PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6852

TERRENCE LOWELL HYMAN,

Petitioner – Appellee,

v.

CASANDRA SKINNER HOEKSTRA, Interim Secretary, North Carolina Department of Public Safety,

Respondent – Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:08-hc-02066-BO)

Argued: March 11, 2022 Decided: July 19, 2022

Before WILKINSON, KING, and AGEE, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Agee wrote the opinion, in which Judge Wilkinson joined. Judge King wrote a separate opinion dissenting.

ARGUED: Nicholaos George Vlahos, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellant. Kristen Lindsay Todd, NORTH CAROLINA PRISONER LEGAL SERVICES, INC., Raleigh, North Carolina, for Appellee. **ON BRIEF:** Joshua H. Stein, Attorney General, Mary Carla Babb, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellant.

AGEE, Circuit Judge:

Casandra Skinner Hoekstra, the Interim Secretary of the North Carolina Department of Public Safety (the "State"), appeals from the district court's order granting state prisoner Terrence Lowell Hyman's 28 U.S.C. § 2254 petition for a writ of habeas corpus. For the following reasons, we vacate the district court's judgment and remand with instructions to dismiss Hyman's petition.

I.

"As a federal court reviewing a state court's decision under § 2254, we do so through a narrow lens, 'carefully consider[ing] all the reasons and evidence supporting [it].' *Mahdi v. Stirling*, 20 F.4th 846, 854 (4th Cir. 2021) (alterations in original) (quoting *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam)). Only then may we determine whether a state court's judgment resulted from "an error that lies beyond any possibility for fairminded disagreement." *Mays*, 141 S. Ct. at 1146.[1]

Hyman's sole claim in his § 2254 petition is that his lead trial counsel, Teresa Smallwood, rendered ineffective assistance by failing to withdraw and testify on his behalf to impeach Derrick Speller, one of the State's key witnesses. We begin by recounting the offense underlying Hyman's conviction and summarizing the proceedings before the North Carolina state trial court. Next, we review the evidentiary hearing addressing whether

[1] Internal quotation marks, citations, and alterations have been omitted unless otherwise indicated.

Smallwood operated under an actual conflict of interest based on her prior representation of Speller. After discussing Hyman's post-conviction proceedings, we then turn to the district court's grant of his petition from which the State now appeals.

A. The Offense

The Supreme Court of North Carolina ("SCNC") summarized the events underlying Hyman's conviction:

> At approximately 10:00 p.m. on 5 May 2001, Earnest Bennett arrived at the L and Q nightclub with his friends Shelton Lamont Gilliam, Tyrone Knight, and Alton Bennett. As the night progressed and early morning arrived, a man confronted Mr. Bennett, leading to an argument between the two men that escalated into an altercation after a "crew of people" approached Mr. Bennett and began to hit him with "bottles, chairs and basically everything that they could find."

State v. Hyman, 817 S.E.2d 157, 159 (N.C. 2018). As the altercation escalated, Bennett was shot multiple times inside and outside the club. He later succumbed to his injuries.

Hyman was arrested soon after, and the trial court appointed Smallwood to represent him. *See* J.A. 286 (Smallwood's time sheet reflecting that she "review[ed] appointment notice/talk[ed] to family" on May 14, 2001). The court also appointed W. Hackney High as second-chair counsel. Nearly three months after the shooting, the Bertie County, North Carolina, grand jury returned a one-count indictment charging Hyman with first-degree murder.

B. The Trial and Smallwood's Cross-Examination of Speller

The case went to trial in September 2003, with Superior Court Judge Cy A. Grant, Sr., presiding. Over several weeks, the jury heard conflicting accounts about what happened the night of Bennett's murder.

