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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7239

PHILLIP VANCE SMITH, II,

Petitioner - Appellant,

v.

JOSH STEIN; ERIK A. HOOKS,

Respondents - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:17-hc-02103-BO)

Submitted: November 2, 2020 Decided: December 3, 2020

Before NIEMEYER, MOTZ, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Niemeyer and Judge Richardson joined.

Ashley P. Peterson, Brian D. Schmalzbach, MCGUIREWOODS LLP, Richmond, Virginia, for Appellant. Joshua H. Stein, Attorney General, Sandra Wallace-Smith, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

DIANA GRIBBON MOTZ, Circuit Judge:

Phillip Vance Smith, II, appeals the dismissal of his 28 U.S.C. § 2254 petition as untimely. Smith contends that *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), extended his limitations period by recognizing a new constitutional right retroactively applicable to cases on collateral review. *See* 28 U.S.C. § 2244(d)(1)(c). For the reasons that follow, we reject this argument and affirm the judgment of the district court.

I.

In 2001, Smith killed a man during the commission of a drug deal, and the State of North Carolina charged him with first-degree murder. At trial, Smith testified that he acted in self-defense. Prior to closing arguments, Smith's counsel told Smith that, given this trial testimony, counsel felt he "had no choice" but to tell the jury that Smith was guilty of felony murder. Smith contends, and Respondents do not contest, that Smith informed his lawyer that he "flat out" "did not agree with him telling the jury [Smith] was guilty of anything."

Defense counsel nevertheless told the trial court that he had "talked about it with Mr. Smith" and that Smith "ha[d] no objection to me arguing that he is in fact guilty as charged with respect to the felony murder aspect." When the trial court sought confirmation from Smith, he said, "if he has got to do it, he has got to do it. If he doesn't, I don't think he should." A bench conference followed, and the case proceeded to closing arguments, during which Smith's counsel did inform the jury that Smith was guilty of first-degree felony murder. The jury found Smith guilty of murder "[o]n the basis of malice,

premeditation, and deliberation," as well as felony murder. The court sentenced Smith to life imprisonment without the possibility of parole.

Smith filed a direct appeal, which the Supreme Court of North Carolina denied on December 4, 2003. On November 10, 2004, Smith filed a timely state postconviction motion for appropriate relief, which the North Carolina Superior Court denied. Smith did not appeal, and the Superior Court's decision became final on March 4, 2005.

In 2016, Smith filed a second motion for appropriate relief, raising four grounds, including the claim that his trial counsel provided ineffective assistance by admitting to the jury, without Smith's consent, that Smith was guilty of felony murder. The state trial court denied the motion, and the state appellate courts affirmed.

In 2017, Smith filed a federal habeas petition, again raising this claim. The district court denied the petition as untimely, and Smith noted this appeal.[1]

II.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations on all federal habeas petitions filed by persons in custody pursuant to the judgment of a state court. *See* 28 U.S.C. § 2244(d). Smith's statutory period under AEDPA began to run when Smith's conviction became final on March 3, 2004, 90 days after the Supreme Court of North Carolina denied his petition for discretionary review. *See* 28 U.S.C. § 2244(d)(1)(A). This one-year statute of limitations was briefly tolled when Smith sought further review in state court between November 2004

[1] We express our thanks to Smith's court-appointed appellate counsel, Ashley P. Peterson and Brian D. Schmalzbach, for their excellent briefs.

and March 2005, but the AEDPA statute of limitations ultimately expired on June 25, 2005. Because Smith did not file the instant petition until 2017, absent any extension in this limitations period, Smith's petition was untimely.

Smith argues that the Supreme Court's issuance of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), provides the basis for such an extension of the limitations period. In *McCoy*, the Court held that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt. The *McCoy* Court explained that this right exists even when a defendant's counsel concludes that confessing guilt offers the defendant the best chance to avoid the death penalty.

McCoy had "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *Id.* at 1505. But at the guilt phase, and again at the penalty phase, of McCoy's capital trial, the trial court permitted defense counsel to concede McCoy's guilt. *Id.* at 1506–07. The trial court reasoned that it was the attorney's task to determine how to best present his client's case. *Id.*

The Supreme Court rejected this rationale and reversed, holding that the right to counsel under the Sixth Amendment includes a right to "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* at 1508. Although "[t]rial management is the lawyer's province," counsel is "still an assistant" to the defendant and "may not override [her client's objections] by conceding guilt." *Id.* 1508–09 (citation and internal quotation marks omitted). Therefore, once a defendant "communicate[s] [his objection] to court and counsel, . . . a concession of guilt should [be] off the table." *Id.* at 1512. The

Court further concluded that a violation of this right constitutes structural error and requires "a new trial without any need first to show prejudice." *Id.* at 1511.

Smith contends that *McCoy* recognized a new rule of constitutional law retroactively applicable to his case that effectively extended the AEDPA limitations period for one year. Federal law provides that the limitations period for a habeas petition runs from "the date on which the constitutional right asserted was initially recognized by the Supreme Court," but only "if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). Thus, to obtain the benefit of this limitations period, a habeas petitioner must demonstrate (1) that the Supreme Court recognized a new right; and (2) that the right has been made retroactively applicable to cases on collateral review. We turn to the question of whether Smith has made that showing.

III.

The principles articulated in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny guide our analysis of this question. In *Teague*, the Supreme Court set forth the framework for determining whether a rule it has announced should be applied retroactively to final judgments in criminal cases. *Id.* at 310. Under *Teague*, "an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)). However, a "new rule" applies retroactively in a collateral proceeding if the rule is substantive, rather than procedural, or if it is a "'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal

proceeding." *Id.* (alteration in original) (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)); *see also Teague*, 489 U.S. at 307. The parties recognize that the *McCoy* rule is not substantive. Accordingly, to be retroactively applicable it must be both a "new rule" and a "watershed rule."

A.

As to the first of these requirements, "a case announces a new rule if the result was not *dictated* by precedent," *Teague*, 489 U.S. at 301 — that is, the rule would not have been "apparent to all reasonable jurists," *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997). "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

Prior to *McCoy*, the Supreme Court had viewed a lawyer's concession of guilt as a tactical choice that counsel could make — in the absence of her client's consent — without exceeding constitutional limitations. In *Florida v. Nixon*, the Court had determined that the Constitution does *not* bar counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." 543 U.S. 175, 178 (2004).[2] Rejecting "a blanket rule demanding defendant's explicit consent," *Nixon* unanimously determined that such an admission was not automatically prejudicial ineffective assistance of counsel. *Id.* at 192.

