. Jones hands document to the court.)

THE COURT: All right, then. Madam Clerk, there will be one judgment.

The defendant, having been found guilty by the jury of possession with intent to manufacture, sell and deliver methamphetamine, possession of marijuana, and possession of drug paraphernalia, and having pled guilty to obtaining the status of an habitual felon, all of the charges will be consolidated into possession with intent to manufacture, sell and deliver methamphetamine. That is a Class H felony. It will be punished as a Class D felony.

The court has determined, and it has been stipulated to by the parties, that the defendant is a prior record level III for felony sentencing purposes, having 7 points, after removing the three felony convictions that we used to establish his habitual felon status.

The court makes no written findings because the prison term imposed is within the presumptive range of sentencing.

I do, in paragraph 3, adjudge the defendant to be an habitual felon to be sentenced four classes higher than the principal felony.

It is the judgment of the court that the defendant be imprisoned for a term of 84 months, minimum of

EX-A

impaired drivers?

A. You would cover, like I stated, the erratic speech, changes in behavior and mood swings, the constriction of the eye and the pupil. Any of those combination of factors are indicators of somebody that would be impaired. Again, I'm not trained to administer the exam that you would do with a standard field sobriety test, but I know what the indicators are of an impaired driver.

Q. Okay. So it's your testimony that during basic law enforcement training, you received no training whatsoever on how to administer any of the standardized field sobriety tests?

A. Not to be certified. You do cover what they are, but again, you do not receive any kind of certificate stating that you are an expert in administering the test.

Q. Okay. So you're saying you know how to administer it, but you just -- you're not certified?

A. I know how they are administered, but I am going to do one without being certified to do one.

Q. Okay. So when you pull someone over who is suspected of driving while under the influence of drugs or alcohol, what do you do in that situation?

A. Generally, you would call someone who is trained in standard field sobriety tests and have them come administer a roadside test.

Q. And did you do that in this case?

A. No, because I wasn't going to charge your client with driving while impaired.

Q. Even though you were under the impression that he was driving under the influence of drugs --

A. Correct.

Q. -- you were not going to charge him with driving while impaired?

A. Correct.

MR. SONG: If I could just have a brief moment, Your Honor.

THE COURT: Yes, sir.

MR. SONG: Thank you.

(Pause.)

BY MR. SONG:

Q. Who conducted the search of the vehicle?

A. That would be a combination of Officer Michael Blaylock, Detective Beck, myself, and Officer -- or Deputy Randy -- or Kevin Smathers. I'm sorry.

Q. Okay. Who was the one that found the tool bucket located in the back of the SUV?

A. That was Deputy Kevin Smathers.

Q. And to your knowledge, did Deputy Smathers use any latex gloves when he handled the evidence?

A. He never handled the evidence.

Q. Okay. He found the bucket, and did he bring that to

being a narcotics detective, I thought it was going to be -- or he was going to be impaired of some kind of narcotic.

Q. Detective, let me interrupt you there.

A. Yes.

Q. I want to go back a little bit.

Detective Beck is driving; is that correct?

A. That's correct.

Q. Where are you seated in this car?

A. I was sitting as the front seat passenger.

Q. Was anything obstructing your view through that window, or did you have a good view of the vehicle that was in front of you, the Tahoe?

A. I had a very clear view of the vehicle in front of me.

Q. When the Tahoe turned left and was traveling north on Poison Cove Road, how close did Detective Beck operate his vehicle behind the vehicle you were behind?

A. We were within a car length's distance.

Q. And do you know what the speed limit is on that portion?

A. The portion right there, I believe, is 35 miles an hour.

Q. And at some point does the speed limit stay constant or change?

A. I believe it drops to 20 at the -- where it forks. I

slam the brakes on to keep from rear-ending the vehicle. In the middle of the turn, the turn signal did come on. The vehicle turned into the parking lot, cruised through the church parking lot into the gravel of the tobacco barn parking lot.

With the violation of the turn causing us to have to slam our brakes on due to him not signaling in time to let us know he was going to make that turn, we -- again, Detective Beck turned his lights on to stop the vehicle.

I was going to get out and approach the driver, but before I could get out of the vehicle, the defendant, Mr. Brennan, had exited the vehicle and was coming back to our vehicle. In that process, he had rolled the window up and slammed the door shut.

I got out and said, "Hey, get back in your vehicle, just have a seat, and we'll deal with this."

Mr. Brennan did comply. I came up to the vehicle, asked him for his identification. At that time he was acting very erratic. His hands were shaking. He as very nervous. He would speak really loud and speak real soft and, I mean, just shaking nervous. You could tell the guy was nervous.

He did give me his identification. I could see his eyes. His eyes looked like his pupils were very constricted about the size of a pinhead. Just with my training and experience, that's somebody who appears to be under the influence of a substance. Since I didn't smell alcohol, me

Ex-A

A. This residence right here.

Q. Okay. Which road is Barefoot Road?

A. Barefoot Ridge turns here off of ---

THE COURT REPORTER: Excuse me. I can't hear you.

THE WITNESS: Barefoot Ridge would be this road that turns off of Poison Cove and goes to the Barefoot Ridge community.