> Derrick Speller testified . . . that, after the altercation had been in progress for approximately fifteen minutes, he observed . . . Hyman enter the nightclub with a firearm and shoot it at Mr. Bennett. At that point, Mr. Speller observed Mr. Bennett "clench his side and run for the door." As Mr. Bennett reached the nightclub door, [Hyman] shot him again in the small of his back. According to Mr. Speller, Mr. Bennett and [Hyman] exited the nightclub once [Hyman] had shot Mr. Bennett a second time. Outside the nightclub, Mr. Speller saw [Hyman] "kneeling down over" Mr. Bennett, who was on the ground, and shoot Mr. Bennett a third time. . . .[2]
>
> On the other hand, Demetrius Pugh testified . . . that he observed Demetrius Jordan[3] shoot Mr. Bennett multiple times inside and outside of the nightclub.[4] According to Demetrius Pugh, Mr. Jordan had a .38 caliber

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[2] Another witness, Robert Wilson, also identified Hyman as the shooter. Wilson was a regular patron of the L and Q social club who sometimes helped man the door or serve food. Wilson knew Hyman, had seen him "at the club on several occasions," and saw him there "that night." J.A. 1098–99. Wilson testified that he saw "Hyman enter the club with a gun. He had his gray shirt in his right hand and a three-eighty [i.e., a .38 caliber handgun] in his left hand with a white t-shirt on." J.A. 1106. Just after, Wilson heard "two shots fired inside the club," *id.*, and then he saw "Hyman come out with a gun. He made a statement—Yeah, you f'ing with a real MF and shot [Bennett] four times[.]" J.A. 1107.

Tyrone Knight testified generally to seeing a man with a .38 caliber handgun, but he had not seen the man's face. Knight was, however, able to describe the man's weight and distinct hairstyle, which matched Hyman's appearance at the time of the incident. *Compare* J.A. 914–15 (describing "a man about six feet" with "little dreds [sic]" that passed by "with a gun tucked in the back of his hand," and estimating that he weighed "about one seventy, one eighty"), *and* J.A. 924 (identifying the dreads as being "about two inches long" and the gun as a "three-eighty"), *and* J.A. 971–72 (describing the man's build), *with* J.A. 1099–1100, 1148 (Robert Wilson describing Hyman as weighing "a hundred and sixty-five, a hundred and seventy pounds" with short dreads).

[3] Robert Wilson testified that he also knew Demetrius Jordan, whom he described as "short," weighing "about a hundred and forty-eight pounds," and having a "close" haircut at the time of the shooting. J.A. 1124–25; *see also* J.A. 279 (Demetrius Jordan's prisoner control record listing him as 5'6" and 140 pounds with a "small" build).

[4] The State impeached Demetrius Pugh with his prior statement asserting he saw Hyman shoot Bennett outside the club. *See* J.A. 1663–67 (testifying that, after he was arrested for breaking and entering and larceny with a firearm, he signed a blank statement provided by the officers); J.A. 1691–99 (reading the portions of the statement identifying

(Continued)

> handgun inside the nightclub and procured a nine millimeter handgun from his van after leaving the nightclub's interior. In addition, Lloyd Pugh[5] testified . . . that he heard two gunshots inside the nightclub. Although Lloyd Pugh could not see who had fired these shots, he knew that [Hyman] had not fired them because he could see [Hyman], who was leaving the nightclub at that time, and observed that he did not have a firearm on his person when the shots were fired. As Lloyd Pugh attempted to bring the fight inside the nightclub under control, he heard additional gunshots outside. Simultaneously, Lloyd Pugh observed [Hyman] reentering the nightclub without a firearm in his possession.

Hyman, 817 S.E.2d at 159 (footnotes omitted).

Amid this conflicting testimony, Speller testified on direct examination that he had spoken with Smallwood before the trial, and suggested that she had "wanted [him] to help her with the case at one point in time" J.A. 110. After a fourteen-minute recess, Smallwood began her cross-examination of Speller, which included the following exchange.

SMALLWOOD:	I believe you testified earlier that you had not talked to any kind of law enforcement. The only person you talked to was Teresa?
SPELLER:	Yes.
SMALLWOOD:	And you're speaking of me?
SPELLER:	Yes.
SMALLWOOD:	You and I had a conversation in and around the time you were being convicted of a crime; isn't that correct?
SPELLER:	Excuse me?
SMALLWOOD:	You had a case that was pending here in Bertie County? You were trying to keep from going to jail?
SPELLER:	When we talked about what?
SMALLWOOD:	You said you talked to me about this matter?