[2] The Supreme Court's decision in *Nixon* was issued in November 2004, a few months after Smith's conviction became final in March 2004. However, Smith maintains, and Respondents do not contest, that *Nixon* reflects the "legal landscape" that existed at the time of Smith's conviction. *See Beard v. Banks*, 542 U.S. 406, 411 (2004).

The *McCoy* Court specifically stated that *Nixon*'s holding was "not . . . contrary" to its holding because "Nixon never asserted" that he opposed counsel's proposed approach. 138 S. Ct. at 1509. This might suggest that the Court did not regard *McCoy* as recognizing a new rule. But the Supreme Court has explained that the fact that it has said a "decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive" as to whether the decision recognizes a new rule. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). The *McCoy* majority did not cite any controlling precedent as dictating its holding. Moreover, unlike *Nixon*, which had followed the logic of *Strickland v. Washington*, 466 U.S. 668 (1984), *McCoy* rejected arguments that the ineffective-assistance-of-counsel line of cases governs when a client voices his objection. Instead, "[b]ecause a client's autonomy, not counsel's competence, is in issue," *McCoy* placed conceding guilt as among the types of decisions reserved for clients under the Sixth Amendment. 138 S. Ct. at 1511; *see also id.* at 1508–09 ("Some decisions [] are reserved for the client — notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this . . . category.") (citation omitted).

McCoy might also be considered a new rule because it appears to have been "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415. The Louisiana Supreme Court determined in *McCoy* itself that counsel had taken "a reasonable course of action," that "constitute[d] reasonable trial strategy." *State v. McCoy*, 218 So. 3d 535, 566, 572 (La. 2016). And Justice Alito noted in dissent, the *McCoy* rule appears to be a "newly

discovered constitutional right" that "made its first appearance," in that decision. 138 S. Ct. at 1514, 1518 (Alito, J., dissenting).

However, we need not here resolve this issue, *see, e.g.*, *United States v. Mathur*, 685 F.3d 396, 398–99 (4th Cir. 2012), because in all events *McCoy* did not establish a watershed rule.

B.

A watershed rule of criminal procedure is one that "requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (alteration in original) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring)). For a new procedural rule to be "watershed," it (1) "must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418 (internal quotation marks omitted).

The *McCoy* rule may well be necessary to prevent an impermissibly large risk of an inaccurate conviction. *McCoy* itself recognized that "a jury would almost certainly be swayed by a lawyer's concession of his client's guilt," and that "the effects of the admission would be immeasurable." *McCoy*, 138 S. Ct. at 1511. Indeed, the Supreme Court held the *McCoy* error structural, requiring a new trial in all cases on direct appeal. *Id.*; *see also Mickens v. Taylor*, 535 U.S. 162, 166 (2002) ("[W]here assistance of counsel has been denied entirely or during a critical stage of the proceeding . . . the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary."). Unlike cases in which procedural rights do not directly pertain to "accuracy in the fact-finding process," *see, e.g.*,

Mathur, 685 F.3d at 400, the denial of representation creates a risk of an unreliable verdict which "is intolerably high." *Whorton*, 549 U.S. at 419.

But the watershed-rule requirement instituted in *Teague* also demands that a new rule must alter our understanding of "essential" and "bedrock procedural element[s]." 489 U.S. at 315. It is "not enough" "[t]hat a new procedural rule is 'fundamental' in some abstract sense." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Nor is it sufficient that a new rule "is *based on* a 'bedrock' right." *Whorton*, 549 U.S at 420–21. The requirement is "extremely narrow," *Schriro*, 542 U.S. at 352, and the Supreme Court has never found a new procedural rule to be "watershed" even though it has considered the question more than a dozen times. *See, e.g.*, *Whorton*, 549 U.S. at 418 (collecting cases).

The one decision that the Court has suggested "might fall within this exception" is *Gideon v. Wainwright*, 372 U.S. 335 (1963), which incorporated the Sixth Amendment right to counsel against the states and held that an indigent defendant in a criminal case has the right to have counsel appointed for him. *Beard*, 542 U.S. at 417. Before the institution of the "watershed" requirement in *Teague*, the Supreme Court repeatedly addressed rules derived from *Gideon* — like the right to counsel at plea hearings, the right to counsel at probation revocation hearings, the right to counsel on appeal, and the right to counsel at any prosecution leading to actual imprisonment — and held them retroactively applicable. *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968); *McConnell v. Rhay*, 393 U.S. 2, 3–4 (1968); *Berry v. City of Cincinnati*, 414 U.S. 29, 29–30 (1973). But under the analysis required by *Teague*, *Gideon* itself seems to be the only example of a rule with sufficient "'primacy' and 'centrality'" to have possibly "effected a profound and 'sweeping' change"

justifying retroactive application. *Whorton*, 549 U.S. at 420 (quoting *Saffle*, 494 U.S. at 495; *Beard*, 542 U.S. at 418). As the Supreme Court has repeatedly stated, it is "unlikely" that any watershed rules "have yet to emerge." *Teague*, 489 U.S. at 313; *accord Schriro*, 542 U.S. at 352; *Tyler v. Cain*, 533 U.S. 656, 667, n.7 (2001); *Sawyer v. Smith*, 497 U.S. 227, 243 (1990).

To be sure, the *McCoy* rule shifts the balance of power between counsel and client and preserves an essential right for a defendant: the "right to make the fundamental choices about his own defense." 138 S. Ct. at 1511. And *McCoy*, of course, derives from *Gideon*. But, at bottom, *McCoy* presupposes what *Gideon* commanded — that a criminal defendant has a right to counsel in the first place. *McCoy* refines the *Gideon* rule, but it is an extension of a watershed rule rather than a watershed rule itself.

IV.

For the foregoing reasons, we hold that the rule announced in *McCoy v. Louisiana*, 138 S. Ct. 1500, is not retroactively applicable on collateral review.[3] Accordingly, Smith's petition is untimely and the judgment of the district court is

AFFIRMED.

[3] Respondents argue that the rule announced in *McCoy* also does not assist Smith because (1) Smith testified that he shot the victim and (2) the *McCoy* rule arose in a death penalty case and Smith did not face capital punishment. Given our resolution of this appeal, we do not reach these issues.

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

NO. 5:17-HC-2103-BO

PHILLIP VANCE SMITH, II	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
ERIK A. HOOKS,	)	
	)	
Respondent.	)	

Petitioner, a state inmate, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter is before the court upon the following motions: (1) respondent's motion to dismiss [DE-10]; (2) petitioner's motion to amend [DE-14]; (3) petitioner's motion to appoint counsel [DE-18]; (4) petitioner's motion to hold in abeyance [DE-19]; (5) petitioner's motion for leave to proceed *in forma pauperis* [DE-20]; and (6) petitioner's motion for discovery [DE-26].

