Record NO. ___________

IN THE
SUPREME COURT OF THE UNITED STATES

GARRY ARTIS YARBOROUGH,
Petitioner-Appellant

V.

LESLIE COOLEY DISMUKES,
Respondent-Appellee

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

APPENDIX OF PETITIONER

Garry Yarborough #0530117
Pender Correctional Institution
P.O. Box 1058
Burgaw, N.C. 28425

Petitioner Pro Se

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Appendix A

Decision of United States Court of Appeals for the Fourth Circuit

FILED: September 23, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-6031
(5:23-hc-02279-BO)

GARRY ARTIS YARBOROUGH

Petitioner - Appellant

v.

LESLIE COOLEY DISMUKES

Respondent - Appellee

JUDGMENT

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

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

/s/ NWAMAKA ANOWI, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-6031

GARRY ARTIS YARBOROUGH,

Petitioner - Appellant,

v.

LESLIE COOLEY DISMUKES,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:23-hc-02279-BO)

Submitted: September 18, 2025 Decided: September 23, 2025

Before THACKER and BENJAMIN, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

George Bullock Currin, Raleigh, North Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Garry Artis Yarborough seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). 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)).

We have independently reviewed the record and conclude that Yarborough has not made the requisite showing. 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

Appendix B

Decision of United States District Court for the Eastern District of North Carolina

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

NO. 5:23-HC-02279-BO

GARRY ARTIS YARBOROUGH,	)	
Petitioner,	)	
v.	)	ORDER
TODD ISHEE,	)	
Respondent.	)	

Garry Artis Yarborough ("petitioner"), a state inmate, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is represented by counsel. The matter now is before the court on the motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(a) (DE 15), filed by respondent Todd Ishee ("respondent"). The matter also is before the court on petitioner's motion to expand the page limitation (DE 22). For the following reasons, the court grants both motions.

STATEMENT OF THE CASE

On August 2, 2018, petitioner was convicted, following a jury trial in the Franklin County Superior Court, of first-degree murder, attempted first-degree murder, first-degree kidnapping, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon with the intent to kill, two counts of discharging a firearm into occupied property, felony breaking and entering, and possession of a firearm by a felon. (DE 17-5). Petitioner subsequently was sentenced to the following four consecutive terms of imprisonment: life without the possibility of parole; 238-298 months; 110-144 months; and 38-58 months. (Id.) Petitioner also was sentenced to the following two concurrent terms of imprisonment: 19-32 months and 97-129 months. (Id.) At trial, petitioner was represented by attorneys Stephen C. Freedman ("Freedman") and Christine Malumphy ("Malumphy").[1] See ((DE 17-19) ¶¶ 14, 15).

Petitioner appealed, and alleged the trial court erred by: (1) joining his charges for a single trial, or, in the alternative, that his counsel was ineffective: (2) allowing a lay witness to testify about his medical condition; (3) denying his motion to dismiss the attempted first-degree murder charge for lack of sufficient evidence of malice, premeditation, and deliberation; (4) instructing the jury on attempted first-degree murder in a misleading manner that lowered the State's burden of proof; and (5) denying defense counsel's request for a self-defense instruction. See State v. Yarborough, 271 N.C. App. 159, 160, 843 S.E.2d 454, 457 (2020). The North Carolina Court of Appeals dismissed without prejudice petitioner's ineffective assistance of counsel claim, and found no error as to his remaining claims. Id. at 463. Petitioner appealed to the North Carolina Supreme Court, and the supreme court denied his petition for discretionary review. State v. Yarborough, 376 N.C. 540, 851 S.E.2d 373 (2020).

