IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5-15-HC-2206-BO

BRANDON DAVID CADY, Defendant-Petitioner, -against- DENNIS DANIELS, ADMINISTRATOR OF MAURY CORRECTIONAL INSTITUTE, Respondent.	)	MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 28 U.S.C. § 2254 Local Civil Rules 7.1(e) and 7.2

Summary of the Nature of the Case and Pertinent Facts

Petitioner was arrested on February 6, 2009 and charged with Statutory Rape and Indecent Liberties With a Minor in violation of North Carolina General Statutes §§ 14-27.7A and 14-202.1 for an incident involving a fourteen (14) year old girl, A.Y., that occurred on December 13, 2008. Attorneys James MacRae, Jr., Esq., and Scott T. Whitley Esq., were retained to represent Petitioner at trial.

Prior to trial, Petitioner informed Mr. MacRae that he suffered from mental illness as a result of his previous experiences during deployments for the United States Army. Mr. MacRae never had an expert examine Petitioner to determine the severity of his mental defect.

After cross-examination of the alleged victim, A.Y., proved to be ineffective, Mr. MacRae told Petitioner to plead guilty. Mr. MacRae refused to proceed with trial since he failed to prepare a viable defense beyond attempting to discredit A.Y.

Based on Mr. MacRae's representation that Petitioner had no other choice, Petitioner withdrew his plea of not guilty and entered a plea of guilty on March 26, 2014 to Attempted

Statutory Rape pursuant to a plea agreement. Petitioner was sentenced the same day to a term of one hundred twenty (120) to one hundred fifty-three (153) months imprisonment.

On March 24, 2015, Petitioner filed a motion for appropriate relief (MAR), which included claims that Petitioner received ineffective assistance of counsel and that his plea was involuntary given the circumstances. Mr. MacRae filed a response to the MAR on June 9, 2014. The State never filed a response. The MAR was summarily denied on July 8, 2015. On August 7, 2015, Petitioner filed a petition for writ of certiorari in the North Carolina Court of Appeals which was denied on August 25, 2015.

On September 9, 2015, Petitioner filed the instant federal habeas petition via Pacer ECF. However, the payment system for the filing fee would not properly process the payment even though the payment was tendered. Undersigned counsel contacted the Clerk to determine the best course of action to timely file the habeas petition. An agent of the Clerk's office assured counsel that the filing would be accepted as timely under the circumstances, and was told to mail the proof of payment and error message along with the habeas application form and supporting memorandum directly to the Clerk's office. (See Exhibit A). Upon receipt of the Petition, proof of payment, and error message, the Clerk docketed the case with filing fee receipt number 0417-3414833, which was included in the enclosed materials and indicates the payment was made on September 9, 2015. (Dkt. #1, Exhibit A).

Respondent filed a Motion for Summary Judgment on November 3, 2015, and Petitioner submits the instant Memorandum in Opposition.

ARGUMENT

I. Standard of Review

A. *Summary Judgment Standard*

Summary judgment is appropriate in cases where there is no genuine issue of material fact, and it appears that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(2); United States v. Lee, 943 F.2d 366, 368 (4th Cir. 1991). Any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). However, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

B. *28 U.S.C. § 2254 Standard*

Additionally, this Court is required to consider the standard of review for a petition for writ of habeas corpus under the requirements set forth in 28 U.S.C. § 2254. Section 2254(d) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); see also Tice v. Johnson, 647 F.3d 87, 103 (4th Cir. 2011).

Further, 28 U.S.C. § 2254(e) states:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
> (A) the claim relies on—
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The United States Supreme Court has held a state court decision is contrary to clearly established federal law if "the state court 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 a result opposite to ours." Williams v. Taylor, 529 U.S. 362, 405 (2000) (quoted by Lewis v. Wheeler, 609 F.3d 291, 300 (4th Cir. 2010)). A state court unreasonably applies federal law when it "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." Williams, 529 U.S. at 407; Lewis, 609 F.3d at 300-01 (stating that a state court unreasonably applies federal law when it "extends a legal principle from [the Court's] 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") (citation and quotation marks omitted).

"[A]n unreasonable application of federal law is different from an incorrect application of federal law" for § 2254(d)(1) purposes. Williams, 529 U.S. at 410. The former requires a "substantially higher threshold" to obtain relief than does the latter. Schiro v. Landrigan, 550 U.S. 465, 473 (2007). A state court's determination that a claim fails on its merits cannot be overturned by a federal habeas court "so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 102 (2011) (internal quotations omitted) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

A habeas court, therefore, must "determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Richter, 562 U.S. at 102 A petitioner has the burden of establishing that the state court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 102-03.

II. Argument on the Merits

A. *Petitioner's Claims Are Meritorious*

i. Ineffective Assistance of Counsel

The Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed

the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

In United States v. Cronic, Strickland's companion case, the United States Supreme Court provided a separate framework or standard for the analysis of claims alleging ineffective assistance of counsel when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." United States v. Cronic, at 659. In Cronic, the United States Supreme Court opined that:

> [t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.