Demetrius Jordan as the shooter inside the club and Hyman as the shooter outside the club who fired the fatal shots).

[5] Lloyd Pugh owned the L and Q nightclub.

SPELLER: Yes.

SMALLWOOD: You caught me a little off guard because I couldn't remember.

SPELLER: I'm sorry about that.

SMALLWOOD: You had a case that was pending that I represented you on; isn't that right?

SPELLER: That was prior to me—prior to us talking about this case.

. . .

SMALLWOOD: At some point in time during that conversation it came up that you had been at the L and Q, do you remember that?

SPELLER: No.

SMALLWOOD: You don't remember that?

SPELLER: No.

SMALLWOOD: Do you remember when you told the members of the jury this earlier that I wanted you to help me, it was because you told me a story on that particular occasion as to what you say happened; isn't that correct?

SPELLER: No, it's not.

SMALLWOOD: Do you recall when you sat in my office, you remember coming to my office?

SPELLER: Yes.

SMALLWOOD: You sat in my office and you told me across the desk from me that you had seen Demetrius Jordan . . . shoot a weapon; isn't that correct?

SPELLER: No, it's not.

SMALLWOOD: And you told me that the reason you didn't want to come forward is because you had been hustling for Turnell Lee and Demetrius Jordan and them dudes was lethal. Do you recall saying that?

SPELLER: No, I did not.

SMALLWOOD: They would off you in a minute. You don't remember that?

SPELLER: No.

SMALLWOOD: I didn't either. Until I went back and got the notes. Then in the course of the conversation when you and I were talking, you said that you would help in any way you could; isn't that correct?

SPELLER: No, it's not.

. . .

SMALLWOOD: Well, back in '01 when you talked to me you said you saw the whole thing; isn't that right?

SPELLER: We never talked about this case.

SMALLWOOD: We didn't talk?

SPELLER: No.

SMALLWOOD: Didn't you say you told Teresa the whole story?

SPELLER: No, [the district attorney] asked me had I talked to anybody. . . . I said, I haven't spoken to nobody about this case other than you.

When I spoke to you about that case, that was when you sent Tyrone Watson to say that you wanted to talk to me, Turnell and a few other people. I went to your office and seen—and talked to you and [Tonza Ruffin[6]] in the parking lot at your office. You all was leaving.

I told you at that time I couldn't help you on this case, that I would harm [Hyman] more than I could help him if I was brought on the stand to testify. That's the only conversation that you and I ever had about this case.

SMALLWOOD: Derrick, that's the second time we talked about this; isn't that correct?

SPELLER: No, it's not. That is the only time you and I ever talked about this case.

SMALLWOOD: Didn't I represent you in '01?

SPELLER: No, [Tonza Ruffin] represented me.

SMALLWOOD: Well, our office. Our office represented you, correct?

SPELLER: Yes.

[6] Ruffin was Smallwood's law partner.

SMALLWOOD: That was your occasion to come to the office, do you recall?

SPELLER: To talk about my probation violation.

SMALLWOOD: Correct.

SPELLER: Yes.

SMALLWOOD: And I ultimately represented you in that case; isn't that correct?

SPELLER: Did you represent me in that case?

SMALLWOOD: Before the judge, you and I stood before the judge on that case?

SPELLER: Yes, we stood before the judge.

SMALLWOOD: And it was in the occurrence of that that you talked about all these things as to why you never came forward; isn't that correct?

SPELLER: No, it is not.

SMALLWOOD: You're telling me today that it was not you who said, Demetrius and Turnell, I hustled for them and I can't talk about those guys because them dudes are lethal. You don't recall telling me that?

SPELLER: We never had this conversation.

SMALLWOOD: And we never had a conversation where you said you saw Demetrius with a three-eighty and a nine millimeter?

SPELLER: We never had that conversation.

SMALLWOOD: You didn't tell me or it didn't happen?