Petitioner next filed a motion for appropriate relief ("MAR") and an amended MAR in the Franklin County Superior Court. See (DE 17-13); (DE 17-15). Petitioner alleged several ineffective assistance of counsel claims including that his trial counsel were ineffective because they failed to move to sever his charges after the State filed a motion for joinder. Petitioner also alleged his trial counsel failed to request a modification to North Carolina Pattern Instruction ("NCPI") 305.11 on the defense of lack of mental capacity to "include a reference" to post

[1] Freedman, an attorney employed by the North Carolina Office of the Capital Defender as an Assistant Capital Defender, was appointed to represent petitioner. See (DE 17-19) ¶ 14). Freedman was the only attorney appointed to represent petitioner, and Assistant Capital Defender Malumphy only assisted Freedman to gain experience. (Id. ¶ 15).

traumatic stress disorder ("PTSD") and dissociation. (DE 17-13);(DE 17-14);(DE 17-15);(DE 16), p. 5). Following an evidentiary hearing, the superior court denied petitioner's MARs. (DE 17-19). Petitioner's petition for a writ of certiorari, filed in the North Carolina Court of Appeals, also was denied. See (DE 17-22).

On December 19, 2023, petitioner filed the instant habeas petition pursuant to § 2254 and alleged his trial counsel rendered ineffective assistance in violation of the Sixth Amendment to the United States Constitution by failing to: (1) file a motion to sever the offenses; and (2) request that the trial court modify the standard "Lack of Mental Capacity" jury instruction to include references to his psychiatric diagnoses. ((DE 1), pp. 1-2). Petitioner also asserts he "did not receive a full and fair hearing in [the] state [MAR] court." (Id. p. 2). Petitioner next filed an addendum to his memorandum in support of his petition. See (DE 11). On May 13, 2024, respondent filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(a), arguing petitioner is not entitled to relief. Petitioner responded and filed a motion to exceed the page limitation.

STATEMENT OF FACTS

The facts underlying petitioner's convictions, as set forth by the North Carolina Court of Appeals, are summarized below:

> Defendant and his girlfriend, Tracy Williams ("Williams"), met around 2009 or 2010 while Defendant was in prison for manslaughter. The two continued their relationship after Defendant was released in 2010. By March 2014, their relationship became volatile and they would cycle between living together and apart. Beginning in April 2015, Defendant was charged with misdemeanor assault and kidnapping Williams when he allegedly prevented her from leaving his residence in Zebulon. In early July 2015, Williams

obtained an ex parte domestic violence protective order against Defendant.[2]

On 17 July 2015, Defendant and Williams, driving separate vehicles, stopped next to each other at an intersection in Franklinton. Williams suspected that Defendant had been following her. Defendant told Williams that "he could put his hands on her at any time he wanted to." Williams then fired two shots from her handgun into the back window of Defendant's vehicle—Defendant was not injured.

On 26 July 2015, Williams stopped her vehicle at an ATM in a Food Lion parking lot in Franklinton Square. Moments later, Defendant arrived in a black SUV and parked behind Williams' vehicle. Defendant had a handgun tucked in his waist. The two started arguing while Williams was sitting in her vehicle and Defendant was beside her kneeling down. The two got into a physical altercation, and Williams then drew her handgun and shot Defendant in the leg. She attempted to fire the gun a second time, but the gun jammed. Williams threw the gun at Defendant and ran away, screaming for help. Defendant chased after Williams while he loaded the magazine in his handgun. Williams attempted to get into the driver's seat of the black SUV, but Defendant caught up to her, pushed her head down, and fatally shot her in the back of her head. Defendant then threw Williams out of the vehicle, drove out of the parking lot, and ran over her body in the process.[3]

Defendant fled and made his way to the residence of Kim Elmore ("Elmore"), a registered nurse, parking the SUV in her backyard rather than in the driveway. Defendant repeatedly rang the doorbell and knocked on the door to get Elmore's attention. Elmore opened the front door a few inches and recognized Defendant as the repairmen who had worked on her air conditioning unit a few months earlier. Elmore tried to shut the door, but Defendant pushed his way in and asked if anyone else was home. When Elmore told Defendant to leave, he pointed a handgun to her forehead and said that he would kill her. Defendant then struck Elmore twice over the head with the butt of his gun, causing her to bleed profusely.