BY MR. JONES:

Q. And which road is Poison Cove?

A. Poison Cove is this road right here.

Q. Okay. One more time we'll show the roads to the other half.

Which one is Barefoot Ridge?

A. This, again, is Barefoot Ridge, which goes into the Barefoot community, and Poison Cove Road, which is directly outside the community.

Q. Thank you.

A. (Returns to the witness stand.)

Q. Now, what day was this? What was the date?

A. This was April 2nd of 2014.

Q. And what was the approximate time of day?

A. It was around 5 o'clock in the afternoon.

Q. And how was the lighting, if you recall?

A. The lighting was good. It was in the evening

starting into sunset, but it was still fairly bright that day.

Q. Now, describe to the jury what kind of vehicle you and Detective Beck were in.

A. Myself and Detective Beck were in a black Ford Crown Vic. It's an unmarked vehicle that belongs to the sheriff's office. It doesn't have a light bar on top, but it does have a light bar on the inside of the vehicle. They're not really noticeable until you turn them on.

Q. Does it have any insignia on the outside of the vehicle?

A. It has no insignia. It's just a solid -- solid black Crown Vic.

Q. Does it have a cage or a video camera in it?

A. No case, no video camera.

Q. Does it have a radio?

A. It does have a radio.

Q. How were you and Detective Beck dressed on April 2nd of 2014?

A. On that day, I was in blue jeans and probably a button-up shirt, and he would have been the same. We don't wear uniforms.

Q. Okay. All right. So when you all got there, what happens? Just tell the jury what happens.

A. Again, we had gone to that residence, watched the neighborhood in reference to the complaints. Just past the

BY MR. JONES:

Q. Were you able to see a person in that vehicle from your vantage point?

A. Yes, I could.

Q. Were you able to see any particular body parts, such as the head or shoulders or arms or hands?

A. Yes.

Q. And what exactly did you see that person do?

A. I could see the head turned in our direction where we were parked.

Q. Okay. And what else did you observe at that time?

A. After the head had turned in the direction facing where we were parked, they sat motionless at the stop sign or the intersection of Barefoot Ridge and Poison Cove probably for 20 to 30 seconds. It looked like they were moving their hands left to right, looking left and right, trying to make a decision whether to pull out onto the roadway or not.

Q. Was there any other traffic coming at that time?

A. There were no other vehicles coming or going on the road at that time.

Q. What happened next?

A. After the 20- to 30-second pause, the vehicle pulled off of Barefoot Ridge and turned left onto Poison Cove. We immediately pulled out of our position and got behind the vehicle. As we were coming up behind it, I could observe what

looked like a white male wearing a hat, a white hat, automatically when he saw us coming behind the vehicle began riding the brake. And I'm not talking about just riding. It was pumping it, pumping it, pumping it. The brakes lights were just flashing as it continued forward down the street. The driver was hanging out the window looking into the side view mirror, looking back at Detective Beck and I, trying to figure out who we were, is what I would imagine, because they were focused on us instead of being focused on the roadway, which is endangering the traffic because they're not paying attention to where they're going instead of paying attention to the vehicles behind them.

It continued on riding the brake, and it appeared to be trying to attempt to make a left-hand turn onto Lois Lane. It slowed down right at the intersection. And it appeared to me that it was going to make a left-hand turn and then continued on, came up to the next intersection, which would be Travis Street, and it again slowed down almost to a stop like it was going to turn right on Travis Street and then sped back up again and continued on straight.

At that point in time, we started down the hill towards New Clyde Highway. We picked our speeds probably back up to 20, 30 miles an hour. And at the bottom entrance of -- I think it's the United Methodist Church there in Clyde, the vehicle just abruptly turned left. It caused Detective Beck to

FILED

STATE OF NORTH CAROLINA
COUNTY OF HAYWOOD 2017 JUL 20 AM 9:5

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 14 CRS 51228, 51230, 14 CRS 1090

STATE OF NORTH CAROLINA)
)
VS)
)
THOMAS LEE BRENNAN,)
Defendant.)

SUMMARY ORDER ON MOTION FOR APPROPRIATE RELIEF

This matter is before the undersigned on the Motion for Appropriate Relief filed by Christopher Heaney, Esq. on behalf of the defendant with the Haywood County Clerk of Superior Court on April 11, 2017. That the Court after review of the court file, the motion for appropriate relief and exhibits attached thereto hereby make the following

SUMMARY FINDINGS OF FACT:

1. That the defendant was charged on April 2, 2014 and subsequently indicted by the Haywood County Grand Jury on September 15, 2014 of the following:
   a. 14 CRS 51228 – Possession With Intent to Manufacture, Sell, and Deliver Methamphetamine;
   b. 14 CRS 51230 – Possession of Marijuana up to ½ ounce and Possession of Drug Paraphernalia; and
   c. 14 CRS 1090 – Habitual Felon Status.

   (See Indictments collectively labeled as Exhibit "A").