SPELLER: I didn't tell you that.

SMALLWOOD: You don't recall ever telling me, he shot the guy then ran out the back door?

SPELLER: No.

SMALLWOOD: You don't recall that?

SPELLER: No, I never told you that.

SMALLWOOD: You never said, somebody else shot at the guy with a chrome-looking gun but I don't know who that was? You don't remember that?

SPELLER: I'll say it again. You and I never had this conversation that you are talking about, never.

SMALLWOOD: You don't recall saying I heard Demetrius shot him again outside but I don't know for sure? You don't recall that?

SPELLER: We never had this conversation.

. . .

SMALLWOOD: Until [the prosecution] sent for you, you never told anybody [about what you saw that night]; is that right? Other than you were starting to talk to me; is that right?

SPELLER: Other than the day you, [Tonza Ruffin] and myself had a conversation in your parking lot. Other than that, no.

SMALLWOOD: And then is when you say you never told me anything. You just said you couldn't help me, you would hurt me; right?

SPELLER: That I would harm you more than I could help you. Yes, that's it.

SMALLWOOD: But you never recall having a conversation with me regarding the things that I told you that you said?

SPELLER: We have never had that conversation.

J.A. 113–17, 120–22, 148–49. During this exchange, Smallwood tried to show Speller her "notes" "[t]o see if they're true." J.A. 129–30. The trial court told her that she "can't do that," so Smallwood withdrew her request. J.A. 130.

The jury ultimately convicted Hyman of first-degree murder and recommended that he be sentenced to life imprisonment without the possibility of parole. The court entered a judgment adopting that recommendation.

C. The 2005 Remand Hearing

On direct appeal, Hyman argued that the trial court erred in failing to conduct a hearing when it discovered Smallwood's potential conflict of interest based on her prior representation of Speller. The North Carolina Court of Appeals ("NCCOA") remanded the case for an evidentiary hearing (the "2005 remand hearing"), over which Judge Grant again presided. But this time the court appointed A. Jackson Warmack to represent Hyman.

Smallwood was the only witness. We recite the relevant portion of her testimony.

ASBELL[7]: Could you tell the Court about your prior representation of Mr. Speller, when that occurred and what type of case did you represent him on?

SMALLWOOD: I don't remember precisely the date and time that it occurred, Your Honor. But I do know that Mr. Speller was, in fact, a client of the firm. He had been—well, he actually retained Ms. Ruffin on a probation violation matter. And at some point in time I do believe I stepped in on her behalf to enter his plea on the probation matter, the probation violation case.

. . .

ASBELL: How long would you say that you represented him or how much contact did you have with Mr. Speller regarding that probation violation?

SMALLWOOD: Maybe five or ten minutes.

ASBELL: And during that five or ten minutes did you speak with Mr. Speller about anything other than his probation violation?

SMALLWOOD: I'm certain I did not.

[7] Valerie Asbell represented the State at Hyman's trial and at the 2005 remand hearing.

ASBELL: And that would conclude your representation of Mr. Speller?

SMALLWOOD: That's correct.

ASBELL: Did you previously represent Mr. Speller on anything to your knowledge other than that probation violation?

SMALLWOOD: Not that I'm aware of.

. . .

ASBLL: During your representation you never had any conversation at all with Derrick Speller about Terrence Hyman?

SMALLWOOD: No, not at all. I don't know the dates but I would venture to say the two did not meet. I'm not certain of the date that Mr. Speller's case came about but I'm not sure that Mr. Hyman had even been charged with murder at that time.

. . .

ASBELL: Have you reviewed your cross-examination of [Speller]?

SMALLWOOD: I perused it.

ASBELL: And during that time you asked him questions about a conversation that you had had about—with him, you asked him certain questions about conversations you had had with him regarding other people; is that correct?

SMALLWOOD: I think I did.

ASBELL: That information that you questioned him about, is what you stated earlier that was not any of that information was not obtained during your representation of Derrick Speller; is that correct?