[2] At trial, Defendant presented evidence that Williams was exaggerating these experiences to extort him for money. Defendant testified that at one point he withdrew $20,000 from his business account to pay Williams to drop the charges.

[3] Though the medical examiner testified that there was no evidence Williams was run over, all three witnesses who observed the incident testified that Defendant drove over Williams' body.

Defendant asked Elmore for band-aids and towels. Although Defendant's leg wound was not bleeding, he wanted Elmore to provide a tourniquet for his leg and bandage the wound. While Elmore was working on Defendant's leg, Defendant called and talked to an acquaintance on the phone. Elmore overheard Defendant "saying something about a van, that he had killed [Williams], and he had a hostage." Elmore begged Defendant not to kill her, and he told her that "if [she] did what he said, he would just leave [her] there tied up," despite saying on the phone that he had a hostage.

After Elmore finished, Defendant got up and told her that they were leaving. While the two were heading to the front door, Elmore said she was going to turn the lights off. As Defendant crossed the door and stepped outside, Elmore quickly shut the door and locked it. Defendant then turned around and fired four to six shots near the doorknob and kicked and yelled at the door. Elmore ran to the bathroom and called 911 and Defendant drove from the scene. Defendant was later found and arrested in a hotel in Raleigh.

Defendant was indicted for first-degree murder, attempted first-degree murder, first-degree kidnapping, felony breaking or entering, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, burning personal property, possession of a firearm by a felon, and two counts of discharging a weapon into occupied property. In October 2017, the State filed a motion to join all of Defendant's charges for a single trial.

Defendant's charges came on for trial on 9 July 2018. Both the State and defense counsel presented expert witness testimony regarding Defendant's mental state at and around the time of the alleged crimes. Following the State's evidence, defense counsel motioned to dismiss all of Defendant's charges for lack of evidence. The trial court dismissed the burning personal property charge and denied the remainder of defense counsel's motion. At the close of all the evidence, the trial court denied defense counsel's renewed motion to dismiss all remaining charges. The jury found Defendant guilty on all counts.

Yarborough, 843 S.E.2d at 457-458.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson, 477 U.S. at 250.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") authorizes federal courts to "entertain an application for a writ of habeas corpus" for a convicted state prisoner on the ground that his custody violates "the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). Where a state court has adjudicated the merits of such a claim in the state court proceeding, the AEDPA "erects a formidable barrier to federal habeas relief." Burt v. Titlow, 571 U.S. 12, 19 (2013). Under AEDPA, there are two paths to federal habeas relief in cases where a state court adjudicated a claim on its merits. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 98 (2011). First, a federal court may grant federal habeas relief if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Second, a federal court may grant federal habeas relief if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." Id. §

2254(d)(2); see, e.g., Shoop v. Twyford, 596 U.S. 811, 819 (2022). A state court's factual determination is presumed correct unless rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Sharpe v. Bell, 593 F.3d 372, 378–79 (4th Cir. 2010).

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) (quotation omitted). 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. "[A] state court decision also involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id.

Congress intended AEDPA's standard to be difficult to meet. See Mays v. Hines, 592 U.S. 385, 391–93 (2021); Harrington, 562 U.S. at 102. "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. "In other words, a litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." Virginia v. LeBlanc, 582 U.S. 91, 94 (2017) (quotation omitted).

B. Analysis

1. Ineffective Assistance of Counsel

Petitioner raises two ineffective assistance of counsel claims, and contends the MAR court's decision denying relief for the claims was contrary to and based upon an unreasonable application of clearly established Supreme Court precedent and an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing. 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). Generally, a petitioner alleging ineffective assistance of counsel must meet the standard established in Strickland v. Washington, 466 U.S. 668 (1984). Pursuant to Strickland, the Sixth Amendment right to effective assistance of counsel is violated when (1) counsel's performance falls below an objective standard of reasonableness, and (2) but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88, 694. The Fourth Circuit Court of Appeals recently explained:

> To prove the first prong, the petitioner must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [him] by the Sixth Amendment." [*Strickland*, 466 U.S. at 687]. This "demands a showing that 'counsel's representation fell below an objective standard of reasonableness,' taking into account 'prevailing professional norms' and whether 'the challenged action might be considered sound trial strategy.'" *Witherspoon*[*v. Stonebreaker*], 30 F.4th [381, 393 (4th Cir. 2022)] (quoting *Strickland*, 466 U.S. at 688–89, 104 S.Ct. 2052). "The critical question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Winston v. Pearson*, 683 F.3d 489, 504 (4th Cir. 2012) (internal quotes omitted). A reviewing court's scrutiny of counsel's performance must be "highly deferential, so as to afford counsel latitude in making strategic decisions." *Witherspoon*, 30 F.4th at 393. In fact, "strategic choices made after thorough investigation of

> law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. Even "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91, 104 S.Ct. 2052.
>
> To prove the second prong, the petitioner must show "that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* at 693, 104 S.Ct. 2052. "It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding," as "[v]irtually every act or omission of counsel would meet that test." *Id.* And "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington*, 562 U.S. at 111–12, 131 S.Ct. 770. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* (quoting *Strickland*, 466 U.S. at 693, 697, 104 S.Ct. 2052). Ultimately, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112, 131 S.Ct. 770.

Cox v. Weber, 102 F.4th 663, 672 (4th Cir. 2024).

The court begins with petitioner's first claim alleging his trial counsel provided ineffective assistance because they failed to file a motion to sever pursuant to N.C. Gen. Stat. § 15A-927, after the prosecution moved for and was granted joinder of the Williams and Elmore offenses. North Carolina General Statutes § 15A-926(a) provides "[t]wo or more offense may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or continuing parts of a single scheme or plan." See State v. Silva, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). "In ruling on a motion to consolidate, the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense. the charges should not be consolidated." Silva, 282 S.E.2d at 452. "It is within the trial judge's discretion whether to permit the consolidation of offenses against a defendant" and the state appellate courts "will not overturn that decision absent a clear showing of abuse of discretion." State v. Cromartie, 177 N.C. App. 73, 78, 627 S.E.2d 677, 681 (2006).

In the event criminal charges are joined, a criminal defendant may file a motion to sever charges prior to trial, or, if the grounds for severance are not known before trial, he may file a motion to sever no later than the close of the State's evidence. N.C. Gen. Stat. § 15A-927(a)(1)-(2). Generally, "[t]he question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial." State v. Bracey, 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981). "The court is required to grant a severance motion if it is necessary for a fair determination of the defendant's guilt or innocence of each offense." Id. (citing N.C. Gen. Stat. § 15A-927(b)) (internal quotations omitted). A criminal defendant, however, waives his right to severance "if the motion is not made at the appropriate time." N.C. Gen. Stat. § 15A-927(a)(1) and (2); Silva, 282 S.E.2d at 453.

Here, the MAR court applied the Strickland test to petitioner's first ineffective assistance of counsel claim and determined he failed to establish both the deficient performance and the prejudice prongs. Regarding the first prong of the Strickland test, the MAR court determined petitioner's trial counsel's failure to file a motion to sever the Williams and Elmore offenses did not fall below an objective standard of reasonableness. See ((DE 17-19) ¶ 34). In making its decision, the MAR court considered portions of the Capital Defense Manual and the Performance Guidelines for Indigent Defense Representation in Non-Capital Cases, which were cited and relied upon as a basis for the opinions given by petitioner's expert witness, attorney David Rudolf, during the evidentiary hearing. See ((DE 17-19) ¶¶ 25-27; (DE 17-18), pp. 160, 171). The MAR court also considered Rudolf's testimony that based upon the standards presented, as well as his own experience, petitioner's trial counsel were ineffective for failing to file a motion to sever the offenses and failing to preserve the issue for appellate review. (Id. pp. 184, 185, 187, 188).