United States v. Cronic, at 657 (citing United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied sub nom., Sielaff v. Williams, 423 U.S. 876 (1975).

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690.

To satisfy that burden, the inquiry focuses on the two-prong test established by the United States Supreme Court in Strickland:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. To satisfy the prejudice prong of Strickland in the context of a guilty plea, Petitioner must show there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, (1985).

The right to effective assistance of counsel under the United States Constitution requires that trial counsel conduct a reasonable investigation into the facts of the case. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding "the defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial"); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel).

"[A]n attorney must engage in a reasonable amount of pretrial investigation and at a minimum, interview potential witnesses and make an independent investigation of the facts and circumstances in the case." Bryant v. Scott, 28 F.3d 1411, 1415 (5th Cir. 1994) (internal quotation marks and alterations omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after

less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland v. Washington, 466 U.S. 688, 690-91 (1988); see also Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992) (holding that counsel did not make a strategic choice not to call a witness when counsel did not talk to that witness).

In Petitioner's case, he has alleged that he received ineffective assistance of counsel at trial due to the fact that Mr. MacRae failed to adequately prepare a reasonable defense strategy. Petitioner informed Mr. MacRae that he suffered from mental illness which required him to take prescribed medication due to his deployments in the United States Army. Despite this information, Mr. MacRae failed to request any medical records from the United States Department of Veterans Affairs and never scheduled a mental evaluation of Petitioner to determine the extent of his mental health issues. Petitioner also notified Mr. MacRae that he should obtain phone records which would show that he was not contacting A.Y. but instead, it was A.Y. who would initiate the conversations. Mr. MacRae never requested the phone records.

Instead, Mr. MacRae unreasonably proceeded to trial without any viable defense strategy in mind. After he cross-examined A.Y., he immediately told Petitioner that he needed to take a plea deal. During the testimony of V.M., Mr. MacRae convinced Petitioner to take a guilty plea. This was largely in part due to the fact that V.M.'s testimony implicated Petitioner for additional criminal charges.

Petitioner previously raised this issue in his Motion for Appropriate Relief in the state of North Carolina. Mr. MacRae filed a response to the motion and failed to address whether he had in fact requested or reviewed Petitioner's medical records, whether or not he had requested phone records, and whether he had a viable defense strategy at the time of trial. (Exhibit B). Instead, Mr. MacRae vaguely stated "I was made aware of his mental condition" and attempted to cast blame

on Petitioner for his failure to schedule a mental evaluation by stating "[Petitioner] never suggested to me that there was any time in his life where he was not aware of the difference between right and wrong." (Exhibit B).

Mr. MacRae also stated "I developed a defense strategy based our investigation (i.e. went to the crime scene, spoke to witnesses, etc.)" and "Mr. Whitley and I spent a substantial amount of time preparing a defense." (Exhibit B). These self-serving blanket assertions do not conclusively refute Petitioner's contention that he received ineffective assistance of counsel at trial. Actually, the fact that Mr. MacRae did not affirmatively state that he reviewed Petitioner's medical records indicates that he never did and he failed to address his failure to obtain phone records.

Since Mr. MacRae failed to conduct a thorough investigation into the relevant facts to develop potential defenses, his so called "strategic choices" are entitled to less deference. Mr. MacRae's failure to have Petitioner evaluated by a psychologist and failure to obtain phone records should not qualify as strategic choices where he has not reviewed Petitioner's medical records and utterly failed to investigate the contents of the phone conversations that occurred. See Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992) (holding that counsel did not make a strategic choice not to call a witness when counsel did not talk to that witness).

Any reasonable defense attorney would have conducted a thorough investigation into Petitioner's mental health and obtained the phone records to potentially discredit A.Y.'s testimony. Mr. MacRae's inaction clearly meets the deficient performance prong under Strickland. Petitioner was prejudiced as required by Hill v. Lockhart as he would have proceeded to trial had Mr. MacRae adequately prepared a defense. Had Mr. MacRae actually conducted a thorough investigation, he would have been aware that V.M.'s testimony would severely prejudice Petitioner and he could have prepared to discredit her at trial. Instead, Mr. MacRae's deficient performance resulted in his

de facto abandonment of Petitioner at trial and Petitioner was forced to accept the State's plea offer.

ii. Involuntary Plea

"[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover up of unconstitutionality." Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). The Supreme Court in Boykin went on to hold:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.

Boykin v. Alabama, supra at 243 (citing McCarthy v. United States, 394 U.S. 459 (1969)).

When determining whether a guilty plea is made knowingly, voluntarily and intelligently, a court must consider all the relevant facts and circumstances in the case, including, but not limited to, the nature and terms of the agreement and the age, experience, and background of the accused. Iowa v. Tovar, 541 U.S. 77, 78 (2004). A reviewing court must examine the totality of the relevant circumstances. Brady v. United States, 397 U.S. 742, 749 (1970).

In Brady, the United States Supreme Court set forth a Constitutional standard for determining whether a guilty plea was voluntary:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their

> nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Brady at 754 (citing Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957)) (emphasis added).