SMALLWOOD: No, in fact, I think the record shows the conversations I had with Mr. Speller pertaining to Mr. Hyman took place from an investigatory standpoint after the fact of

my representation of him and incident to my preparation for the Hyman trial.

. . .

ASBELL: So the information that you actually cross-examined Mr. Speller on was in response to a conversation you had when you were investigating the case and preparing for trial; is that correct?

SMALLWOOD: Absolutely.

ASBELL: So any questions that you asked Mr. Speller regarding previous conversations you had with him were regarding your preparation for Mr. Hyman's case and not on any prior knowledge you had of Derrick Speller; is that correct?

SMALLWOOD: That's correct.

J.A. 171–76. The following exchange occurred during cross-examination.

WARMACK: [T]o your knowledge there was no overlap between [your representation of Speller and Hyman]? In other words, you weren't representing the two at the same time?

SMALLWOOD: Not to my knowledge.

. . .

WARMACK: And prior to your representation of Mr. Speller in court did you ever sit down and either in your office or in the courthouse—well, I'm sure you did or had a conversation with him about what was going to happen with the probation violation?

SMALLWOOD: I'm not certain that I did do that, not me personally.

WARMACK: So you may have been operating from some notes?

SMALLWOOD: More likely than not I was operating from my hip, which is what I have done for twenty years.

. . .

WARMACK: I believe there was some reference to [Speller] said there was a conversation in the parking lot, I think your representation was there was a conversation he had with you in . . . your office?

SMALLWOOD: Correct.

WARMACK: And but as I understand what you are saying that happened, at least to your recollection, after you were done representing Mr. Speller?

SMALLWOOD: Correct.

WARMACK: So at some time post probation hearing?

SMALLWOOD: Yes.

. . .

WARMACK: And I believe at least in the record it indicated that you had taken some notes of that conversation?

SMALLWOOD: Correct.

WARMACK: Okay. And I think he then made reference to another meeting you had in a parking lot?

SMALLWOOD: I didn't have a subsequent meeting with him.

WARMACK: So you had the meeting with him in your office?

SMALLWOOD: Correct.

J.A. 176–79. During a recess, Judge Grant called the deputy clerk of court for Bertie County, North Carolina, and learned that Speller was served with an arrest warrant for a probation violation on July 18, 2002, and that he had hired Ruffin to represent him. Ruffin entered an appearance in his case on August 14, 2002. And Speller appeared in court for the hearing on September 26, 2002. The records confirmed that Smallwood represented Speller at the revocation hearing, though Ruffin was listed as counsel of record.

The court entered an order finding that Smallwood's representation of Speller did not adversely affect her representation of Hyman. The NCCOA affirmed, noting that Hyman had failed to challenge Judge Grant's findings of fact, rendering them conclusive for purposes of appellate review. Hyman then unsuccessfully petitioned the SCNC for a writ of certiorari.

D. Hyman's § 2254 Petition

While his direct appeal from his criminal conviction was pending in the state courts, Hyman filed a § 2254 petition, arguing that Smallwood's decision not to withdraw from his case and testify as an exculpatory witness violated his Sixth Amendment right to effective assistance of conflict-free counsel (the "exculpatory-witness IAC claim").

In March 2010, the district court granted the petition, finding that Smallwood's actual conflict of interest adversely affected her performance and thus prejudiced Hyman's defense. *See Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980) (holding that prejudice is presumed when a defendant establishes his attorney operated under an actual conflict of interest arising from concurrent representation of multiple clients which adversely affected the attorney's performance). The State appealed, and we stayed further proceedings in "the interests of federalism and comity" to give the North Carolina state courts an opportunity to weigh in on the procedural and substantive issues related to the exculpatory-witness IAC claim. *Hyman v. Keller*, No. 10-6652, 2011 WL 3489092, at *1 (4th Cir. Aug. 10, 2011).