After hearing the evidence presented at the hearing, the MAR court correctly determined that the cited standards "are guides to determining what is reasonable, but they are only guides." (Id. ¶ 26) (citing Strickland, 466 U.S. at 688-89) ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."). The court likewise agrees with the MAR court's determination that trial "counsel's compliance or non-compliance with [the proffered] standards [are not] dispositive of whether or not counsel's conduct fell below an objective standard of reasonableness." (Id. ¶ 27); Yarbrough v. Johnson, 520 F.3d 329, 339 (4th Cir. 2008) ("[T]o hold defense counsel responsible for performing every task that the ABA Guidelines say he should do is to impose precisely the set of detailed rules for counsel's conduct that the Supreme Court has long since rejected as being unable to satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.") (internal quotations omitted).

Although petitioner's trial attorneys did not file a motion to sever, attorney Freedman vigorously opposed the prosecution's pretrial motion for joinder. ((DE 17-3), pp. 13-16); ((DE 17-18, p. 64, l. 22). In opposing the motion for joinder, attorney Freedman acknowledged the Williams and Elmore offenses were transactionally related, but asked the trial court judge to exercise his discretion not to join the offenses on the grounds that it would prejudice petitioner. (Id. p. 13). Specifically, defense counsel argued there was "a good chance that the jury could be inflamed by what happened to Ms. Elmore and use that to punish [petitioner] in terms of what happened to Ms. Williams" and that joinder could prejudice his client's defense strategies. (Id. p. 15, l. 3-6, 10-22). After hearing the parties' arguments, the trial court considered and rejected defense counsel's prejudice arguments, and granted the prosecution's motion to join the offenses. (Id. p. 18). Providing trial counsel the deference due in accordance with Strickland, petitioner cannot satisfy the first prong of the Strickland test for this claim. See Owens v. Stirling, 967 F.3d 396, 412 (4th Cir. 2020).

As for the prejudice prong of the Strickland test, petitioner asserts no reasonable finder of fact would have found him guilty of the first-degree murder of Williams without the alleged prejudicial testimony from Elmore. See ((DE 1-1), p. 19). The court disagrees, and finds petitioner cannot establish the prejudice prong of the Strickland test due to the overwhelming evidence of petitioner's guilt presented at trial. Specifically, as noted by the MAR court: "the State presented the testimony of multiple witnesses who were present in the Food Lion parking lot when the shooting [of Williams] occurred. In addition to eyewitnesses, a substantial portion of the incident resulting in Tracy Williams' death was captured on video by an ATM camera in the Food Lion parking lot." ((DE 17-19) ¶ 40). Further, the jury heard evidence at trial regarding threatening text messages petitioner sent to Williams the day before her murder, including the following: "Next time I see you, it will be Frog[4] again." . . . "You Peaches." ((DE 17-18), pp. 235-236). Based upon the foregoing, even if petitioner could establish the first prong of the Strickland test, he cannot establish the prejudice prong. See Williams v. Clarke, No. 2:14-cv-375, 2015 WL 7015680, at *9 (E.D. Va. Nov. 12, 2015), appeal dismissed, 656 F. App'x 17 (4th Cir. 2016); McGaha v. Riley, Civ. A. No. 0:08-3287-RBH, 2009 WL 3063070, at *11-12 (D.S.C. Sept. 21,

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[4] Williams' mother, Kathryn Williams, testified at trial and identified "Frog" as her son, who is in prison because he shot his girlfriend whose name is "Peaches." ((DE 17-18), p. 234, l. 10-18.)

2009); Chandler v. Netherland, Civ. A. No. 96-0966-R, 1997 WL 461907, at *13 (W.D. Va. Aug. 4, 1997) ("The court concludes that [the petitioner's] attorney's failure to preserve a federal due process challenge to Virginia's statutory review did not amount to ineffective assistance of counsel because it is highly unlikely that a challenge on those grounds would succeed."), aff'd, 145 F.3d 1323 (4th Cir. 1998).

The court next turns to petitioner's second ineffective assistance of counsel claim asserting his trial counsel failed to request a modification of the standard "Lack of Mental Capacity" jury instruction to include references to his psychiatric diagnoses. At trial, petitioner's counsel requested and received the North Carolina pattern jury instruction for diminished capacity. ((DE 17-23), p. 77). "The pattern instruction[] on diminished capacity direct[s] a jury to consider the defendant's mental capacity and whether or not intoxication or a drugged condition prevented the defendant from forming the specific intent necessary to commit the crimes charged." State v. Roache, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004); NCPI 305.11. The jury also was instructed on the defense of automatism or unconsciousness. ((DE 17-24), p. 35). "[D]efense counsel [however] did not request a modification to NCPI 305.11 so as to specifically refer to evidence that was presented in the case." ((DE17-19) ¶ 48). The MAR court considered petitioner's claim on post-conviction review and found as follows:

> 56. The Defendant does not contend that the law, as embodied in NCPI 305.11 and as given to the jury in this matter, was incorrect. Rather, Defendant contends that a modified instruction that included facts presented in this case would have been given a much clearer explanation of how the Defendant's alleged illness was to be interpreted in light of the instruction.
>
> 57. In the trial of this matter, both attorneys for the Defendant made closing arguments to the jury. Defense counsel Freedman's final argument began shortly after 10:58 a.m. and ended shortly before 12:10 p.m. During his final argument to the jury, Mr.

Freedman argued extensively to the jury the Defense's contention as to how the evidence in the case should be interpreted in light of the instructions on the law. Mr. Freedman argued extensively as to how the Defendant's conduct and actions were reflective of an individual suffering from post-traumatic stress disorder and in a dissociative state, which negated any evidence of malice and any evidence of premeditation and deliberation and made the charge of murder inapplicable to this defendant.

58. After a careful review of the transcript of defense counsel's final arguments and the Court's instructions on the law to the jury in this matter, there is little doubt the jury well understood the Defendant's contentions as to how the Defendant's conduct and alleged conditions should be interpreted in light of the Court's instructions on the law.

60. In light of all the circumstances in this matter, defense counsel's conduct in failing to request a modification to NCPI 305.11 so as to specifically refer to evidence that was presented in the case falls well within the wide range of professionally competent assistance.

61. With respect to the second prong of the Strickland test, as previously found, a thorough review of the trial in this matter reveals overwhelming record support for the jury's verdicts in each of the Defendant's matters.

62. The jury heard extensive arguments from counsel for the Defendant as to how the Defendant contended the law should be applied to the specific facts presented in this case.

((DE 17-19) ¶¶ 56-58, 60-62).

Here, the record reflects defense counsel called Dr. George P. Corvin,[5] a general and forensic psychiatrist, as a witness at trial and Corvin provided detailed testimony regarding petitioner's mental state at the time the offenses were committed as well has his mental health diagnoses. ((DE 17-26), pp. 6, 56-58; (DE 17-27), pp. 6). Defense counsel Freedman further

[5] Dr. Corvin is employed as a partner at North Raleigh Psychiatry. ((DE 17-26), p. 6).

argued extensively during his closing argument that petitioner's conduct and actions were reflective of an individual suffering from PTSD and in a dissociative state, as well as that petitioner's mental state negated evidence of malice, premeditation, and deliberation. ((DE 17-25), pp. 13-35). As stated, attorney Freedman requested, and the trial court gave pattern jury instruction 305.11 on lack of mental capacity, and the jury also was instructed on the defense of automatism or unconsciousness. ((DE 17-24), pp. 15-16); see also, Benjamin v. Sparks, 986 F.3d 332, 353 (4th Cir. 2021) ("[T]he use of pattern instructions is the preferred method of jury instruction in North Carolina.").

The Fourth Circuit Court of Appeals has held "it is not ineffective assistance of counsel to fail to offer additional or different instructions if the ones given by the trial court are proper." *Pruett v. Thompson*, 996 F.2d 1560, 1577 (4th Cir. 1993); Jackson v. Clarke, No. 7:19-cv-00006, 2019 WL 7282498, at *6 (W.D. Va. Dec. 27, 2019) ("Ordinarily, failure to offer additional or different jury instructions does not constitute ineffective assistance of counsel if the ones given by the trial court are proper.") (citation omitted), appeal dismissed, 837 F. App'x 1000 (4th Cir. 2021). Based upon the foregoing, the court agrees with the MAR court's conclusion that "there is little doubt the jury well understood the Defendant's contentions as to how the Defendant's conduct and alleged conditions should be interpreted in light of the Court's instructions on the law." ((DE 17-19) ¶ 58). Thus, petitioner cannot satisfy the first prong of the Strickland test for this claim.

Petitioner, likewise, has not established the prejudice prong of the Strickland test for this claim due to the overwhelming evidence of his guilt presented at trial, which the court discussed in detail above, and because he has not presented evidence that there is a reasonable probability the result of the proceedings would have been different. Thus, petitioner cannot establish the first or second prong of the Strickland test for this claim.

In summary, the MAR court did not reach a result contrary to, or involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States as to either of petitioner's ineffective assistance of counsel claims. See 28 U.S.C. § 2254(d). Likewise, the MAR court did not base its ruling 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 respondent's motion for summary judgment as to petitioner's ineffective assistance of counsel claims.

2. Full and Fair Hearing

In his third claim, petitioner alleges he "did not receive a full and fair hearing in state court because the trial court would not allow him to introduce evidence that an Assistant District Attorney opined that the Defendant would be prejudiced by joinder of offenses, and would not allow David Rudolf, the Defendant's ineffective assistance of counsel expert, to testify how the Defendant was prejudiced by joinder of offenses." ((DE 1), p. 18). This claim is not cognizable on federal habeas review, because "[a] state prisoner has no federal constitutional right to post-conviction proceedings in state court." See Lawrence v. Branker, 517 F.3d 700, 717 (4th Cir. 2008); Thomas v. Green, No. CCB-06-248, 2007 WL 9758417, at *3 (D. Md. Aug. 27, 2007), appeal dismissed, 271 F. App'x 311 (4th Cir. 2008); King v. Warden, No. 9:07-0104-TLW-GCK, 2007 WL 3181292, at *12 (D.S.C. Oct. 29, 2007). "[E]ven where there is some error in state post-conviction proceedings, a petitioner is not entitled to federal habeas relief because the assignment of error relating to those post-conviction proceedings represents an attack on a proceeding collateral to detention and not to the detention itself." Lawrence, 517 F.3d at 717; see also, Jamison v. Cohen, 756 F. App'x 265, 270 (4th Cir. 2018). Based upon the foregoing, respondent's motion for summary judgment is granted as to this claim.

As for petitioner's motion for an evidentiary hearing, the court finds that an evidentiary hearing is not necessary because the existing record is sufficient to resolve the issues raised in the petition. 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.

CONCLUSION

In summary, the court GRANTS petitioner's motion to expand the page limitation (DE 22). Respondent's motion for summary judgment (DE 15) also is GRANTED. The certificate of appealability is DENIED. See 28 U.S.C. § 2253(c); Buck v. Davis, 580 U.S. 100, 115 (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 of Court is DIRECTED to close this case.

SO ORDERED, this the 13 day of December, 2024.

Terrence Boyle
TERRENCE W. BOYLE
United States District Judge

Appendix C

Decision of United States Court of Appeals for Rehearing

FILED: January 13, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-6031
(5:23-hc-02279-BO)

GARRY ARTIS YARBOROUGH

Petitioner - Appellant

v.

LESLIE COOLEY DISMUKES

Respondent - Appellee

O R D E R

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 Thacker, Judge Benjamin, and Senior Judge Traxler.

For the Court

/s/ Nwamaka Anowi, Clerk

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