I. Statement of the Case

On March 8, 2002, in Wake County Superior Court, a jury found petitioner guilty of first degree murder. Pet. [DE-1], p. 1. The trial court sentenced petitioner to life imprisonment without the possibility of parole. Id. Petitioner appealed. State v. Smith, 158 N.C. App. 747, 582 S.E.2d 83, 2003 WL 21498954 (2003). On July 1, 2003, the North Carolina Court of Appeals found no error in petitioner's conviction and sentence. Id. The North Carolina Supreme Court denied petitioner's petition for discretionary review on December 4, 2003. State v. Smith, 357 N.C. 661,

590 S.E.2d 858 (2003).

Petitioner then contacted North Carolina Prisoner Legal Services, Inc. ("NCPLS"). On June 17, 2004, Elizabeth Coleman Gray of NCPLS informed petitioner: "I have had an opportunity to read and review your Court of Appeals decision. I am sorry, but I do not see any legal issues that I believe would be successful on further appeal. Therefore, we will not be able to provide any legal assistance to you in this matter." Pet'r Ex. [DE-1-1], p. 10. NCPLS then sent petitioner a packet to assist him in filing any pro se post-conviction motions. Id. at p. 12.

Petitioner filed a pro se Motion for Appropriate Relief ("MAR") in Wake County Superior court on November 10, 2004. Pet. [DE-1], p. 2. The trial court denied petitioner's MAR with prejudice on February 2, 2005. Id. at 3. Petitioner did not file a petition for a writ of certiorari with the North Carolina Court of Appeals to review the denial of his MAR. Id. at p. 5.

Petitioner filed a second MAR in the trial court on May 11, 2016. Id. at p. 3. The trial court denied petitioner's second MAR with prejudice on May 20, 2016. Id. The North Carolina Court of Appeals denied petitioner's petition for writ of certiorari on November 17, 2016. Resp't. Ex. 9 [DE-11-10]. The North Carolina Supreme Court dismissed petitioner's motion for leave to appeal the denial of certiorari on January 26, 2017. State v. Smith, 369 N.C. 484, 795 S.E.2d 361, 362 (2017). On March 1, 2017, petitioner filed a petition in the North Carolina Supreme Court, again seeking leave to appeal. State v. Smith, 369 N.C. 570, 799 S.E.2d 40 (2017). The North Carolina Supreme Court dismissed the petition on May 3, 2017. Id.

Petitioner filed the instant federal habeas petition and paid the requisite filing fee on May 10,

2017.[1] Pet. [DE-1], p. 15. Petitioner acknowledges the untimeliness of his petition, and makes several arguments in support of equitable tolling. Id. at pp. 13-15. His petition was accompanied with a motion to appoint counsel. [DE-2]. Petitioner's claims survived frivolity review, but his motion to appoint counsel was denied. [DE-6].

Respondent filed the instant motion to dismiss on January 24, 2018. [DE-10]. That motion has been fully briefed. [DE-17, 22, 24]. Petitioner moved to correct the caption of his petition on January 31, 2018. [DE-14]. On February 16, 2018, petitioner filed his motion to appoint counsel, motion to hold petition in abeyance, and motion for leave to proceed *in forma pauperis*. [DE-18, 19, 20]. On February 20, 2018, respondent filed a response to petitioner's motion to hold in abeyance. [DE-23]. Petitioner replied on March 2, 2018. [DE-25]. Finally, petitioner filed his motion for discovery on April 4, 2018 [DE-26], and respondent filed a response in opposition on April 5, 2018 [DE-27]. These matters are ripe for adjudication.

II. Statement of the Facts

The North Carolina Court of Appeals summarized the factual background of petitioner's conviction and the evidence presented at trial as follows:

> On 2 March 2001, Rico Waters ("the victim") contacted Phillip Vance Smith, II ("defendant") in order to arrange a drug purchase. Unbeknownst to victim, defendant decided he was going to rob the victim for the drug money and not sell him drugs. The victim, driven by his friend Gregory Adams ("Adams"), arrived at the bowling alley where defendant and the victim had arranged to meet. Defendant got in the back seat of the car and directed Adams to park behind a dumpster in a parking lot at an apartment complex. At that point, defendant drew a gun and aimed it towards the front of the car in the direction of the victim and Adams. Defendant demanded the victim's money, and the victim began to plead and argue with defendant.

[1] The court gives petitioner the benefit of the mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (1988) (holding that a pro se prisoner's notice of appeal is filed at the moment it is delivered to prison authorities for mailing to the district court).

Approximately three minutes later, the victim reached under his seat and pulled out what appeared to be a gun and pointed it at defendant. In actuality, the victim had pulled a plastic toy from beneath the seat. The victim continued to ask defendant why he was pulling a gun on him and why he was robbing him. When Adams thought defendant was sufficiently distracted, he exited the car. As Adams ran from the car, he heard defendant and the victim continue to argue, and when he had run approximately fifty yards from the car, he heard multiple shots fired. These shots were also heard by Michael Solares and Nicole Velarde, who saw defendant running from the area with a look of terror on his face.

After the shooting, defendant paged his friend, Heather Sollars, so she would come to get him. She drove defendant to a place where he wrapped the gun in a plastic bag and disposed of it. The victim was found at approximately 4:30 a.m. on the morning following the shooting. He had died as a result of sustaining two gunshot wounds from close range to the head. Defendant went to Chicago, but returned to North Carolina and turned himself in at the advice of his father.

Defendant was indicted for murder by the Wake County Grand Jury on 20 March 2001 for violation of N.C. Gen.Stat. § 14-17. State's witness, Robert Lundy ("Lundy"), had previously been at the same correctional facility with defendant when defendant was incarcerated on unrelated charges. Lundy testified defendant wrote a manuscript about "life in the streets" during the time they were imprisoned together. Defendant's manuscript described a misunderstanding between himself and an individual named Rico and defendant's desire to "get him back." When questioned about the manuscript by Lundy, defendant stated he was going to kill the victim when he was released from the correctional facility.

Defendant testified on his own behalf concerning the shooting and stated he had not wanted to "pull the gun out." Defendant further testified he shot only after the victim had pulled what appeared to be a gun and "tried to reach out at" him. Defendant testified he only intended to rob the victim. Though defendant "had a feeling that ... [the victim] was probably going to die" when defendant started shooting, he testified he fired because he was trying to survive the encounter. Regarding his written manuscript, defendant explained that the character named Rico was fictional. The name was based on that of a former fellow inmate, and he had not yet met the victim, also named Rico, at the time he wrote the story.

