

FILED: November 14, 2017

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 17-6631  
(5:16-hc-02031-D)

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BILLY F. LARKIN

Petitioner - Appellant

v.

JOHNNY HAWKINS, Superintendent; ROY COOPER, Attorney General of the  
State of North Carolina

Respondents - Appellees

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O R D E R

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

Entered at the direction of the panel: Judge Wilkinson, Judge Floyd, and  
Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix - A

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 17-6631**

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**BILLY F. LARKIN,**

Petitioner - Appellant,

v.

**JOHNNY HAWKINS**, Superintendent; **ROY COOPER**, Attorney General of the  
State of North Carolina,

Respondents - Appellees.

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Appeal from the United States District Court for the Eastern District of North Carolina, at  
Raleigh. James C. Dever III, Chief District Judge. (5:16-hc-02031-D)

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Submitted: September 26, 2017

Decided: October 3, 2017

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Before **WILKINSON**, **FLOYD**, and **THACKER**, Circuit Judges.

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Dismissed by unpublished per curiam opinion.

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**Billy F. Larkin**, Appellant Pro Se. **Clarence Joe DelForge, III**, **NORTH CAROLINA  
DEPARTMENT OF JUSTICE**, Raleigh, North Carolina, for Appellees.

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Unpublished opinions are not binding precedent in this circuit.

## PER CURIAM:

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

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

*DISMISSED*

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
No. 5:16-HC-2031-D

BILLY FRANK LARKIN,

Petitioner,

v.

JOHNNY HAWKINS,

Respondent.

**ORDER**

On February 16, 2016, Billy Frank Larkin ("Larkin"), a state inmate proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 [D.E. 1]. On August 24, 2016, the court reviewed the petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts and allowed the petition to proceed [D.E. 5].

On September 20, 2016, respondent answered the petition [D.E. 7] and moved for summary judgment [D.E. 8]. Pursuant to Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam), the court notified Larkin about the motion for summary judgment, the consequences of failing to respond, and the response deadline [D.E. 12]. On October 6, 2016, Larkin responded to the motion for summary judgment with exhibits [D.E. 13]. Larkin also moves for an evidentiary hearing [D.E. 14] and appointment of counsel [D.E. 15]. As explained below, the court grants respondent's motion for summary judgment, denies petitioner's motions, and dismisses the petition.

I.

The court briefly recites the crime that produced Larkin's conviction and sentence.

A. Johnson Incident

Around 5:00 pm on 5 November 2010, Robbie Johnson left his photography

equipment on a couch in his Carolina Beach condominium. This photography equipment included a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera. The following morning, on 6 November 2010, Johnson discovered that his photography equipment was missing from his condominium. That day, [Larkin] sold a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera to a camera store in Raleigh.

On 8 November 2013 [sic], Johnson visited the Raleigh camera store after discovering that it had recently acquired photography equipment matching the description of his missing property. Johnson brought registration cards that contained the missing items' serial numbers. Johnson and the store manager discovered that the serial numbers of the photography equipment sold by [Larkin] matched Johnson's serial numbers. The camera store returned all four items to Johnson.

#### **B. Breese Incident**

On 7 November 2010, Nancy Breese left her Bose CD changer and radio on a chest in her Kure Beach house. Breese earlier had recorded the serial numbers associated with the Bose CD changer and radio. Breese went to bed that night around 9:00 p.m. During the middle of the night, Breese heard noises and yelled, thinking it was her cat. When Breese rose from bed the next morning, she immediately noticed that her Bose CD changer and radio were missing.

On 7 April 2011, in an investigation unrelated to the Breese incident, police officers conducted a search of [Larkin]'s hotel room in Fayetteville and discovered a Bose CD changer and radio. The serial numbers of the Bose CD changer and radio matched the serial numbers recorded by Breese.

#### **C. Madsen Incident**

Around 11:00 p.m. on 7 November 2010, Don Madsen went to bed in his Carolina Beach condominium. Around 3:00 a.m., Madsen woke up and saw the shadow of a person. Madsen yelled, jumped out of bed, and chased the intruder. The intruder ran away from Madsen and onto Madsen's balcony, and Madsen pursued the intruder until he jumped off of Madsen's balcony and ran out of sight. Madsen did not get a good look at the intruder.

Madsen noticed that an envelope containing a set of keys was missing from his condominium. Madsen also noticed a pair of tennis shoes on his patio that were not his. One of the shoes had a car key tied in its laces. At 12:15 p.m. on 8 November 2010, Detective Humphries of the Carolina Beach Police Department ("CBPD") discovered a shoeprint in some sand outside Breese's house that, in his lay opinion, matched the soles of the shoes found on Madsen's patio.

#### D. Search of [Larkin]'s Corvette

In April 2011, the Wrightsville Beach Police Department ("WBPD") seized [Larkin]'s Corvette in Fayetteville and transported it to an impound lot in Wilmington. This seizure was unrelated to any of the incidents described above. Officer James Carl Mobley told Detective Humphries that, while working for the WBPD, he had encountered [Larkin] and remembered that [Larkin] had worn a pair of tennis shoes with a Corvette key interlaced in his right shoe. On or about 20 April 2011, Detective Humphries obtained a search warrant for [Larkin]'s Corvette based upon information that he had received from the WBPD, and he tried the car key that had been interlaced in one of the shoes left on Madsen's patio in the seized Corvette. The key fit the Corvette, thus linking [Larkin] to the key found in the shoes.

#### E. Course of Proceedings

On or about 27 June 2011, a grand jury indicted [Larkin] for felonious breaking or entering and felonious larceny after breaking or entering in connection with the Johnson incident, first-degree burglary and felonious larceny pursuant to burglary in connection with the Breese incident, and first-degree burglary in connection with the Madsen incident. On or about 13 September 2013, [Larkin] moved to suppress evidence resulting from the CBPD's search of his Corvette. On or about 14 September 2013, [Larkin] moved to sever the charges into three trials. On 4 October 2013, nunc pro tunc for 16 September 2013, the trial court denied (1) [Larkin]'s motion to suppress after concluding that the State had proved that the CBPD would have inevitably discovered [Larkin]'s Corvette; and (2) [Larkin]'s motion to sever after finding that all three incidents occurred within a three-day span, within 2.5 miles of each other, and involved breaking into a personal beachfront residence to commit a larceny. [Larkin] renewed his pretrial motion to sever during jury selection, and the trial court again denied it. At the close of all the evidence, [Larkin] moved to dismiss all charges. The trial court denied the motion.

State v. Larkin, 237 N.C. App. 335, 337–39, 764 S.E.2d 681, 684–85 (2014); see Pet. [D.E. 1] 1–2; Resp't's Mot. Summ. J., Exs. 1 [D.E. 10-1] (copy of opinion), 13 [D.E. 10-13] (stenographic transcript of trial).

On September 19, 2013, a jury convicted Larkin of two counts of first-degree burglary, two counts of felonious larceny, and one count of breaking or entering, and the trial court sentenced him to two consecutive terms of 85–111 months' imprisonment. See Larkin, 237 N.C. App. at 339, 764 S.E.2d at 685; Pet. 1. Larkin appealed. See Larkin, 237 N.C. App. at 339, 764 S.E.2d at 685; Pet.

2. On November 18, 2014, the North Carolina Court of Appeals found no error. See Larkin, 237 N.C. App. at 350, 764 S.E.2d at 691; Pet. 2. On March 5, 2015, the Supreme Court of North Carolina denied Larkin's petition for discretionary review. See State v. Larkin, 368 N.C. 245, 768 S.E.2d 841, 842 (2015); Pet. 2.

On September 18, 2015, Larkin filed a motion for appropriate relief ("MAR") in New Hanover County Superior Court. See Pet. 3; Resp't's Mot. Summ. J., Ex. 8 [D.E. 10-8] (copy of MAR). On October 15, 2015, the state court summarily denied the MAR. See Pet. 3 & Exs. [D.E. 1] 26-28 (copy of state court order); Resp't's Mot. Summ. J., Ex. 9 [D.E. 10-9] (same). On November 24, 2015, Larkin filed a petition for certiorari in the North Carolina Court of Appeals, which denied the petition on December 11, 2015. See Pet. 4; Resp't's Mot. Summ. J., Exs. 10 [D.E. 10-10] (petition), 12 [D.E. 10-10] (order).

Larkin signed his section 2254 petition on February 4, 2016, and filed it in this court on February 16, 2016. See Pet. 1, 15. Larkin asserts four claims: (1) the prosecutor knowingly used perjured testimony in order to have Larkin's motion to suppress denied; (2) a juror had a conflict of interest; (3) ineffective assistance of counsel for counsel's failure to challenge the search warrant; and (4) the trial court erred in denying Larkin's motion to suppress. Pet. 5-10.

## II.

As for Larkin's motion for appointed counsel, no right to counsel exists in habeas corpus actions. See, e.g., Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Nonetheless, the court may appoint counsel if it determines that "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). This action does not present legally complex issues, and Larkin has set forth his claims adequately. Thus, the interests of justice do not require the appointment of counsel. Accordingly, the court denies the motion.

As for Larkin's motion for an evidentiary hearing, he has failed to make the requisite showing. See, e.g., Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts; Maynard v. Dixon, 943 F.2d 407, 412–13 (4th Cir. 1991). Thus, the court denies the motion.

### III.

Summary judgment is appropriate when, after reviewing the record taken as a whole, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party may not rest on the allegations or denials in its pleadings, Anderson, 477 U.S. at 248–49, but “must come forward with specific facts showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis and quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. Anderson, 477 U.S. at 248–49. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. Scott v. Harris, 550 U.S. 372, 378 (2007).

A federal court cannot grant habeas relief in cases when a state court considered a claim on its merits unless (1) the state-court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) the state-court decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); see, e.g., Kernan v. Hinojosa, 136 S. Ct. 1603, 1604 (2016) (per curiam); Woods v. Ehterton, 136 S. Ct. 1149, 1151 (2016) (per curiam); White v. Wheeler, 136 S. Ct. 456, 460 (2015) (per curiam); Davis v. Ayala, 135

S. Ct. 2187, 2198 (2015); Woods v. Donald, 135 S. Ct. 1372, 1376–78 (2015); Glebe v. Frost, 135 S. Ct. 429, 430 (2014) (per curiam); Lopez v. Smith, 135 S. Ct. 1, 1–2 (2014) (per curiam); Marshall v. Rodgers, 133 S. Ct. 1446, 1449–51 (2013) (per curiam). A state-court decision is “contrary to” Supreme Court precedent if it either “arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law” or “confronts facts that are materially indistinguishable from a relevant Supreme Court precedent” and arrives at an opposite result. Williams v. Taylor, 529 U.S. 362, 405 (2000). A state-court decision involves an “unreasonable application” of Supreme Court precedent “if the state court identifies the correct governing legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case.” *Id.* at 407; see White v. Woodall, 134 S. Ct. 1697, 1702–07 (2014); Nevada v. Jackson, 133 S. Ct. 1990, 1992–94 (2013) (per curiam); Metrish v. Lancaster, 133 S. Ct. 1781, 1786–92 (2013); Parker v. Matthews, 567 U.S. 37, 40–45 (2012) (per curiam); Bobby v. Dixon, 565 U.S. 23, 27–32 (2011) (per curiam); Renico v. Lett, 559 U.S. 766, 773–79 (2010).

Section 2254(d) “does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision is an objectively reasonable one.” Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir. 2000) (en banc). Section 2254(d) also does not require a federal court to “offer an independent opinion as to whether it believes, based upon its own reading of the controlling Supreme Court precedents, that the [petitioner’s] constitutional rights were violated during the state court proceedings.” *Id.* Moreover, a state court’s factual determination is presumed correct, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Sharpe v. Bell, 593 F.3d 372, 378 (4th Cir. 2010).

Congress intended the standard in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) to be difficult to meet. See White, 134 S. Ct. at 1702; Harrington v. Richter, 562 U.S.

86, 102 (2011). "Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." Harrington, 562 U.S. at 103. To prevail in an action brought under section 2254(d), a petitioner must show that "there was no reasonable basis for the state court to deny relief." Id. at 98; see DeCastro v. Branker, 642 F.3d 442, 449 (4th Cir. 2011).

A.

Larkin first asserts that the prosecutor knowingly used perjured testimony in order to have his motion to suppress denied. Larkin contends that Officer Mobley "provided Det. Humphries with much more information . . . than Det. Humphries was willing to admit under oath at [the] suppression hearing," that Humphries and the prosecutor "colluded to conceal these facts," and the prosecutor "intentionally exclude[d] Officer Mobley and his statement from [the] suppress[ion] hearing in order to get the result he wanted." Pet. 5, 17-18.

At the suppression hearing, Humphries testified that Mobley

told [Humphries] of a similar case with an individual that had a Corvette key interlaced in his right shoe just like this one that they were looking into as a possible B&E suspect. He had told [Humphries] that he had gotten up with Mr. Larkin on the beach and they had arrested Mr. Larkin for I believe a breaking and entering. Mr. Mobley said that at that time Mr. Larkin was wearing a pair of tennis shoes with a key, a Corvette key interlaced in the right shoe. They allowed Mr. Larkin to go to the Holiday Inn in Wrightsville Beach and retrieve personal property from his vehicle that he needed. Mr. Larkin took the key out of the shoe, unlaced it from the shoe, opened the Corvette and took out the personal belongings.

Trial Tr. [D.E. 10-13] 24.

Larkin cites Mobley's statement of August 21, 2011, indicating that he "retrieved the key from Humphries and went to Wrightsville Beach Police Department to compare it to the one from Larkins [sic] vehicle . . . . The cut of the key was found to be a match and this information was passed onto Humphries." Pet'r Resp. Opp'n Mot. Summ. J., Ex. [D.E. 13-1]. Mobley's trial

testimony comported with his statement. See Trial Tp. 163–64 [D.E. 10–13] 172–73. Larkin raised this claim in his MAR, and the state court rejected it. See Pet., Exs. [D.E. 1] 26–28; Resp’t’s Mot. Summ. J., Ex. 9 [D.E. 10–9] .

The Fourteenth Amendment Due Process Clause prohibits a state from knowingly using false evidence at a criminal trial or allowing untrue testimony to go uncorrected. See Giglio v. United States, 405 U.S. 150, 153 (1972); Miller v. Pate, 386 U.S. 1, 6–7 (1967); Napue v. Illinois, 360 U.S. 264, 269 (1959). To show that his due process rights were violated by the presentation of false evidence, Larkin must show that the prosecution knew that the theory or evidence was false at the time of trial. See Napue, 360 U.S. at 269. Larkin also must show that the evidence was material to the jury’s verdict: “[a] new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.” Giglio, 405 U.S. at 154 (internal quotation omitted); see Kyles v. Whitney, 514 U.S. 419, 438 (1995); United States v. Bartko, 728 F.3d 327, 337–41 (4th Cir. 2013).

Larkin has failed to demonstrate any due process violation, or that the testimony was material to the jury’s verdict. See, e.g., Murray v. United States, 704 F.3d 23, 30–32 (1st Cir. 2013); Kozol v. Payne, 329 F. App’x 707, 709 (9th Cir. 2009) (per curiam) (unpublished); Dickerson v. Cain, No. CV 14-1247, 2015 WL 10323197, at \*12 (E.D. La. Dec. 4, 2015) (unpublished), report and recommendation adopted, 2016 WL 687634 (E.D. La. Feb. 19, 2016) (unpublished); United States ex rel. Weems v. Williams, No. 13 C 7274, 2014 WL 5423268, at \*3 (N.D. Ill. Oct. 21, 2014) (unpublished); Bailey v. Braxton, No. 3:12CV537, 2013 WL 4880846, at \*8 (E.D. Va. Sept. 12, 2013) (unpublished). Thus, Larkin has not demonstrated that the state court’s ruling reached a result contrary to, or involved an unreasonable application of, clearly established federal law. Likewise, the state court’s ruling was not based on an unreasonable determination of facts, in light of the

evidence presented in the state-court proceeding. See, e.g., 28 U.S.C. § 2254(d)–(e). Accordingly, the court grants summary judgment to respondent on this claim.

B.

Next, Larkin asserts that a juror had a conflict of interest:

On September 18, 2013, during a recess at my trial, I observed one of the jurors (Mrs. Violette) and a lady in a whispered conversation. The matter was brought to the attention of the trial judge, and the lady talking to the juror Mrs. Violette was revealed to be the state prosecutor's wife (Mrs. Smith). The prosecutor's wife revealed that she was an attorney and that her office represents Mrs. Violette's husband.

Pet. 7.

On the second day of Larkin's trial, following the lunch recess, the court convened the parties outside the presence of the jury:

(IN SESSION AT 2:04 P.M. OUT OF THE PRESENCE OF THE JURY.)  
(THE DEFENDANT AND ALL COUNSEL ARE PRESENT.)

THE COURT: Are you ready to proceed?

MR. SMITH: We are, Your Honor. I would like to put one thing on the record, Your Honor. It was brought to my attention by my wife over lunch, who is also an attorney here in town, that she knows a member of the jury. She stated that while she was sitting in here watching the previous testimony prior to lunch that as the juror was walking out, that this juror stopped and said, "What are you doing here?" and my wife stated that she was just watching and the juror moved on. It's my understanding that she has not spoken to this juror and she is here available for testimony, Judge, if you need her, but she hasn't spoken to this juror in a number of years. It's also my understanding that she has not spoken to this juror about this case. Honestly, Judge, I don't know which juror it is.

THE COURT: Anything else?

MR. SMITH: No, Your Honor.

THE COURT: What says the defendant?

MR. DAVIS: Your Honor, out of an abundance of caution it may be that we may want to find out who the juror is and if there is anything at all to it.

THE COURT: What are you asking the Court to do?

MR. DAVIS: Should we ask that that particular juror, if knowing that Mrs. Smith was here would have any affect on her at all?

THE COURT: What are you asking the Court to do though, in chambers do that or what?

MR. DAVIS: Your Honor, I don't know if I would want to do it in chambers, I don't know if I would want a juror to go into that area of the courtroom, the courthouse, but maybe that the rest of the jurors could go leaving her and we just ask her to come.

THE COURT: I'm talking about with lawyers back in chambers.

MR. DAVIS: That would be the easiest.

THE COURT: Yes. So now we need to identify which juror it is.

MRS. SMITH: Your No. 7, Mrs. Violet, and just for clarification, my office represents her husband.

THE COURT: No. 1.

MRS. SMITH: I'm sorry, No. 1.

THE COURT: Tamara Violette. Okay. So let's be excused to chambers and I need Juror No. 1. You should just say something like Juror No. 1, will you step out in the hall, please? And then bring her to chambers.

(THE FOLLOWING TOOK PLACE IN CHAMBERS. PRESENT ARE MR. SMITH, MR. DAVIS AND JUROR NO. 1.)

THE COURT: You are not in any trouble.

JUROR NO. 1: I'm like: Oh, my God.

THE COURT: It has come to our attention that either you spoke to Tamara Smith or she spoke to you?

JUROR NO. 1: Oh, I spoke to her.

THE COURT: That is his wife.

JUROR NO. 1: Oh.

THE COURT: You don't know that, do you?

JUROR NO. 1: No.

THE COURT: It's my understanding y'all said: Hey, how are you doing?

JUROR NO. 1: I said, "What are you doing here?" and she said, "Just watching."

THE COURT: The question is now that you are aware of that, do you think that anything about that knowledge would have any effect on you being able to render a fair and impartial jury verdict in this case?

JUROR NO. 1: It would not.

THE COURT: Do you have any questions, Mr. Davis?

MR. DAVIS: I do not, Your Honor.

THE COURT: Do you have any questions?

MR. SMITH: I do not.

THE COURT: Okay, join your troops.

JUROR NO. 1: Thank you.

MR. SMITH: Thank you, Your Honor.

(THE FOLLOWING TOOK PLACE IN THE COURTROOM. THE DEFENDANT AND ALL COUNSEL ARE PRESENT.)

THE COURT: All right, let the record reflect that after examining in chambers, the Court determines that there is no infirmity with the jury pool and the Court can proceed on in this case. And with the consent of both counsel?

MR. DAVIS: That's correct.

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Have the witness come back up to the stand. You can bring the jury in.

(WITNESS RETURNS TO THE STAND.)

(JURY RETURNS TO THE COURTROOM AT 2:10 P.M.)

Trial Tr. at 297–301.

The Sixth Amendment guarantees a criminal defendant “the right to a . . . trial[] by an impartial jury[.]” U.S. Const. amend. VI; see Smith v. Phillips, 455 U.S. 209, 217 (1982); Irvin v. Dowd, 366 U.S. 717, 721–22 (1961); Conner v. Polk, 407 F.3d 198, 205 (4th Cir. 2005). However, “due process does not require a new trial every time a juror has been placed in a potentially compromising situation.” Smith, 455 U.S. at 217. Rather, it “means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” Id.; see Conner, 407 F.3d at 207. Under AEDPA, the state court’s finding of impartiality is a finding of fact that is presumed to be correct. See Wainwright v. Witt, 469 U.S. 412, 429 (1985); Smith, 455 U.S. at 218.

Larkin has not demonstrated that the North Carolina Court of Appeals’s ruling reached a result contrary to, or involved an unreasonable application of, clearly established federal law. See, e.g., Smith, 455 U.S. at 212, 215; Hedlund v. Ryan, No. 09-99019, 2017 WL 1363346, at \*11–13 (9th Cir. Apr. 13, 2017); Treesh v. Bagley, 612 F.3d 424, 438 (6th Cir. 2010); Poynter by Poynter v. Ratcliff, 874 F.2d 219, 221–22 (4th Cir. 1989). Likewise, the state court’s ruling was not based on an unreasonable determination of facts, in light of the evidence presented in the state-court proceeding. See, e.g., 28 U.S.C. § 2254(d)–(e). Thus, the court grants summary judgment to respondent on this claim.

C.

Next, Larkin asserts that his trial counsel was ineffective for failing to challenge the search warrant. Pet. 6–7. Larkin raised this claim in his MAR, and the state court summarily denied it. See Pet., Exs. [D.E. 1] 27–28; Resp’t’s Exs. 8 [D.E. 10-8] 13, 9 [D.E. 10-9] 3–4. “Although

[Larkin] moved to suppress this evidence before trial, [Larkin] failed to object to its admission at trial and thus failed to preserve error.” Larkin, 237 N.C. App. at 339, 764 S.E.2d at 685. On direct appeal, the North Carolina Court of Appeals found no plain error in the admission of the evidence and provided an exhaustive and persuasive explanation. Id. at 339–46, 764 S.E.2d at 685–89.

The Sixth Amendment right to counsel includes the right to the effective assistance of counsel at trial and on direct appeal. See Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (per curiam); Strickland v. Washington, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of trial counsel, a habeas petitioner must establish two things. First, a petitioner must show that counsel’s performance was deficient in that it was objectively unreasonable under prevailing professional norms. See Van Hook, 558 U.S. at 7; Strickland, 466 U.S. at 687–91. In reviewing this element, a court must be “highly deferential” of counsel’s performance and must make every effort to “eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. Therefore, the court must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.; see Gray v. Branker, 529 F.3d 220, 228–29 (4th Cir. 2008). Second, a petitioner must show there is a “reasonable probability” that, but for the deficiency, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694. Moreover, the AEDPA adds a double layer of deference to ineffective-assistance-of-counsel claims. See, e.g., Burt v. Titlow, 134 S. Ct. 10, 13 (2013); Pinholster, 563 U.S. at 190.

“[A] meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim” based on defense counsel’s failure to fully litigate a Fourth Amendment claim. Kimmelman v. Morrison, 477 U.S. 365, 375, 382 (1986); see Blackshire v. Maclaren, No. 15-1904, 2016 WL 561521, at \*4 (6th Cir. Feb. 9, 2016) (per curiam) (unpublished); United States v. Jones, 600 F. App’x 74, 79 (4th Cir. 2014) (per curiam) (unpublished). Here, Larkin has not demonstrated that

the state court's ruling on this issue reached a result contrary to, or involved an unreasonable application of, clearly established federal law. See, e.g., Nix, 467 U.S. at 448–49; Sutton v. Pfister, 834 F.3d 816, 822–23 (7th Cir. 2016); Blackshire, 2016 WL 561521, at \*4; Eastin v. Hobbs, 688 F.3d 911, 915–16 (8th Cir. 2012); Rideout v. Clarke, No. 3:16CV190, 2017 WL 811492, at \*7 (E.D. Va. Feb. 28, 2017) (unpublished); Pearson v. Lee, No. 1:06CV69-03-MU, 2008 WL 4186894, at \*9–10 (W.D.N.C. Sept. 5, 2008) (unpublished). Likewise, the state court's ruling was not based on an unreasonable determination of facts, in light of the evidence presented in the state-court proceeding. See 28 U.S.C. § 2254(d)–(e). Thus, the court grants summary judgment to respondent on this claim.

D.

Finally, Larkin challenges the trial court's denial of his motion to suppress. Pet. 10. As noted, Larkin raised this claim on direct appeal and the North Carolina Court of Appeals found no plain error. Larkin, 237 N.C. App. at 339–46, 764 S.E.2d at 685–89. “[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.” Stone v. Powell, 428 U.S. 465, 482 (1976); see Sutton, 834 F.3d at 820; Sanchez v. Bryant, 652 F. App'x 599, 604 (10th Cir.) (per curiam) (unpublished), cert. denied, 137 S. Ct. 230 (2016); Blackshire, 2016 WL 561521, at \*3; Newman v. Wengler, 790 F.3d 876, 879–80 (9th Cir. 2015). When presented with a Fourth Amendment claim on habeas, the court must

first inquire as to whether or not the petitioner was afforded an opportunity to raise his Fourth Amendment claims under the then existing state practice. This may be determined . . . from the relevant state statutes, the applicable state court decisions, and from judicial notice of state practice by the district court.

Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir. 1978) (emphasis omitted). Once this court “has made the ‘opportunity’ inquiry, it need not inquire further into the merits of the petitioner’s case . . . unless the prisoner alleges something to indicate that his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired.” Id. An adequate opportunity exists where the petitioner “had an opportunity to present his Fourth Amendment claims by a motion to suppress both at the trial court level and thereafter to assign as an error, an adverse ruling thereon, on appeal.” Id.

Larkin had ample opportunities to challenge the search warrant. Larkin’s trial counsel filed a motion to suppress, and on September 16, 2013, the trial court held an evidentiary hearing. See Trial Tr. at 14–36; Resp’t’s Ex. 3 [D.E. 10-3] 21–23 (order denying motion to suppress). Larkin appealed his conviction and raised his Fourth Amendment claim. See Larkin, 237 N.C. App. at 339, 764 S.E.2d at 685. Thus, Larkin had a full and fair opportunity to litigate his Fourth Amendment claims in state court. See, e.g., Newman, 790 F.3d at 880–81; Smith v. Wolfe, No. CV CCB-16-2956, 2017 WL 281993, at \*3–7 (D. Md. Jan. 23, 2017) (unpublished); Jefferson v. Clarke, No. 2:15-CV-450, 2016 WL 6824444, at \*5 (E.D. Va. Oct. 12, 2016) (unpublished), report and recommendation adopted, 2016 WL 6821091 (E.D. Va. Nov. 17, 2016) (unpublished), appeal dismissed, No. 16-7737, 2017 WL 702263 (4th Cir. Feb. 22, 2017) (per curiam) (unpublished). Moreover, Larkin has not alleged or otherwise shown that he did not receive such an opportunity. See Doleman, 579 F.2d at 1266 (habeas petitioner must allege “the reasons he has, and the facts in support thereof, as to why he contends he did not” have a full and fair opportunity to litigate his Fourth Amendment claim (emphases in original)). Thus, the court may not consider this claim in a habeas petition.

IV.

In sum, the court DENIES Larkin's motions for appointed counsel and an evidentiary hearing [D.E. 14–15], GRANTS respondent's motion for summary judgment [D.E. 8], and DISMISSES Larkin's application for a writ of habeas corpus [D.E. 1]. The court DENIES a certificate of appealability. See 28 U.S.C. § 2253(c); Buck v. Davis, 137 S. Ct. 759, 773 (2017); Miller-El v. Cockrell, 537 U.S. 322, 335–38 (2003); Slack v. McDaniel, 529 U.S. 473, 478, 483–85 (2000). The clerk shall close the case.

SO ORDERED. This 5 day of May 2017.

  
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JAMES C. DEVER III  
Chief United States District Judge

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