Mr. MacRae's threat of abandonment of Petitioner at trial was the moving force behind Petitioner's entrance of his guilty plea. Petitioner was sitting in the middle of trial when he realized Mr. MacRae's cross-examination of A.Y. was underwhelming and he was immediately confronted by Mr. MacRae with the fact that there was no strategy moving forward and he refused to proceed. Also, Petitioner just learned that V.M.'s testimony implicated him for additional criminal charges. Faced with these pressures, and without a willing attorney to represent him, Petitioner felt that he had no other choice but to accept a plea offer from the State. Petitioner's plea was therefore entered involuntary in violation of the United States Constitution.

iii. Conclusion

The trial court's summary denial of the MAR was erroneous as Petitioner's claims that he received ineffective assistance of counsel and his plea was entered involuntarily are not clearly refuted by the record. The trial court imputed their own facts from the trial to deny Petitioner's MAR as they stated Petitioner's first attorney asked the court for a continuance due to the fact that he had received Petitioner's medical records. In actuality, Mr. MacRae's response was devoid of any mention of medical records and the trial court's finding that the records had in fact been obtained should be given little to no weight.

Additionally, the trial court's order denying the MAR failed to analyze Petitioner's claim that his plea was involuntarily entered, apparently due to the fact that he did not affirmatively object to the factual basis or acceptance of the plea and never moved to withdraw his plea. The correct analysis is whether Petitioner's plea was entered voluntarily under the totality of the

circumstances. See Brady, 397 U.S. at 749 (1970). Instead the trial court decided to ignore Petitioner's claim based on the fact that he never objected or moved to withdraw, which was an incorrect application of clearly established federal law.

Therefore, drawing all inferences in favor of Petitioner, the trial court's summary denial of Petitioner's MAR was unreasonable in light of the evidence presented and constituted an incorrect application of clearly established federal law. At the very least, Petitioner has raised disputed issues of material fact and Respondent's Motion for summary Judgment should be denied.

B. *Petitioner's Claims Are Not Barred by the Statute of Limitation*

Under the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104 132, 110 Stat. 1214, a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court must be filed within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). In addition, the one-year limitations period is tolled during pendency of a properly filed state post-conviction proceeding. See 28 U.S.C. § 2244(d)(2).

Petitioner's one year period of limitation began to run on April 9, 2015, which is when his time to file an appeal had expired. Respondent contends that Petitioner should not be afforded the 14 day period to seek appellate review because he apparently had no right to appeal. However,

Respondent does not cite to any authority to support their argument. In reality, the AEDPA reads, the statute of limitations for filing a "petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court must be filed within one year **of the latest of**: (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

The plain language of the AEDPA indicates that Petitioner's judgment became final for the purposes of calculating the statute of limitations under 28 U.S.C. § 2244(d)(1)(A) upon the expiration of the 14 day period for filing a notice of appeal under North Carolina Rule of Appellate Procedure 4(a)(2). Therefore, the one year limitation began to run on April 9, 2014, 14 days after entry of his guilty plea.

Additionally, Respondent contends that Petitioner's MAR should be deemed filed on March 31, 2014, rather than on March 24, 2015, which is when counsel deposited the motion enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the Postal Service of the United States. N.C.G.S. § 15A-951(c), which governs the filing of MARs pursuant to. N.C.G.S. § 15A-1420(a)(3), is silent on when the motion is deemed filed. However, N.C.G.S. § 15A-951(b) provides that service of a motion is complete upon mailing and Rule 26 of the North Carolina Rules of Appellate Procedure states that papers are deemed filed upon mailing. Therefore, Petitioner's MAR should be deemed filed on the date upon which it was mailed, which was March 24, 2015.

The instant petition should also be deemed filed on September 9, 2015, rather than September 15, 2015, as counsel attempted to submit the petition to the Clerk of Court through the CM/ECF system on September 9, 2015. A system error prevented the filing of the petition and proof of the error was submitted to the Clerk of Court. (Exhibit A). In any event, equitable tolling

would be appropriate as Petitioner was diligently pursuing his rights and extraordinary circumstances outside of Petitioner's control prevented him from filing the instant petition on September 9, 2015, specifically an error with the CM/ECF system. Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000).

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, this Court should deny Respondent's Motion for Summary Judgment and grant the petition in its entirety.

WHEREFORE, Petitioner prays that this Court:

A. Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement upon a personal recognizance bond; or in the alternative,

B. Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement unless the judgment of conviction and sentence are vacated and he be restored to pre-pleading status; or in the alternative;

C. Hold an evidentiary hearing to consider the merits of Petitioner's claims; or in the alternative;

D. For such other and further relief as this Court may deem just, proper and equitable.

Dated: Orlando, Florida
November 20, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November 2015, I served a copy of the foregoing upon the parties listed below:

United States District Court, Clerk of the Court
Eastern District of North Carolina
VIA ECF

Clarence J. DelForge, III
Assistant Attorney General
VIA ECF

/s/Patrick Michael Megaro, Esq.
Patrick Michael Megaro, Esq.