At the close of the State's case and again at the close of all the evidence, defendant moved to dismiss the charge of first-degree murder on the grounds that there was insufficient evidence of each element of the charged offense. The trial court denied both motions. The jury was given the following options on the verdict sheet: guilty of first-degree murder on the basis of malice, premeditation and deliberation; guilty of first-degree murder under the first-degree felony murder rule; guilty of

> second-degree murder; and not guilty. The jury found defendant guilty of both forms of first-degree murder, and the trial court entered judgment, sentencing defendant to life imprisonment without parole. Defendant appeals.

Smith, 2003 WL 21498954, at * 1-2.

III. Discussion

A. Motion to Amend

Petitioner requests leave to amend the caption of the case to reflect that Erik A. Hooks is now his custodian. [DE-14]. That request is ALLOWED.

B. Motion to Appoint Counsel

Petitioner renews his request for the appointment of counsel. [DE-18]. As the court previously noted, there is no constitutional right to counsel in habeas corpus actions. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Under 18 U.S.C. § 3006A(a)(2)(B), a court may appoint counsel in a habeas corpus proceeding if it determines that "the interests of justice so require." The court previously considered the matter, and concluded the interests of justice did not mandate the appointment of counsel. Petitioner's renewed motion does not introduce any new factors to alter that analysis. Accordingly, petitioner's motion for counsel [DE-18] is DENIED.

C. Motion to Hold in Abeyance

Petitioner requests leave to hold this matter in abeyance until the United States Supreme Court rules on McCoy v. Louisiana, 138 S. Ct. 1500 (2018). The Supreme Court issued a decision in McCoy on May 14, 2018. Id. Accordingly, petitioner's request [DE-19] is DENIED as moot.

D. Motion to Proceed *in forma pauperis*

As noted, petitioner paid the $5.00 filing fee when he submitted his petition. [DE-1]. Accordingly, his request to proceed *in forma pauperis* [DE-20] is DENIED as moot.

third, and fourth grounds for relief. The limitation period under section 2244(d)(1) is tolled during the time that "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2); see Taylor v. Lee, 186 F.3d 557, 560 (4th Cir. 1999). An application for post-conviction or other collateral review is pending from initial filing in state court until final disposition in the highest state court. Taylor, 186 F.3d at 560–61. The period between the time a petitioner's conviction becomes final and the time a petitioner files a state application for post-conviction relief counts against the one-year limitation period. See, e.g., Hernandez v. Caldwell, 225 F.3d 435, 438 (4th Cir. 2000); Harris v. Hutchinson, 209 F.3d 325, 327 (4th Cir. 2000); Flanagan v. Johnson, 154 F.3d 196, 199 n.1 (5th Cir. 1998). The statutory period then resumes after the state highest state court denies post-conviction relief to a petitioner. See, e.g., Holland v. Florida, 560 U.S. 631, 638 (2000); Hernandez, 225 F.3d at 438.

Subsection (A) of section 2244(d)(1) requires the court to determine when petitioner's judgment became final. See 28 U.S.C. § 2244(d)(1)(A). Petitioner's conviction became final on March 3, 2004, 90 days after the North Carolina Supreme Court denied his petition for discretionary review on December 4, 2003. See Sup. Ct. R. 13.1 (providing 90 days in which to file a certiorari petition with the United States Supreme Court from a final order of a state's highest court denying review); Clay v. United States, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.").

Petitioner's one-year statutory period then began to run on March 3, 2004 and ran for 252 days until petitioner filed his MAR on November 10, 2004. Ordinarily, the one-year statute of

limitations would begin to run again at the "expiration of the period of time to seek further appellate review [of the state post-conviction motion]." Taylor v. Lee, 186 F.3d 557, 561 (4th Cir. 1999). However, the North Carolina Rules of Appellate Procedure do not firmly establish any deadline for prisoners to file a petition for writ of certiorari to review orders denying a MAR. See N.C.R. App. P. 21(e). Rather, prisoners seeking to challenge the denial of a MAR must avoid "unreasonabl[e] delays." Id.

In a case construing similar language the Supreme Court held that "[i]n the absence of . . . clear direction or explanation from [a state] Supreme Court about the meaning of the term 'reasonable time' . . . [the district court] must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness." Evans v. Chavis, 546 U.S. 189, 198 (2006). The Court further explained that a district court's analysis should be informed by the state's deadlines for filing other types of appeals. See id. at 201. Because the North Carolina Supreme Court has not defined the phrase "unreasonable delay" for purposes of North Carolina Rule of Appellate Procedure 21(e), the court compares other relevant state deadlines to determine when petitioner's right to seek appellate review of the order denying his MAR expired. Evans, 546 U.S. at 201; see also Coley v. Hooks, No. 5:16-HC-2308-FL, 2018 WL 1570799, at *4 (E.D.N.C. Mar. 30, 2018); McConnell v. Beck, 427 F. Supp. 2d 578, 582 (M.D.N.C. 2006).

In North Carolina, the time period for filing appeals is 14 days in criminal cases, 30 days in civil cases, and 60 days in death penalty cases. N.C.R. App. P. 3(c), 4(a), 21(f). The court finds that the 30 day deadline for filing appeals in a civil case is most applicable to a post-conviction petition for certiorari. See Evans, 546 U.S. at 201; McConnell, 427 F. Supp. 2d at 582 (concluding "it is unlikely North Carolina would interpret N.C.R. App. P. 21(e) to extend beyond thirty days, except

perhaps for brief, limited periods in very unusual circumstances, which do not arise in this case"); Coley, 2018 WL 1570799, at *4 (applying 30 day deadline to file petition for writ of certiorari seeking review of denied MAR). Therefore, AEDPA's one-year statute of limitations was tolled from the date petitioner filed his MAR until his time for filing an appeal expired thirty days after the state court denied the MAR. See Evans, 546 U.S. at 201; Taylor, 186 F.3d at 561; Coley, 2018 WL 1570799, at *4.

Thus, the statute of limitations was tolled from February 2, 2005 until March 4, 2005 (i.e. 30 days after his MAR was denied by the Wake County Superior Court). Petitioner's statutory period subsequently resumed on March 4, 2005, and expired 113 days later on June 25, 2005. Petitioner's May 11, 2016 second MAR, or any later state post-conviction filing, does not operate to further toll the running of the statutory period. See Streater v. Beck, No. 3:05CV284-MU-02, 2006 WL 1877149, *2 (W.D.N.C. Jul. 6, 2006) ("[I]t is well settled that a . . . motion or petition [filed subsequent to the close of the statutory period] for collateral review in State court cannot somehow breathe new life into an already expired federal limitations period[.]"), appeal dismissed, 207 F. App'x 271, 2006 WL 3407741 (4th Cir. 2006). The instant petition was not filed until May 10, 2017, nearly 12 years out of time. Accordingly, absent equitable tolling, the instant petition is untimely.

Under the AEDPA, the one-year statute of limitations is subject to equitable tolling. Holland, 560 U.S. at 655. Equitable tolling applies only if a petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. (quotations omitted); see Green v. Johnson, 515 F.3d 290, 304 (4th Cir. 2008). A court may allow equitable tolling under section 2244 "in those rare instances where—due to

circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Green, 515 F.3d at 304 (quotations omitted); see Jackson v. Kelly, 650 F.3d 477, 491–92 (4th Cir.), cert. denied, 549 U.S. 1122 (2011). "[A]ny invocation of equity to relieve the strict application of a statute of limitations," however, "must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." Harris, 209 F.3d at 330.

Petitioner argues he is entitled to equitable tolling because NCPLS refused to assist him in filing his habeas petition, and he does not have access to a law library. Pet. [DE-1], pp. 13-15. Petitioner's allegations regarding NCPLS do not constitute extraordinary circumstances because NCPLS attorneys are not required to take every prisoner action brought by inmates and may use their professional judgment when determining whether to provide representation in a matter. Salters v. Butler, No. 06-3073, 2006 WL 4691237, at *1 (E.D.N.C. Oct. 19, 2006), aff'd, 214 Fed.Appx. 267 (4th Cir. Jan. 24, 2007); see also, Zuniga v. Perry, No. 15-35, 2015 WL 5159299, at *5 (E.D.N.C. Sept. 2, 2015) ("That NCPLS declines to represent some inmates does not deny prisoners meaningful access to the courts.") (citation omitted). Petitioner's remaining contentions concerning law libraries likewise do not constitute exceptional circumstances for the purposes of equitable tolling. See United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (stating that ignorance of the law is not a basis for equitable tolling); see also, Garvin v. Eagleton, No. 12–1165, 2013 WL 3821482, at *13 (D.S.C. July 23, 2013) ("Petitioner's allegations regarding lack of resources in the law library do not constitute the type of extraordinary circumstances that justify equitable tolling because alleged inadequacies of prison law libraries do not toll the statute of limitations."), appeal dismissed, 544 Fed.Appx. 236 (4th Cir. 2013); Jenkins v. Johnson, No. 09-32, 2009 WL 1923938, at *4 (E.D. Va. June 29, 2009)

("[D]elays due to seeking legal advice and related allegations of inadequate prison law libraries have consistently been held not to constitute the 'extraordinary circumstances' to warrant the application of equitable tolling.") (citation omitted). Thus, petitioner is not entitled to equitable tolling on these grounds. See Coley, 2018 WL 1570799, at *6 (declining to apply equitable tolling where NCPLS "refused to assist [petitioner] in filing his habeas petition, and he does not have access to a law library"), appeal dismissed, No. 18-6361, 2018 WL 4046518 (4th Cir. Aug. 24, 2018); Lesane v. Clay, No. 5:17-HC-2172-BO, 2018 WL 792051, at *2 (E.D.N.C. Feb. 8, 2018) (noting petitioner is not entitled to equitable tolling on similar grounds), appeal dismissed, 723 F. App'x 203 (4th Cir. 2018).[2]

Even if these factors warranted some degree of equitable tolling, the circumstances described by petitioner certainly do not justify a nearly 12 year delay. NCPLS informed petitioner that it would not represent him on June 17, 2004. Petitioner subsequently demonstrated the ability to file his own post-conviction motions, filing a pro se MAR on November 10, 2004. Petitioner did not file any other petition or motion challenging his conviction until almost 12 years later. Petitioner has not plausibly alleged diligent pursuit of his rights, and he is not entitled to equitable tolling. Eliaba v.

[2] Similarly, these facts do not establish an "impediment to filing an application created by State action in violation of the Constitution or laws of the United States" under 28 U.S.C. § 2244(d)(1)(B). See Newell v. Soloman, No. 1:17CV254, 2017 WL 7058234, at *4 (M.D.N.C. Dec. 1, 2017) ("The fact that NCPLS apparently declined to represent Petitioner does not change the fact that the state has met its obligation to provide inmates adequate access to the courts"), report and recommendation adopted, No. 1:17CV254, 2018 WL 566859 (M.D.N.C. Jan. 25, 2018), appeal dismissed, 720 F. App'x 175 (4th Cir. 2018); Smith v. Dail, No. 1:13CV911, 2014 WL 2442072, at *2 (M.D.N.C. May 30, 2014) ("[A]ny argument under subparagraph (B) also fails. Even if the undersigned assumed that the alleged errors Petitioner asserts were well-supported, attributable to the state, and amounted to a violation of the Constitution or federal law—all dubious assumptions to one degree or another—these alleged errors could hardly have been the cause of a nine year impediment to the filing of the instant action.").

Clarke, No. 3:15CV376, 2016 WL 4706930, at *6 (E.D. Va. Sept. 7, 2016) ("Simply put, [petitioner] fails to demonstrate some external impediment, rather than his own lack of diligence, prevented him from filing a habeas petition in a timely fashion.") (citation omitted), dismissing appeal, No. 16-7392, 2017 WL 698359 (4th Cir. 2017).

For these reasons, petitioner's first, third, and fourth grounds for relief are DISMISSED as untimely.

4. Petitioner's Second Ground for Relief

In his second ground for relief, petitioner argues "[t]he defendant's Sixth Amendment right to effective assistance of counsel was violated when defense counsel admitted the Defendant's guilt of felony murder, to the jury, without the defendant's consent." Pet. [DE-1], p. 7. In an affidavit attached to his petition, petitioner elaborates upon this claim as follows:

> On March 7, 2002, my defense attorney, Randolf J. Hill, came into the holding cell where I was waiting during a short recess of my trial.
>
> He explained that he wanted to tell the jury that I was guilty of felony murder during his closing argument. I asked him why, and he said that he had no choice because I had admitted to attempting to rob Rico Waters during my testimony.
>
> I asked him why he couldn't argue second-degree murder because the judge had told him that he would allow it. But Mr. Hill said that he couldn't convince the jury to convict me of second-degree murder because I had told the truth.
>
> I told him flat out that I did not agree with him telling the jury that I was guilty of anything, because I did not understand how it would benefit me.
>
> I was surprised when Mr. Hill told Judge Stanback that I had no objection to him saying that I was guilty of felony murder. Mr. Hill did not tell me that he needed my consent. I was also surprised when the judge allowed me to speak on the issue. At first I thought I was going to get in trouble for disagreeing with my attorney, but in the end I held true to what I thought, and I told Judge Stanback that I didn't think he should say that to the jury.

> But the judge allowed it anyway, and Mr. Hill told the jury that I was guilty of first degree felony murder.

Pet'r. Ex. 7 [DE-1-1], p. 7. The Supreme Court recently addressed a similar issue in McCoy. In McCoy, defense counsel conceded his client's guilt during the guilt phase of a capital trial in hopes of avoiding the death penalty. 138 S. Ct. at 1505. The Supreme Court ruled that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Id.

As an initial matter, it is not clear that McCoy applies to petitioner's claim. First, McCoy may only be applicable in capital cases. See McCoy, 138 S. Ct. at 1514 ("[I]t is hard to see how the right could come into play in any case other than a capital case in which the jury must decide both guilt and punishment.") (J. Alito, dissenting); see also United States v. Rosemond, No. S6 10-CR-431 (LAK), 2018 WL 4292295, at *3 (S.D.N.Y. Sept. 7, 2018) (noting that applicability of McCoy to non-capital cases "will be resolved in due course by appellate courts"). Furthermore, in McCoy, the defendant "expressly assert[ed] that the objective of 'his defence' [wa]s to maintain innocence of the charged criminal acts" and his counsel "overr[ode] it by conceding guilt." McCoy 138 S. Ct. at 1509 (quoting U.S. Const. Amdt. 6). Importantly, the Supreme Court concluded that the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Id. at 1505. Here, petitioner testified and, during his testimony, conceded that he set out to rob, and eventually shot, the victim. Smith, 2003 WL 21498954, at * 1-2; see also Pet. [DE-1], p. 8. Nonetheless, the court will assume without deciding that McCoy is applicable.

As noted above, § 2244(d)(1)(C) provides that the limitations period begins to run on the date

on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. "This belated commencement provision protects petitioners when their claims could not have been brought earlier." David v. Dir., VDOC, No. 3:11CV391, 2012 WL 1831233, at *2 (E.D. Va. May 18, 2012). Thus, the court must determine whether § 2244(d)(1)(C) applies to petitioner's potential McCoy claim. See Tyler v. Cain, 533 U.S. 656, 665 (2001).

When interpreting similar language under 28 U.S.C. § 2244(b)(2)(A), the Supreme Court made it clear that a constitutional right can only be "made" retroactive by a holding of the Supreme Court. See Tyler, 533 U.S. at 664 (holding that a "new rule of constitutional law" is "made retroactive to cases on collateral review by the Supreme Court" only if the Supreme Court holds as much); see also Griffin v. Ransom, No. 5:16-HC-2149-FL, 2017 WL 1628883, at *2 (E.D.N.C. Apr. 28, 2017) ("The Supreme Court is the only entity that can make a rule retroactive"), appeal dismissed, 699 F. App'x 180 (4th Cir. 2017). McCoy on its face is silent as to retroactivity.

Moreover, the reasoning applied in McCoy does not indicate that the Supreme Court intended the ruling to apply retroactively. To apply retroactively on federal collateral review, a new rule must forbid criminal punishment of a certain individual act or the rule must be a "watershed" rule of criminal procedure. Teague v. Lane, 489 U .S. 288, 311 (1989). In order to qualify as a watershed rule, a new rule "must be necessary to prevent 'an impermissibly large risk' of inaccurate conviction," and it "must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" Whorton v. Bockting, 549 U.S. 406, 418 (2007) (quoting Schriro v. Summerlin, 542 U.S. 348, 356 (2004)) (some internal quotation marks omitted).

Here, the McCoy court explained that its holding was simply the logical extension of the

previous recognition that "some decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." McCoy, 138 S. Ct. at 1508 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)); see also Gonzalez v. United States, 553 U.S. 242, 250 (2008) (noting that "some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right."). Similarly, the McCoy court noted that its holding "agree[d] with the majority of state courts of last resort that counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." McCoy, 138 S. Ct. at 1510. In sum, the reasoning provided by the McCoy court does not announce a "watershed" rule that alters our understanding of bedrock procedural requirements.

Therefore, petitioner is not entitled to belated commencement of the limitations period under § 2244(d)(1)(C). Griffin, 2017 WL 1628883, at *2. Accordingly, petitioner's second ground for relief is also untimely for the reasons discussed above.

5. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases ("Habeas Rules") provides "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Having determined petitioner is not entitled to relief and respondent is entitled to dismissal of the petition, the court considers whether petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in his habeas petition.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the

issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

After reviewing the claims presented in the habeas petition in light of the applicable standard, the court finds reasonable jurists would not find the court's treatment of any of petitioner's claims debatable or wrong and none of the issue are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is denied.

III. Conclusion

In sum, for the aforementioned reasons:

(1) Petitioner's motion to amend [DE-14] is ALLOWED, and the caption is amended to reflect that Erik A. Hooks is petitioner's custodian;

(2) Petitioner's motion to appoint counsel [DE-18] is DENIED;

(3) Petitioner's motion to hold this matter in abeyance [DE-19] is DENIED as moot;

(4) Petitioner's motion to proceed *in forma pauperis* [DE-20] is DENIED as moot;

(5) Petitioner's motion for leave to request discovery [DE-26] is DENIED; and

(6) Respondent's motion to dismiss [DE-10] is ALLOWED, and petitioner's § 2254 petition is DISMISSED as untimely. The court DENIES a certificate of appealability, and the clerk of court is DIRECTED to close the case.

SO ORDERED, this the 14 day of September, 2018.

Terrence Boyle

TERRENCE W. BOYLE
United States District Judge

ATTACHMENT 30

Exhibit D1
Charge Conference

(Recess taken.)

THE COURT: All right. Are there motions after all the evidence?

MR. HILL: No further evidence. Just like to renew the motions that we made at the close of the State's evidence and don't wish to be heard.

THE COURT: All right. Those motions will be denied.

Are you ready for charge conference?

MR. RAND: State's prepared, your Honor.

MR. HILL: Yes, sir.

THE COURT: All right. Are there any special requests from the State on jury instructions?

MR. RAND: Your Honor, I would ask that you instruct the jury on both first degree murder for premeditation and deliberation and for felony murder. I believe there is evidence to support both theories and the State's prepared to argue both theories. And I would ask that you instruct on both of those. And I would --

THE COURT: That's 206.14?

MR. RAND: I don't have the numbers in front of me, but --

THE COURT: All right. I think that's what it

App. 29

ATTACHMENT —32—

Exhibit D3
Charge Conference

Or do you want that instruction?

Are you familiar with what I am talking about?

MR. RAND: Yes, I am familiar with what you are talking about. I don't -- I do think that Mr. Hill asked some questions of a couple of the witnesses about statements made to police versus statements made in Court. And however you want to deal with that is fine with the State.

THE COURT: Do you want that in, Mr. Hill?

MR. HILL: Yes, your Honor. I don't think it hurts anything to add that in and it occurred.

THE COURT: All right. I will give that instruction.

Also I will give the instruction concerning witnesses being convicted of criminal charges. Also the instruction concerning the defendant being convicted of criminal charges.

And, of course, 206.14, which is the first degree murder instruction that carries the premeditation and deliberation as well as the felony murder option. And -- yes.

MR. HILL: I thought you were finished.

THE COURT: No. And the concluding instructions as well as the instruction on flight as it relates to first degree murder.

Anything else?

ATTACHMENT —33—

Exhibit D4
Charge Conference

MR. HILL: Yes, your Honor. I don't have the actual instruction in front of me, but 104.3 is informer, undercover agent. I think that's what Mr. Lundy probably fits, although I haven't specifically looked at that. He was clearly trying to act as an informer.

THE COURT: That's one oh what?

MR. HILL: 104.30.

THE COURT: Let me look at that. Yes.

MR. RAND: Your Honor, I would argue that that is more designed to deal with people who are at the time that they are acting, acting as informants at police direction or law enforcement direction. Not just somebody who comes forward later and says I have information about something.

Even though the defendant and Mr. Lundy were in prison at the same time, I don't think that's -- I don't think that works here. I think that is more of somebody who is being, you know, compensated by the police or is acting as an informant by -- for and by law enforcement at the time that the -- the statements are being dealt with.

MR. HILL: Certainly hoping to be compensated by some District Attorney's office to cut his sentence. Whether he fully admitted or not it is clearly what he had in mind.

THE COURT: I want to find that instruction.

ATTACHMENT —34—

Exhibit D5
Charge Conference

It's 104?

MR. HILL: Point 30, your Honor.

THE COURT: Okay. I am not going to give that instruction. I don't think I can characterize that witness as an informer or undercover agent as the word informer denotes a particular vocation or undertaking on several occasions by an individual. I don't think that would -- is applicable here. So I will note your exception to that.

MR. HILL: Thank you, your Honor.

THE COURT: But I will not give that instruction.

Any other requests?

MR. HILL: With regard to the premeditation and deliberation, I would submit self-defense, your Honor. Not with regard to the felony murder, but with regard to the premeditation and deliberation. I believe --

THE COURT: Well, I don't think self-defense would be an option under these circumstances.

MR. HILL: I believe you are correct as regard the felony murder, your Honor. But I don't -- I believe that he is entitled to it on the premeditation and deliberation side of this.

United States -- or excuse me. North Carolina versus Richardson is the case that I found that I thought was on point. If I am remembering it correctly.

ATTACHMENT —35—

Exhibit D6
Charge Conference

MR. RAND: Your Honor, I am familiar with Richardson and the other cases that deal with that. While I would agree with you that I don't think it applies, I think if you are going to instruct on premeditation and deliberation, one of the elements that the State has to meet is that the defendant did not kill Rico Waters in self-defense.

I mean that's just -- whether there is evidence of self-defense or not, that's part of the -- part of the six things that the State has to prove under that instruction. And so I don't -- I don't think you can keep it out as to premeditation and deliberation.

I would ask as part of the felony murder charge that you instruct the jury that there is no self-defense claim with respect to felony murder. I am not sure exactly how that reads.

But with respect to the premeditation and deliberation there is a piece in that instruction that says that one of the things the State has to prove is that the defendant did not kill the victim in self-defense and the State doesn't have a problem where that sort of instruction as it applies to the premeditation and deliberation instruction.

THE COURT: All right. Let me review that.

All right. Tell me where it says that you have

ATTACHMENT —36—

Exhibit D7
Charge Conference
406

to prove that he did not kill him in self-defense.

MR. RAND: That, just from -- I don't have a copy of the first degree murder instruction. I was looking at them earlier and it says there is six things the defendant -- I mean that the State has to prove and I have got them on this chart.

THE COURT: Mine has five. Let me see it. Show it to me.

MR. RAND: If I can have --

MR. HILL: At the end of it, it refers to without justification or execution.

THE COURT: That's only if self-defense is an issue. He has to address that without hesitation or execution. But that is if he is entitled to the self-defense instruction.

MR. HILL: I think that I am -- that we are specifically allowed that as regards to premeditation and deliberation.

THE COURT: You say you have a case on that?

MR. HILL: I read a lot of cases last night, your Honor.

THE COURT: Well, you can have the night to review it. If that's not it --

MR. HILL: This is State versus James Karl Richardson and it's 341 NC 658.

ATTACHMENT —37—

Exhibit D8
Charge Conference

THE COURT: You say this says -- now where are you talking about in this case?

MR. HILL: That particular case just kind of states the overall law. I believe that's why I picked that one out. But if memory serves --

THE COURT: Self-defense?

MR. HILL: Well, with regard to self-defense and felony murder and premeditation and deliberation. That's -- it kind of states the overall law.

THE COURT: But I am just saying under the facts of this case, premeditation under the -- there is no facts in her to support self-defense. If he by his own statement was attempting to rob the defendant, he wouldn't be entitled to a self-defense.

MR. RAND: Well, that is true as for felony murder. There is no self-defense claim to felony murder. I would -- I mean as much as I hate to admit it, I think that his testimony was sufficient to give a self-defense instruction as to the premeditation and deliberation part of it.

MR. HILL: Specific --

MR. RAND: And that does merit a self-defense instruction in all fairness.

MR. HILL: And his statement was that he didn't go there to kill him, it didn't happen until Mr. Waters

ATTACHMENT —38—

Exhibit D9
Charge Conference

pulled out his gun and then things kind of got crazy.

THE COURT: But even in his statement he still was the aggressor, and if you are an aggressor that doesn't entitle you -- well, I will review it and I will make a decision before we bring in the jury. But I would ask you also if you can find some case law on it.

MR. RAND: We were having some printer problems earlier which is why I didn't bring it up. But I will get that figured out before court tomorrow morning.

MR. HILL: I will see if I can find a better copy for you, your Honor.

THE COURT: Okay.

MR. HILL: And while we are on that same subject, I understand case law tells me I am not entitled to it, but I am going to ask for self-defense on felony murder as well. And I don't wish to be heard any further on that.

THE COURT: All right. I will deny that one. All right. We will be in recess until 9:30 in the morning.

(End of day's proceedings.)

-oOo-

ATTACHMENT —39—

Exhibit D10
Charge Conference

RALEIGH, NORTH CAROLINA; THURSDAY, MARCH 7, 2002;
A. M. SESSION
-oOo-

(The following proceedings were held in open court outside the presence and hearing of the jury:)

MR. RAND: Your Honor, we were talking yesterday about --

MR. HILL: We are missing a necessary party.

THE COURT: All right.

MR. RAND: Sorry about that.

THE COURT: All right.

MR. RAND: Your Honor, we were talking yesterday about whether or not a self-defense instruction was appropriate in this matter. I don't know if you had considered that any further. I did a little homework last night and wanted to be heard in addition.

THE COURT: All right. Let me see what you did.

MR. RAND: In State V. Norris, which basically goes through perfect and imperfect self-defense, the four requirements of perfect self-defense are that the defendant honestly believed in the need to defend himself, the defendant's belief was reasonable, the defendant was not the

ATTACHMENT —40—

Exhibit D11
Charge Conference

410

aggressor and the defendant did not use excessive force.

An imperfect self-defense instruction is just the first two, involves just the first two of those. The defendant's belief was both honest and reasonable and if the defendant is the aggressor the defendant does not get the perfect self-defense charge, which is what I believe you were talking about yesterday where you were talking about the aggressor.

Based on the evidence, I think that an imperfect self-defense instruction as to the premeditation and deliberation is probably appropriate.

THE COURT: Well, I have considered the fact situation here. Considering all of the circumstances in this case where the defendant had the -- or pulled a gun on the deceased and that scenario, whole scenario is created by the defendant, I just don't think that he is entitled to a self-defense instruction on those facts just in this particular case.

The evidence is uncontroverted that he created the situation, and since that is the undisputed evidence in the case, I just don't think he is entitled to a self-defense instruction. And I will note your points on that, but I just don't think in the facts in this particular cases that he is entitled to that.

MR. RAND: Okay. I also want to be heard about

ATTACHMENT —41—

Exhibit D12
Charge Conference

the verdict sheet at the appropriate time.

THE COURT: All right. Well, I will hear from you now.

MR. RAND: I didn't know how you wanted to do it. I just -- before we started arguing, before I made my argument, I wanted to make sure I know what the verdict sheet was going to look like.

THE COURT: We are going to take a brief break and I am going to print up the jury instructions so you have that too. You will have a chance to review that before you start your arguments.

But the verdict sheets -- now, you want to be heard on second degree murder?

MR. RAND: I would argue there is no evidence to support a charge of second degree murder.

THE COURT: All right. Do you want to be heard on the second degree murder?

MR. HILL: I request it, but I don't need to be heard, your Honor.

THE COURT: Well, when you consider the evidence on premeditation and deliberation, the second degree murder is a part of that Pattern jury instruction. If the jury could find that he did not deliberate and premeditate, then I think definitely second degree is an option. If they want to find him to consider that prong in

ATTACHMENT —42—

Exhibit D13
Charge Conference

that a robbery did not -- a robbery or attempted robbery did not take place.

I think that's the option. I think it's a stretch, but I do think that under the evidence they have the privilege or the opportunity to decide that he did not deliberate and premeditate. And if they don't find that, then second degree would be the only option under that prong. So I will give of the second degree instruction.

MR. HILL: Thank you.

THE COURT: Okay? Here is the verdict sheet. Did I give you the verdict sheet?

MR. RAND: You did, your Honor.

MR. HILL: You only had one.

MR. RAND: We came up there and looked at it and I think it's fine for both sides.

THE COURT: All right. Let's take a 10 minute recess. We will be at ease, rather, while I print out these jury instructions.

(Recess taken.)

THE COURT: All right. Mr. Hill, you want to be heard.

MR. HILL: Yes, your Honor. On page seven of the instructions is the only change that I would request.

ATTACHMENT —43—

Exhibit D14
Charge Conference
413

It states -- it's the first sentence of the last paragraph. The State contends, and the defendant denies, that the defendant fled.

I think a more appropriate way for that to be stated is the State contends that the defendant fled.

THE COURT: All right. Just to strike that the defendant denies?

MR. HILL: Correct.

THE COURT: All right. I will do that.

Anything else before I bring the jury in?

MR. HILL: Yes, your Honor. Mr. Smith obviously testified yesterday at great length about his involvement in this case, but we should probably still address what I am allowed to argue.

THE COURT: All right.

MR. HILL: And I have talked about it with Mr. Smith and he has no objection to me arguing that he is in fact guilty as charged with respect to the felony murder aspect.

MR. RAND: Nothing from the State. I don't care to be heard about anything.

THE COURT: All right. Mr. Smith, you have given your attorney the -- the option of arguing that you are in fact guilty of first degree murder under the felony murder rule.

ATTACHMENT —44—

Exhibit D15
Charge Conference

THE DEFENDANT: Well, I mean, he has got a job to do, you know. I don't know -- I don't know anything about the law, but I mean the truth of the situation, if that's what the law says, I do -- I mean if he has got to do it, he has got to do it. If he doesn't, I don't think he should. But I mean --

THE COURT: Okay. Would y'all approach the bench?

(Conference held at the bench, not reported.)

THE COURT: All right. Are we ready for the jury?

MR. HILL: Yes.

MR. RAND: Yes, your Honor.

THE COURT: All right. Bring the jury out, please.

(The following proceedings were held in open court in the presence and hearing of the jury:)

THE COURT: All right. Ladies and gentlemen of the jury, you have heard all of the evidence in this case. We are now ready for the final arguments of the attorneys. The final arguments of the lawyers are not evidence but are

ATTACHMENT —45—

Exhibit E

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
01-CRS-22131

STATE OF NORTH CAROLINA)
)
VS.)
) **AFFIDAVIT**
PHILLIP VANCE SMITH, II)
)
Defendant.)

I, Phillip V. Smith II, being competent to testify, having first-hand knowledge of the facts stated below, and being duly sworn, depose and say:

On March 7, 2002, my defense attorney, Randolf J. Hill, came into the holding cell where I was waiting during a short recess of my trial.

He explained that he wanted to tell the jury that I was guilty of felony murder during his closing argument. I asked him why, and he said that he had no choice because I had admitted to attempting to rob Rico Waters during my testimony.

I asked him why he couldn't argue second-degree murder because the judge had told him that he would allow it. But Mr. Hill said that he couldn't convince the jury to convict me of second-degree murder because I had told the truth.

I told him flat out that I did not agree with him telling the jury that I was guilty of anything, because I did not understand how it would benefit me.

I was surprised when Mr. Hill told judge Stanback that I had no objection to him saying that I was guilty of felony murder. Mr. Hill did not tell me that he needed my consent. I was also surprised when the judge allowed me to speak on the issue. At first I thought I was going to get in trouble for disagreeing with my attorney, but in the end I held true to what I thought, and I told Judge Stanback that I didn't think he should say that to the jury.

But, the judge allowed it anyway, and Mr. Hill told the jury that I was guilty of first-degree felony murder.

Sworn and subscribed before me this

5th day of May, 2016.

Signature

Jo-Ann Mason
NOTARY PUBLIC
Nash County, North Carolina

Notary Public

Phillip V. Smith, II—0643656
P.O. Box 600
Nashville, NC 27856-600

My commission expires: 2/28/19