E. The MAR Court's Ruling

Two years later, Hyman filed a motion for appropriate relief ("MAR") in the Bertie County Superior Court (the "MAR court"), raising the same exculpatory-witness IAC

claim. The court held an evidentiary hearing (the "MAR evidentiary hearing"). Judge Grant again presided. Hyman offered evidence and testimony from High, Ruffin, Warmack, and Ravie Manne, a North Carolina Prisoner Legal Services ("NCPLS") attorney who had reviewed Smallwood's trial file. Even though Hyman bore the burden of proof, he called neither Smallwood nor Speller—the two most important witnesses for his claim—to testify. *See State v. Allen*, 861 S.E.2d 273, 281 n.4 (N.C. 2021) (recognizing "the undisputed premise that the [MAR petitioner] ultimately bears the burden of proving by a preponderance of the evidence 'the existence of the asserted ground for relief'" (quoting N.C. Gen. Stat. § 15A–1420(c)(6)).

The MAR court denied Hyman's motion. In doing so, Judge Grant made detailed factual findings, the most relevant of which we recount below.

> 4. Speller insisted that he talked with Ms. Smallwood about [Hyman's] case in the parking lot of her office with Ms. Smallwood's law partner, Tonza Ruffin, present. Speller further insisted that in the parking lot he told Ms. Smallwood that he would harm [Hyman] more than help him if he testified. Ms. Smallwood asked Speller whether they had a second, earlier conversation around the time her law office represented him on a probation matter in 2001, in which he told her Demetrius Jordan shot the victim. In response, Speller insisted that they did not have that conversation. Ms. Smallwood attempted to show Speller what she claimed were her notes from the conversation. The State objected, arguing among other things, that Ms. Smallwood was not allowed to do so because Speller had denied having the conversation. Thereafter, the undersigned did not allow Ms. Smallwood to show Speller her notes.
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> . . .
>
> 11. At the MAR evidentiary hearing . . . [Hyman] introduced as evidence a page out of a legal notepad which contained handwritten notes, the contents of which are as follows:

11/20/01
Derrick Speller
saw the whole thing
Demet had a .380 and a 9mm
He shot the guy and then ran out the back door
Somebody else shot at the guy with a chrome looking small gun but "I don't know who it was."
"I heard Demetrius shot him again outside but I don't know for sure."
"I think it was a 9 mm he (Demet) had outside.
--Never gave a statement to police because he hustled for Demet and Turnell and them [n*****] are lethal.
can you shoot me a couple of dollars

The handwritten notes had an exhibit stamp on them reading "Defendant's Exhibit 1." This is an indication that at trial Ms. Smallwood placed the exhibit stamp on the notes, marking them as Defendant's Exhibit 1, when she attempted to show the notes to Speller, but the undersigned would not allow her to do so. The undersigned admitted the handwritten notes into evidence at the MAR evidentiary hearing as [Hyman's] MAR Exhibit 1 over an objection of the State.

. . .

13. Former NCPLS attorney Ravi Manne testified at the MAR evidentiary hearing that he . . . located [Hyman's] MAR Exhibit 1 among Ms. Smallwood's files on [Hyman's] case.

. . .

17. At the MAR evidentiary hearing, [Hyman] introduced an October 9, 2003 letter Ms. Smallwood sent the Office of Indigent Defense Services . . . . Attached to the letter was an "Attorney Time Sheet," detailing in eight pages Ms. Smallwood's daily hours in [Hyman's] case. The first entry on the time sheet is for May 14, 2001, at which time Ms. Smallwood noted that she reviewed her appointment notice and talked to [Hyman's] family. There is no entry on the time sheet for November 20, 2001, the date listed on the handwritten notes purportedly from the conversation Ms. Smallwood had with Speller admitted . . . as [Hyman's] MAR Exhibit 1.

. . .

19. At the MAR evidentiary hearing, . . . High testified that he was appointed, along with Ms. Smallwood, to represent [Hyman] at trial. . . . In preparing for trial, Mr. High and Ms. Smallwood reviewed the State's witness list and together determined which attorney would cross-examine which witness, depending on several factors including whether either attorney knew the witness. Mr. High and Ms. Smallwood had decided prior to trial that Mr. High would cross-examine Speller. A witness list Ms. Smallwood and Mr. High prepared from information conveyed to them by the State was admitted into evidence at the MAR evidentiary hearing as [Hyman's] MAR Exhibit 21. The list contained a notation indicating that "Hack," meaning Mr. High, was to cross-examine Speller.

20. According to Mr. High's MAR evidentiary hearing testimony, prior to trial he and Ms. Smallwood did not have a substantive conversation about Speller. . . . Mr. High further testified that he was not aware of any conversation between Speller and Ms. Smallwood or any notes regarding a conversation between the two before trial. . . .

21. According to Mr. High's MAR evidentiary hearing testimony, when Speller's name was called at trial, Ms. Smallwood leaned over to Mr. High and said, "[D]on't worry about this one, I've got it." When Mr. High inquired as to why, Ms. Smallwood told him that she had spoken with Speller about the case and to let her handle it.

22. At the MAR evidentiary hearing, Mr. High testified that after District Attorney Asbell concluded her direct examination of Speller at trial, Ms. Smallwood left the courtroom during the recess and returned with some papers. Ms. Smallwood told Mr. High that she had talked to Speller prior to trial and that she had some notes she was going to use to cross-examine him. This was the first time Mr. High heard of the notes. . . . According to Mr. High, Ms. Smallwood had a piece of paper in her hand when she was cross-examining Speller. . . .

. . .

24. At the MAR evidentiary hearing, Mr. High could not positively identify [Hyman's] MAR Exhibit 1 as the piece of paper Ms. Smallwood had with her when she came back into the courtroom after the recess.

. . .

> 27. At the MAR evidentiary hearing, [Tonza] Ruffin stated that she was . . . under the impression that Speller had information which would be helpful. Ms. Ruffin remembered being in the parking lot when Speller was speaking with Ms. Smallwood and that he indicated he could be helpful to the case, but she could not remember exactly what he said. Ms. Ruffin also remembered Ms. Smallwood telling her that Speller claimed that he was there the night of the murder, that he saw everything, and that he sought her out and indicated to her that he could help. Ms. Ruffin testified that Ms. Smallwood may have had a conversation with Speller other than the one in the parking lot.
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> 28. At the MAR evidentiary hearing, Ms. Ruffin identified the handwriting on [Hyman's] MAR Exhibit 1 as that of Ms. Smallwood.
>
> . . .
>
> 30. At the MAR evidentiary hearing, [Hyman] presented as evidence an Order of Discipline from the North Carolina State Bar filed against Ms. Smallwood on February 6, 2007. The Order of Discipline was admitted into evidence as [Hyman's] MAR Exhibit 31. Pursuant thereto, the North Carolina State Bar disbarred Ms. Smallwood for misconduct occurring in 2002 through 2004. That misconduct included embezzlement of client funds, neglecting client matters, and knowingly making false statements to the Superior Court, none of which was related to [Hyman]. The Order of Discipline reflected that in the course of the North Carolina State Bar's investigation of and proceedings against Ms. Smallwood, she knowingly made false statements to the North Carolina State Bar's Grievance Committee.

J.A. 306, 310–11, 313–18.

Based on these findings, the MAR court determined Hyman had "presented no credible evidence" that: (1) "the conversation which Ms. Smallwood claimed she had with Speller ever took place"; (2) "[Hyman's] MAR Exhibit 1 contained, as he purported, notes taken contemporaneously with any conversation between Ms. Smallwood and Speller"; or (3) "the purported conversation between Ms. Smallwood and Speller took place on the date appearing on [Hyman's] MAR Exhibit 1, i.e., November 20, 2001." J.A. 318 ¶¶ 32–34. Thus, the MAR court found the "evidence indicated that the conversation purportedly

memorialized in [Hyman's] MAR Exhibit 1 never took place," J.A. 318–19 ¶ 35, meaning Hyman could establish neither an actual conflict of interest under *Sullivan* nor deficient performance or prejudice to support an IAC claim under *Strickland v. Washington*, 466 U.S. 668 (1984).