2. That the defendant was appointed Caleb Decker, Esq. as counsel on April 3, 2014.

3. That Caleb Decker, Esq. was allowed to withdraw and Jonathan Song, Esq. was appointed as counsel of record on July 30, 2014.

4. That the jury trial began on February 9, 2015 before the Honorable Gary Gavenus.

5. That on February 12, 2015 the jury returned verdicts of:
   a. 14 CRS 51228 – Guilty of Possession with Intent to Manufacture Sell or Deliver Methamphetamine;
   b. 14 CRS 51230 – Guilty of Possession of Marijuana and Guilty of Possession of Drug Paraphernalia.

   (See Verdicts collectively labeled as Exhibit "B").

6. That the defendant pled guilty to attaining the status of Habitual Felon.

7. That on February 12, 2015 the Honorable Gary Gavenus sentenced the defendant to a minimum term of 84 months to a maximum term of 113 months active sentence to be served in the North Carolina Department of Adult Corrections.

(See Judgment and Commitment labeled as Exhibit "C").

8. That the defendant entered a pro se Notice of Appeal on February 23, 2015.

9. That due to defects in the pro se Notice of Appeal, the defendant filed a petition for writ of certiorari which the North Carolina Court of Appeals granted.

10. That the defendant raised only one question on appeal: whether the trial court erred by denying the defendants motion to dismiss the charge of possession with intent to manufacture, sell or deliver methamphetamine.

11. That on May 3, 2016 the North Carolina Court of Appeals Opinion affirmed the judgment of the trial court.

(See North Carolina Court of Appeals Opinion labeled as Exhibit "D").

12. That the defendant, through counsel, filed a Motion for Appropriate Relief on April 11, 2017.

13. That the Motion for Appropriate Relief was filed more than ten (10) days after the entry of the judgment.

14. That N.C. Gen. Stat. §15A-1415(b) and (c) sets forth an exclusive list of claims that may only be asserted 10 days after entry of judgment. These claims are:
    a. The acts charges in the criminal pleading did not at the time they were committed constitute a violation of criminal law.
    b. The trial court lacked jurisdiction over the person of the defendant or over the subject matter.
    c. The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.
    d. The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.
    e. The conduct for with the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
    f. There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.
    g. The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law. However, a motion for appropriate relief on the grounds that the sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing must be made before the sentencing judge.

h. The Defendant is in confinement and it entitled to release because his sentence has been fully served.
i. There exists newly discovered evidence.

15. That the court entered an order assigning the Motion for Appropriate Relief to the undersigned for review and the taking of appropriate administrative action to dispense with the motion pursuant to N.C. Gen. Stat. §15A-1413 which was filed with the Haywood County Clerk of Superior Court on June 1, 2017.

16. That the defendant argues in his Motion for Appropriate Relief ineffective assistance of trial counsel.

17. That defendant argues that trial counsel filed an untimely, incomplete motion to suppress evidence thus providing ineffective assistance of counsel.

18. That N.C. Gen. Stat. § 15A-1419(a)(3) provides that a ground for denial of a Motion for Appropriate Relief is that "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so".

19. "To avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants should necessarily raise those IAC claims on direct appeal that are apparent from the record" and can be "developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166-67 cert. denied, 535 U.S. 1114 (2002).

20. That the defendant failed to raise a claim of ineffective assistance of counsel in his February 23, 2015 appeal to the North Carolina Court of Appeals.

21. That defendant failed to provide by a preponderance of the evidence in his Motion for Appropriate Relief that his failure to raise the claim of ineffective assistance of counsel on appeal was based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous post-conviction review pursuant to N.C. Gen. Stat.§ 15A-1419(c)(3).

22. That the defendant's Motion for Appropriate Relief has failed to satisfy the procedural rules in N.C. Gen. Stat. §15A-1419(a) and (b). Procedural default rules are mandatory and in the absence of an exception, the judge does not have discretion to waive the mandatory requirement.

THAT BASED UPON THE FOREGOING SUMMARY FINDINGS OF FACT THE COURT CONCLUDES AS A MATTER OF LAW:

1. That the court has jurisdiction over person and subject matter.

2. That the defendant's Motion for Appropriate Relief claiming Ineffective Assistance of Counsel is procedurally barred because in the previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

3. That the defendant's Motion for Appropriate Relief has failed to satisfy the procedural rules in N.C. Gen. Stat.§15A-1419(a) and (b).

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES:

1. That the defendant's Motion for Appropriate Relief claiming ineffective assistance of counsel shall be, and hereby is, **DENIED.**

Entered this the 19th day of July, 2017.

Signed this the 19th day of July, 2017.

B. B. Letts

Honorable Bradley B. Letts
Senior Resident Superior Court Judge
Judicial District 30B

19-7431

Thomas Lee Brennan
#0677188
DAN RIVER PRISON WORK FARM
981 Murray Road
Blanch, NC 27212

FILED: May 4, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7431
(1:18-cv-00163-FDW)

THOMAS LEE BRENNAN

Petitioner - Appellant

v.

ERIC A. HOOKS, Attorney General of the State of North Carolina

Respondent - Appellee

M A N D A T E

The judgment of this court, entered March 24, 2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk