No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Stephen D Herto,

Petitioner,

v.

John T. Murphy,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A District Court failed to adjudicate a single claim from the petitioner in its final order dismissing his petition under 28 U.S.C. § 2254. The petitioner filed a Motion to Amend Judgement and Findings under Fed. R. Civ. P. Rule 59(e). The District Court for the first time adjudicated the claim in response in a footnote, denying the motion, and denying a certificate of appealability. The District Court committed a fallacious error in its response forsaking all evidence before it and denying a certificate of appealability(COA).

Can the district court deny a merit claim based on an entirely fabricated basis, that is contrary to the record and not argued by either party?

Can a certificate of appealability be denied under 28 U.S.C. § 2253(c)(2) by the District Court without evidence in the record to support its stated reasons for meritorious denial and the only evidence in the record supporting the petitioners claim?

Can the US Court of Appeals confirm such a denial of a certificate of appealability?

LIST OF PARTIES

1. Stephen D. Herto, Petitioner.
2. John T. Murphy, Respondent.

RELATED PROCEEDINGS

1. *Herto v. Murphy*, No. 24-6961, 2025 WL 444423 (4th Cir. Feb. 10, 2025) Dismissing Appeal.
2. *Herto v. Murphy,* No. 5:17-CV-54, 2024 WL 4132670 (N.D.W. Va. Sept. 10, 2024)), report and recommendation adopted. Petition dismissed.
3. *State v. Stephen H.*, No. 15-0801, 2016 WL 3165791 (W. Va. June 6, 2016) direct appeal denied.
4. *State Ex Rel. Herto v. Plumley*, Case No. 16-C-172,(W.Va. July 7, 2017) Habeas Corpus dismissed as mooted upon parole.
5. *State of W.Va. v. Herto,* Case No. 13-F-65 (Filed April 20, 2020, Pending) Petition for Writ of Error Coram Nobis

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STATUTORY LAW

RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The citation to the 4th Cir. Opinion below is *Herto v. Murphy,* No. 24-6961, 2025 WL 444423 (4th Cir. Feb. 10, 2025) is unpublished and appears at **Appendix A**.

The citation to the Opinion of the District Court below final Order denying his Motion to Amend Judgment and Findings and dismissing his petition and denying a certificate of appealability is unpublished as Doc. 126 dated September 23, 2024, and appears at **Appendix B**.

The citation to the Opinion of the District Court below is *Herto v. Murphy,* No. 5:17-CV-54, 2024 WL 4132670 (N.D.W. Va. Sept. 10, 2024) adopting the report and recommendation appears at **Appendix C**.

JURISDICTION

The Fourth Circuit United States Court of Appeals decided my case on Feb. 10, 2025. A petition for rehearing was timely filed. The timely filed petition for rehearing was denied by the 4th Cir. and dismissed on March 11, 2025, and is attached at Appendix D. This Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a

court of appeals panel. *Hohn v. United States*, 524 U.S. 236, 236, 118 S. Ct. 1969, 1970, 141 L. Ed. 2d 242 (1998)

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 2253 Appeal

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C.A. § 2254 State custody; remedies in Federal courts

STATE CODE

W. Va. Code §62-1F ELECTRONIC INTERCEPTION OF PERSON'S CONDUCT OR ORAL COMMUNICATIONS IN HOME BY LAW ENFORCEMENT.

§62-1F-2. Electronic interception of conduct or oral communications in the home authorized.

(a) Prior to engaging in electronic interception, as defined in section one of this article, an investigative or law-enforcement officer shall, in accordance with this article, first obtain from a magistrate or a judge of a circuit court within the county wherein the nonconsenting party's home is located an order authorizing said interception. The order shall be based upon an affidavit by the investigative or law-enforcement officer or an informant that establishes probable cause that the interception would provide evidence of the commission of a crime under the laws of this state or the United States.

§62-1F-1. Definitions.

(a) For the purposes of this article, the following terms have the following meanings:

(1) "Body wire" means: (a) An audio and/or video recording device surreptitiously carried on or under the control of an investigative or law-enforcement officer or informant to simultaneously record a nonconsenting party's conduct or oral communications.

STATEMENT OF THE CASE

Two civilian clothed law enforcement officers arrived at the petitioner's home in an unmarked vehicle and requested to enter the petitioner's home to ask some questions concerning anonymous emails.

> Lt. Swiger: We traveled to Dr. Herto's residence in an unmarked vehicle. I believe at that time I had a Dodge Durango. And we went in civilian clothes, we wanted to do things very low key, to conduct the interview of Dr. Herto in his residence.
>
> [Doc. 39-3 at 50, p. 97 line 17-21]

The petitioner cooperated and was interviewed by the officers inside his home. The petitioner admitted to co-owning the email address, knowing the alleged victim and sending some emails. The officer secretly recorded the 1 hour 28-minute interview without permission from the petitioner or without a court order, an unlawful act in West Virginia under W. Va. Code §62-1 F. Electronic Interception of Person's Conduct or Oral Communications in Home by Law Enforcement.

The illegally obtained recording was entered into evidence and testified about by law enforcement at trial without objection. Following the trial the jury requested to listen to the interview themselves during their deliberations, and the request was granted without objection. [Doc. 39-4 at 41- 42(pages 80-82)] Defense counsel failed to suppress the illegal recording or object to any of the evidence being used against the petitioner. The petitioner was convicted of the email offenses and acquitted of a lone contact allegation.

Procedural History of Claim of Ineffective Assistance of Counsel(IAC).

1. The petitioner filed a direct appeal to the West Virgina Supreme Court of Appeals who affirmed his convictions but declined to adjudicate the claim for IAC as it requires a record provided from a lower court to review, normally provided by a hearing. *State v. Stephen H.*, No. 15-0801, 2016 WL 3165791 (W. Va. June 6, 2016)
2. The petitioner filed a Petition for Writ of Habeas Corpus under W. Va. Code §53-4A-1, *State ex rel. Herto v. Plumley,* Case. No. 16-C-172 (2016). That petition was dismissed by the Circuit Court, again without a hearing, on July 7, 2017 when the defendant was paroled, as the case was considered moot.
3. The petitioner presented the same ground for relief to the federal court in a §2254 Habeas petition on April 26, 2017. That case was dismissed without a hearing. *Herto v. Murphy,* No. 5:17-CV-54, 2024 WL 4132670 (N.D.W. Va. Sept. 10, 2024) adopting the report and recommendation, Appendix A.
4. The petitioner motioned the District Court under Rule 59(e) to amend the findings as his claim had not been adjudicated.[Doc. 126] Appendix B. That motion and a COA were denied, again without a hearing on Sept. 23, 2024.
5. The petitioner presented the same ground for relief to the WV state trial court on April 20, 2020, in a petition for Writ of Error Coram Nobis as the federal court required the petition to be filed allowing state comity for exhaustion. That petition has been pending without an evidentiary hearing

for over 5 years. The federal court granted an exception to exhaustion on April 4, 2024. [Doc. 96]

The petitioner has argued for his convictions to be overturned due to ineffective assistance of counsel by failure to suppress compelling evidence against him.

> GROUND ONE: PETITIONER WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE UNITED STATES CONSTITUTION.
> Supporting Fact 9
>
> > Defense counsel failed to prepare for a pre-trial suppression hearing and missed critical evidence, including the state's use in trial of an unlawfully obtained, secretly recorded audio surveillance of the petitioner inside his home, in violation of state law W. Va. Code §§ 62–1F–1 to –9.
> > [Doc. 106-1 at 2] Amended Petition for Writ of Habeas Corpus

Petitioner argued that a hearing must be held with his former counsel to examine his actions or lack thereof and how the illegal recordings admissions effected his strategy at trial and the verdict.

The District Court Order adopting the report and recommendation [Doc. 123] failed to provide a de novo analysis of this claim. The petitioner argued this lone claim to the District Court in his Motion to Amend Judgement and Findings. [Doc. 125]The District Court agreed that the claim was not adjudicated and addressed this lone argument in response in a footnote.

> Petitioner cites W.Va. Code § 62-1 F in his argument that police should have had a warrant to record a police interview in his home. [Doc. 125 at 1—7]. The definition of "electronic interception" in W.Va. Code § 62-1 F- requires "recording with a body wire." The definition of "body wire" in that same code section states that "body wire" means, "recording device surreptitiously carried. . . ." There is no indication that the police interview conducted at

petitioner's house was conducted with any "surreptitiously carried" recording equipment.

[Doc. 126 at 3, fn. 1] ORDER (Denying Motion to Amend Judgement and denying a COA) Appendix B

The District Court finds that:

"There is no indication that the police interview conducted at petitioner's house was conducted with any "surreptitiously carried" recording equipment."

Explicit trial testimony provided to the court directly opposes this finding. **This is why a certificate of appealability is warranted in this case.**

Testimony from law enforcement presented to the District Court clearly shows that the in- home recording was made secretly from a recording device concealed inside his pocket.

Prosecutor: And is that something - - - can you describe how you do those recordings?
Lt. Swiger: Typically I carry a digital voice recorder in my pocket and record interviews from start to finish, from the time I get out of the car till the time I get back in the car.
Prosecutor: And you did that in this case?
Lt. Swiger: **Yes.**

[Doc. 39-3 at 52, p. 102 line 16-23] Transcript, [Doc. 118 at 10] Resp. Reply to Petitioner's Response to M. for Judgement on the Pleadings add to Appendix

and later when questioned by defense counsel,

Defense Counsel: You've got a hidden recording device.
Lt. SWIGER: **Yes.**

[Doc. 39-3, p. 107, L 5-6]transcript [Doc. 116 at 24] Response to Respondent's M. for Judgement on the Pleadings [Doc.125 at 2] Petitioner's M. to Amend Judgement and Findings

The District Court finding is fallacious and mistaken that there was "no indication" the recording was made secretly by a "recording device surreptitiously carried". **The only evidence in the record before the court from both the petitioner and respondent is the exact opposite.** A reasonable jurist could find after reviewing the above testimony that the court decision was debatable or outright wrong. **This is why a certificate of appealability is warranted in this case.**

Even if the District Court were right that it found "no indication" that the recording was made with a hidden recorder, the court also had no indication the recording was made with permission of the petitioner or with a valid warrant under W. Va. Code § 62-1F. The District Court had no fact finding to dismiss the petition at this early stage. The petitioner must clearly allege constitutional violations which are presumed correct until unsubstantiated by fact finding in the record or by an evidentiary hearing. When, as here, the district court denies relief without an evidentiary hearing, "the facts must be viewed in the light most favorable to the § 2255[4] movant" – drawing all reasonable inferences in his favor. Id. (internal quotations omitted); United States v. Paylor, 88 F.4th 553, 565 (4th Cir. 2023).

> Finally, a district court is obligated to hold an evidentiary hearing on a petitioner's *Strickland* claim "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief[.]" 28 U.S.C. § 2255(b). Although "whether to hold a hearing ordinarily is a matter of district court discretion, a hearing is required when a movant presents a colorable Sixth Amendment claim showing disputed facts beyond the record, or when a credibility determination is necessary to resolve the claim." *Mayhew*, 995 F.3d at 176–77; *see Paylor*, 88 F.4th at 565.
>
> United States v. McNeil, 126 F.4th 935, 942–43 (4th Cir. 2025)[1]

[1] Case granted a COA by the US Appellate Court , vacated and remanded for a hearing with nearly identical IAC claim for failure to suppress evidence. (Warrantless entry by law enforcement)

The District Court denied his motion without a hearing and denied the petitioner's certificate of appealability(COA) [Doc. 126 at 4] in response to the Rule 59(e) Motion to Amend Judgement[Doc. 125]. The petitioner appealed directly to the U.S. Court of Appeals for the Fourth Circuit for a COA and requested a remand for a hearing. The petitioner provided a Memorandum of Support for Certificate of Appealability. [Doc. 6] The 4th Cir. dismissed his appeal stating simply that the petitioner "has not made the requisite showing" [Doc. 7 at 2] A Petition for Rehearing was filed. [Doc.9]. That petition was also denied. [Doc. 11]

A CERTIFICATE OF APPEALABILTY AND HEARING IS REQUIRED BECAUSE THE GOVERNMENT HAS NOT SHOWN PETITIONER IS CONCLUSIVELY UNENTITLED TO RELIEF.

The Standard for Issuance of a COA.

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). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); see *710 Miller–El v. Cockrell, 537 U.S. 322, 336–38, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner, the court was clearly wrong, or

that the issues presented were adequate to deserve encouragement to proceed further.[2]

The burden of proof placed upon the petitioner for merit does not exist at this early stage of the his §2254 Habeas proceeding. He must simply allege that his counsel was ineffective because he failed to suppress the illegally obtained recording from evidence before the court. The petitioner should have the right to a COA for a clearly fallacious finding from the District Court that forsakes the only evidence from trial. Until a COA is issued the 4th Cir. cannot address the merits of the case.

There are no findings that indicate that law enforcement requested permission to record the interview or sought out a court order to obtain a secret recording inside the petitioner's home. The only evidence from testimony supports the petitioners claim the recording was secretly obtained by a recording device hidden on the officer.

A hearing is required with former counsel to ascertain:

1. Why he failed to suppress the illegally obtained recording which violated state law;
2. How the recordings entrance into evidence affected his trial strategy and defense and;
3. Determine the extent of reliability of the convictions that fall into question absent the illegally obtained audio recordings being played for the jury and testified about by law enforcement.

In short, at this early stage the petitioner needs to allege a denial of a constitutional right by evidence in the record. He may have the opportunity to

[2] See 28 U.S.C. § 2253 APPEAL. Notes of Decisions 170. Numerous cases citing this standard.

prove such an allegation during a hearing with his former counsel who can explain his actions. The petitioner must be given a hearing unless his allegations and the record of the case conclusively show he is not entitled to relief. 28 U.S.C. § 2255(b); *Paylor*, 88 F.4th at 565. The petitioner has cleared this hurdle.

Competent counsel would have filed a motion to suppress the recording, and would have argued that the officer's warrantless recording inside his home was an illegal under W. VA. Code §62-1F. The police would be crucial witnesses for the government at the suppression hearing, because the government would carry the burden of proving that the recording was lawful.

To deny the petitioner at this early stage with the only evidence in testimony supporting his allegation that he was secretly recorded by a hidden device by law enforcement without a warrant from a court without granting a COA would violate the intent of 28 U.S.C. § 2253(c)(2). The District Court made a mistaken finding and failed to recognize the only testimony in the record on point indicative of "surreptitiously carried" recording equipment by law enforcement. Reasonable jurists could find the District Court's findings debatable or outright wrong. The District Court's findings are not just false. It's an acknowledgement that under the true facts, that the recording was secretly made, and the petitioners claim is meritorious and deserves further proceedings by granting a COA.

REASONS FOR GRANTING THE PETITION

The District Court has departed from the accepted and usual course of judicial proceedings for granting a COA that calls for an exercise of this Court's supervisory

power. The Appeals Court has sanctioned the departure. This is one of the rare factual cases deserving the Court's attention because it is so blatant.

COA's are the last means that prisoners have afforded to them by statute to correct a wrong by a judicial body upon appeal. To deny the petitioner further adjudication of this lone meritorious claim due to an oversight by the District Court would result in a manifest injustice reducing the COA to merely a rubberstamp checkbox by simply citing "petitioner has failed to make 'a substantial showing of the denial of a constitutional right.' 28 U.S.C. § 2253(c)(2)". [Doc. 126 at 4]

CONCLUSION

The petitioner for good cause asks this Honorable Court to intervene and remand this case to grant a COA and remand for a hearing for ineffective assistance of counsel or provide other remedies to prevent a manifest injustice. To deny a COA with such a blatant error without remedy serves to negate the intent of 28 U.S.C. § 2253(c)(2). Petitioners cannot prove the merits of their cases without first gaining evidence through an evidentiary hearing with former counsel for ineffective assistance of counsel claims.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Stephen D. Herto,
Petitioner, pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

STEPHEN D. HERTO,

Petitioner,

v.

CIVIL ACTION NO. 5:17-CV-54
Judge Bailey

JOHN T. MURPHY, Acting Warden,

Respondent.

ORDER

The above-styled matter came before this Court for consideration of the Report and Recommendation of United States Magistrate Judge Mazzone [Doc. 120]. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Mazzone for submission of a proposed Report and Recommendations ("R&R"). Magistrate Judge Mazzone filed his R&R on August 12, 2024, wherein he recommends that the Amended Petition be denied and dismissed with prejudice, Respondent's Motion for Judgment on the Pleadings be granted, and Petitioner's Motion for Summary Judgements [sic] be denied. [Id. at 37]. For the reasons that follow, this Court will adopt the R&R.

Petitioner submitted a Motion for Leave to Exceed the Page Limit [Doc. 122] alongside Petitioner's Objections to Report and Recommendations [Doc. 122-1]. This Court will **GRANT** Petitioner's Motion for Leave to Exceed the Page Limit [Doc. 122] and will review the Objections to the Report and Recommendations [Doc. 122-1] in full.

APPENDIX A

I. BACKGROUND[1] & STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150 (1985). Nor is this Court required to conduct a *de novo* review when the party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." ***Orpiano v. Johnson***, 687 F.2d 44, 47 (4th Cir. 1982).

In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); ***Snyder v. Ridenour***, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***, 727 F.2d 91, 94 (4th Cir. 1984). *Pro se* filings must be liberally construed and held to a less stringent standard than those drafted by licensed attorneys, however, courts are not required to create objections where none exist. ***Haines v. Kerner***, 404 U.S. 519, 520 (1972); ***Gordon v. Leeke***, 574 F.2d 1147, 1151 (4th Cir. 1971).

Here, objections to Magistrate Judge Mazzone's R&R were due within fourteen (14) days of receipt, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure. Petitioner timely filed his Objections to the Report and Recommendation [Doc. 122-1] on August 30, 2024. Accordingly, this Court will review the

[1] This Court fully adopts and incorporates herein the "Factual and Procedural History" section of the R&R. *See* [Doc. 120 at 2–7].

portions of the R&R to which objection was filed under a *de novo* standard of review. The remainder of the R&R will be reviewed for clear error.

II. DISCUSSION

In Petitioner's Objections to the Report and Recommendations, he advances eight (8) individual objections. [Doc. 122-1]. Petitioner first objects to the following sentence within the R&R: "Petitioner has not shown that there was any valid basis for suppressing or objecting to this recording, and as such is unable to show that defense counsel's performance was unreasonable in this respect." [Doc. 122-1 at 1 (quoting [Doc. 120 at 36])]. Petitioner responds to this quote stating counsel for the defense "made an unprofessional error" and reiterates his claim that this was ineffective assistance of counsel. [Doc. 122-1 at 1]. Petitioner contends that Magistrate Judge Mazzone "misinterprets what warrants were contested at the suppression hearing" and therefore fails to find ineffective assistance here. [Id. at 2].

This Court disagrees. Magistrate Judge Mazzone reasons in the R&R that there is no evidence defense counsel was unprepared for the suppression hearing, as counsel made a motion to exclude the audio recording that defendant wanted excluded and "conducted a thorough examination attempting to support his arguments." [Doc. 120 at 35]. This Court agrees with the R&R that there is insufficient evidence to constitute ineffective assistance of counsel in the suppression hearing.

Petitioner's second objection cites the following quote: "The WVSCA's determination that the jury instructions, reviewed as a whole, were sufficient, is not contrary to or an unreasonable application of federal law." [Doc. 122-1 at 6 (quoting [Doc. 120 at 12])]. To elaborate on this objection, petitioner reiterates Ground Two of his Amended Petition

including the desire to have defense's theory of the case within the jury instructions. [Doc. 122-1 at 6-11 (citing [Doc. 116 at 8–11])].

Magistrate Judge Mazzone, in response to Ground Two of the Amended Petition, notes that the language "as previously defined in this charge" specifically refers to the "person in a position of trust" and "care, custody, or control" language within the statute. [Doc. 120 at 13]. Thus, petitioner's desired language is incorporated into the jury instructions through a referral back to earlier definitions of the statute. Magistrate Judge Mazzone notes that "the 'only question' in a federal habeas review of the state court's jury instructions, is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" [Id. (citing ***Estelle v. McGuire***, 502 U.S. 62, 72 (1991)]. This Court agrees with the R&R that the state court's jury instructions did not infect the entire trial such that a resulting conviction violates due process.

Petitioner's third objection echoes Ground One, Part One, of petitioner's Amended Petition. [Doc. 122-1 at 11]. The specific quote petitioner objects to is, "[t]he jury instructions were proper and defense counsel was not ineffective for failing to introduce alternate instructions." [Id. (quoting [Doc. 120 at 25])]. Petitioner contends that this is incorrect, and restates his original argument that counsel's failure to object to the jury instructions constituted ineffective assistance of counsel. [Doc. 122-1 at 11].

In the R&R section that addresses this objection, Magistrate Judge Mazzone states that there was not ineffective assistance of counsel based on the failure to introduce alternate jury instructions because petitioner "cannot show either that the trial court would have accepted defense counsel's proposed instructions or that such instructions would

have had any impact on the outcome of the case." [Doc. 120 at 25–26]. This Court agrees with the reasoning within the R&R relating to this objection.

Petitioner's fourth objection is based on the following quote from the R&R: "A reasonable juror could have concluded that, as the respondent argues, the professional relationship did not dissolve simply because the victim had not scheduled another appointment." [Doc. 122-1 at 12 (quoting [Doc. 120 at 19])]. Petitioner argues that this is untrue; that a reasonable juror could not have concluded that; and "[t]he State must prove that there was ongoing 'care, custody or control' after the victim's last visit as a patient" but that there is no evidence of further care. [Doc. 122-1 at 12–13]. Petitioner expounds upon that objection through a list of evidence he believes shows that it is more plausible that there was no continuing relationship. [Id. at 14].

Magistrate Judge Mazzone notes that this issue involves "two layers of judicial deference" which are difficult for petitioner to overcome: "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial," and "on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court.'" [Doc. 120 at 16 (quoting ***Coleman v. Johnson***, 566 U.S. 650, 651 (2012) (internal citations omitted))]. This Court agrees with Magistrate Judge Mazzone's reasoning in the R&R pertaining to this objection.

In objection number five, petitioner alleges that Magistrate Judge Mazzone does not address Ground One, Supporting Fact Two, referring to the alleged failure of defense counsel to "use overwhelming evidence that the victim was not in the defendant's 'care.'" [Doc. 122-1 at 14 (citing [Doc. 106-1 at 2])]. Petitioner states that "[d]efense [c]ounsel

admitted to the petitioner he did not hear the victim say at trial she was in someone else's care, 'I found someone else.'" [Id.]. Additionally, petitioner argues that his counsel "failed to argue in closing that no 'care' of the victim was in the record and that the victim was released from defendant's care, and in the care of another doctor of her choice," which he argues constitutes ineffective assistance of counsel. [Id.].

This Court disagrees. Magistrate Judge Mazzone addresses this argument in the R&R stating that there is no showing of ineffective assistance of counsel based on not presenting more evidence of "care, custody, or control" because counsel's closing argument raised the issue of "care, custody, or control" including that the relationship did not still exist at the time of the alleged conduct. [Doc. 120 at 26]. This Court agrees with the reasoning in the R&R relating to this objection.

Objection number six by petitioner takes issue with the following quote in the R&R: "Petitioner cannot demonstrate he was convicted on insufficient evidence, and to the extent the WVSCA has ruled on this issue, its findings are not 'objectively unreasonable.'" [Doc. 122-1 at 15 (quoting [Doc. 120 at 15])]. Petitioner quotes directly from the R&R multiple times in this objection, and argues that "it would be hard to attempt sexual abuse by email when you are not physically present with the alleged victim." [Doc. 122-1 at 16]. This argument was presented in Ground Three of Petitioner's Amended Petition and responded to in the R&R. [Doc. 120 at 15].

Magistrate Judge Mazzone, in response to Ground Three, notes that "[a] reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." [Id. at 16 (citing ***Coleman***, 566 U.S. at 651)]. Magistrate Judge Mazzone also notes that the WVSCA rejected petitioner's

argument that he must be in the same physical space to be convicted because physical harm is not a requirement of conviction under the statute. [Id.]. Although petitioner argues that attempt cannot be shown through email, the R&R addresses that argument: "WVSCA rejected petitioner's argument 'that the statute requires that he and the victim share the same physical space to sustain such a conviction [under § 61-8D-5].'" [Id. (citing [Doc. 39-8 at 8])]. Magistrate Judge Mazzone further explains "[n]othing in the text of § 61-8D-5 leads the undersigned to find that physical presence is a requirement of the statute." [Id. at 16–17]. This Court agrees with the R&R relating to this objection.

Objection number seven by petitioner takes issue with the finding, "[t]he undersigned finds no constitutional error from any deficiency in Count 1 of the Indictment." [Doc. 122-1 at 18 (quoting [Doc. 120 at 21])]. Count One, in petitioner's view, is not the unconstitutional issue but instead the jury instructions that were a result of the alleged inaccuracy of Count One. [Doc. 122-1 at 18]. Petitioner contends that Count One of the indictment did not contain sexual exploitation and that the jury instructions were incorrect as a result. [Id.].

Magistrate Judge Mazzone reviewed (de novo) the claim that sexual exploitation was not a part of Count One. [Doc. 120 at 22–23]. The R&R states, "the indictment unambiguously alleges in Count 1 that petitioner 'unlawfully and feloniously engaged in or attempted to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with' a child under his care." [Id. at 23 (citing [Doc. 39-1 at 2])]. Magistrate Judge Mazzone further recommends that if this Court determines that the "April 11, 2017 Order constitutes 'a determination of a factual issue made by a State court' that sexual exploitation was not charged in the indictment," then "the burden of rebutting the

presumption of correctness" has still been met "by clear and convincing evidence" because otherwise the result would be "clearly at odds with the plain text of the indictment." [Doc. 120 at 24]. This Court agrees with the R&R relating to this objection.

In objection number eight, petitioner argues similarly to the Amended Petition, that if this Court finds that "sexual exploitation" was part of Count One of the indictment, then his counsel did not present a defense to that count and petitioner was prejudiced. [Doc. 122-1 at 18–19]. Petitioner takes issue with Magistrate Judge Mazzone's view that there was no prejudice in the outcome and that a defense was presented for "sexual exploitation" by defense counsel. [Id. at 19]. Specifically, petitioner states that there was a lack of defense for " sexual exploitation and that this lack of defense "prejudiced the petitioner." [Id. at 21].

This Court disagrees. Magistrate Judge Mazzone, in the R&R, states that defense counsel's handling of Count One including "sexual exploitation" is not ineffective assistance because although there may have been ineffective performance through not understanding the scope of Count One, the "prejudice prong" was not satisfied under ***Strickland v. Washington***, 466 U.S. 668 (1984). [Doc. 120 at 29]. The R&R states that counsel did not fail to present a defense to Count One, and presented an argument "that the victim had led petitioner to believe she was 18," "that he was not a person in a position of trust," "that the victim was not under his 'care, custody or control,'" and "that petitioner's conduct was merely 'some form of regrettable online fantasizing.'" [Id. (citing [Doc. 39-3] and [Doc. 39-4])]. These are counsel's defenses to a charge of sexual exploitation as well as to other charges in the case. [Id. at 30]. This Court agrees with the R&R relating to this objection.

III. CONCLUSION

Aside from the arguments addressed herein, a *de novo* review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's Report and Recommendations **[Doc. 120]** is hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. Respondent's Motion for Judgment on the Pleadings **[Doc. 109]** is hereby **GRANTED**, Petitioner's Motion for Summary Judgements [sic] **[Doc. 117]** is **DENIED**, and Petitioner's Notice of Intent to Reply to Respondent's Motion for Judgement on the Pleadings **[Doc. 113]** is hereby **DENIED AS MOOT**. Petitioner's Response/Objections **[Doc. 122-1]** are **OVERRULED**. The Amended Petition **[Doc. 106]** is **DENIED and DISMISSED WITH PREJUDICE.**

This Court further **DIRECTS** the Clerk to **STRIKE** this case from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: September 10, 2024.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

STEPHEN D. HERTO,

Petitioner,

v.

CIVIL ACTION NO. 5:17-CV-54
Judge Bailey

JOHN T. MURPHY, Acting Warden,

Respondent.

ORDER

Pending before this Court is Petitioner's Motion to Amend Judgement [sic] and Findings [Doc. 125], filed September 19, 2024. Therein, petitioner requests this Court alter its September 10, 2024 Order [Doc. 123]. In his Motion, petitioner alleges "manifest errors of law and facts contained within the judgement [sic]." [Doc. 125 at 1]. Petitioner requests that this Court amend the Order denying his claim based on "factual error"; adjudicate the ineffective assistance of counsel claim found within his Amended Petition [Doc. 106]; vacate the Report and Recommendations (R&R) [Doc. 120]; grant a hearing so the petitioner can explain how the "absence of a §62-1F warrant" led to his conviction; and, in the alternative to granting any of the above requests, grant a Certificate of Appealability in this case. [Id. at 8].

Federal Rule of Civil Procedure 59(e) provides that a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment," and as such, petitioner's motion is timely.

APPENDIX B

In considering the instant motion, this Court has considered the recognized grounds upon which to grant relief pursuant to Rule 59(e). The Fourth Circuit has recognized that "there are three grounds for amending an earlier judgment:"

> (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See* ***EEOC v. Lockheed Martin Corp.***, 116 F.3d at 112; ***Hutchinson v. Staton***, 994 F.2d 1076, 1081 (4th Cir. 1993). Thus, the rule permits a district court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." ***Russell v. Delco Remy Div. of Gen. Motors Corp.***, 51 F.3d 746, 749 (7th Cir. 1995). Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance. *See* ***Russell***, 51 F.3d at 749; ***Concordia College Corp. v. W.R. Grace & Co.***, 999 F.2d 326, 330 (8th Cir. 1993); ***FDIC v. World Univ., Inc.***, 978 F.2d 10, 16 (1st Cir. 1992); ***Simon v. United States***, 891 F.2d 1154, 1159 (5th Cir. 1990); *see also* ***In re: Reese***, 91 F.3d 37, 39 (7th Cir. 1996) ("A motion under Rule 59(e) is not authorized 'to enable a party to complete presenting h[er] case after the court has ruled against h[er].'") (quoting ***Frietsch v. Refco, Inc.***, 56 F.3d 825, 828 (7th Cir. 1995)); 11 Wright *et al.*, ***Federal Practice and Procedure*** § 2810.1, at 127-28 (2d ed. 1995) ("The Rule 59(e) motion may not be used

> to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."). Similarly, if a party relies on newly discovered evidence in its Rule 59(e) motion, the party "must produce a 'legitimate justification for not presenting' the evidence during the earlier proceeding." ***Small v. Hunt***, 98 F.3d 789, 798 (4th Cir. 1996) (quoting ***RGI, Inc. v. Unified Indus., Inc.***, 963 F.2d 658, 662 (4th Cir. 1992)). In general, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright *et al.*, *supra*, § 2810.1, at 124.

Pac. Ins. Co. v. American Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Further, a party's disagreement with the court's ruling is not a proper ground for a Rule 59(e) motion. ***Hutchinson***, 994 F.2d at 1076 (citing ***Atkins v. Marathon LeTourneau Co.***, 130 F.R.D. 625, 626 (S.D. Miss. 1990)).

Upon review, the majority of petitioner's Motion merely seeks to relitigate matters this Court has already ruled upon. This Court has already ruled upon petitioner's arguments surrounding the audio recording and ineffective assistance of counsel in its September 10, 2024 Order. [Doc.123 at 3]. This Court also fully ruled upon petitioner's objections to the R&R and explained the reasoning behind its ruling. [Id. at 3–8]. Additionally, this Court has already ruled upon petitioner's argument surrounding "the absence of a §62-1F warrant"[1] in this Court's Order adopting the R&R. [Id. at 3].

[1]Petitioner cites W.Va. Code § 62-1F in his argument that police should have had a warrant to record a police interview in his home. [Doc. 125 at 1–7]. The definition of "electronic interception" in W.Va. Code § 62-1F-1 requires "recording with a body wire." The definition of "body wire" in that same code section states that "body wire" means,

Accordingly, this Court finds that reconsideration of its September 10, 2024 Order is not warranted. Accordingly, Petitioner's Motion to Amend Judgement [sic] and Findings [**Doc. 125**] is hereby **DENIED**.

As a final matter, upon an independent review of the record, this Court hereby **DENIES** a certificate of appealability, finding that the petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: September 23, 2024.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

"recording device surreptitiously carried. . . ." There is no indication that the police interview conducted at petitioner's house was conducted with any "surreptitiously carried" recording equipment.

FILED: March 11, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6961
(5:17-cv-00054-JPB)

STEPHEN D. HERTO

Petitioner - Appellant

v.

JOHN T. MURPHY, Acting Warden

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Thacker, and Senior Judge Keenan.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6961

STEPHEN D. HERTO,

Petitioner - Appellant,

v.

JOHN T. MURPHY, Acting Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:17-cv-00054-JPB)

Submitted: January 31, 2025 Decided: February 10, 2025

Before KING and THACKER, Circuit Judges, and KEENAN, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Stephen D. Herto, Appellant Pro Se. Andrea Nease Proper, Michael Ray Williams, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Stephen D. Herto seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Herto's 28 U.S.C. § 2254 petition, and the court's subsequent order denying Herto's Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). 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). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (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)).

Limiting our review of the record to the issues raised in Herto's informal brief, we conclude that Herto has not made the requisite showing. *See* 4th Cir. R. 34(b); *see also Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, we deny a certificate of appealability 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