The SCNC ultimately affirmed the MAR court's ruling and adopted its findings of fact.[8] Relevant here, the SCNC began its analysis by observing that Hyman "ha[d] the burden of proving by a preponderance of the evidence every fact essential to support" his MAR. *State v. Hyman*, 817 S.E.2d 157, 172 (N.C. 2018) (quoting N.C. Gen. Stat. § 15A-1420(c)(5)). So he "was required to persuade the [MAR] court, by a preponderance of the evidence, of the nature and extent of the testimony that Ms. Smallwood would have provided had she withdrawn from her representation as [his] trial counsel and testified on [his] behalf." *Id.* But he didn't do that. Citing the MAR evidentiary hearing testimony from High and Ruffin, as well as Hyman's MAR Exhibit 1 and Smallwood's time sheet, the SCNC determined "that the record contain[ed] adequate evidentiary support for" that finding. *Id.* Indeed, "neither Ms. Smallwood nor anyone else ever testified that a conversation of the nature allegedly memorialized in [her] notes actually occurred." *Id.*

[8] The dissenting opinion highlights the North Carolina Court of Appeals' intervening decision reversing the MAR court's ruling. *See* Diss. Op. 44–46 (citing *State v. Hyman*, 797 S.E.2d 308 (N.C. Ct. App. 2017)). Because that decision was ultimately reversed by the SCNC, however, it is irrelevant for our purposes in reviewing Hyman's § 2254 claim. *See Tyler v. Hooks*, 945 F.3d 159, 167–68 (4th Cir. 2019) ("[T]he highest state court decision . . . is the relevant one for § 2254 purposes."); *see also Greene v. Fisher*, 565 U.S. 34, 40 (2011).

The SCNC held that, based on the MAR court's factual finding, Smallwood could not have rendered ineffective assistance by failing to withdraw and testify about something that never happened. "[T]he complete absence of any testimony from Ms. Smallwood or some other witness to the effect that the conversation in question" occurred, "coupled with the existence of ample evidentiary support for the [MAR] court's determination, based upon its observations during the original trial and subsequent hearings, that the alleged conversation never took place," supported the MAR court's decision. *Id.* at 173.

F. The District Court's Grant of Hyman's § 2254 Petition

After Hyman's state-court MAR review became final, we remanded his federal habeas petition for further proceedings. The district court again issued the writ. After setting out the appropriate standard of review for § 2254 petitions, the court determined that "[t]he state court's factual findings in this case [were] objectively unreasonable." J.A. 745. According to the district court, "It is illogical to suggest that the conversation between Smallwood and Speller never occurred given that Speller himself admitted at [Hyman's] trial that he had a conversation with Smallwood regarding [Hyman's] case before trial, and that Smallwood had asked for his assistance." J.A. 745. The conversation's existence was also established, the court reasoned, by Smallwood's testimony during the 2005 remand hearing and Ruffin's corroborating testimony from the MAR evidentiary hearing. "A finding that the conversation between Smallwood and Speller never occurred under these circumstances would mean that both Smallwood and Ruffin provided perjured testimony." J.A. 745–46. Making its own credibility determination, the district court discounted High's testimony based on evidence of a strained relationship between himself and Smallwood.

See J.A. 746 ("[N]otably, Smallwood at one point had attempted to have High removed from the case."). And it opined that "Smallwood's actions at trial, including her admission that she did not initially recall her conversation with Speller until Speller testified and her last minute decision to cross-examine Speller, were consistent with her own characterization of her style as 'operating from [her] hip.'" *Id.* (alteration in original).

Turning to whether the notes were written contemporaneous with the November 20, 2001, conversation, or whether the conversation occurred on that date, the district court again found the MAR court's factual determinations were unreasonable. The court cited Smallwood's testimony that she took notes from her pretrial conversation with Speller, Manne's testimony that he found "hand-written notes regarding the purported conversation between Smallwood and Speller in Smallwood's trial file," and Ruffin's corroboration of those notes as having been written in Smallwood's handwriting. J.A. 746–47. And because "the record reflect[ed] Smallwood unsuccessfully attempted to introduce at trial a document matching the description of the notes found in Smallwood's trial file," the court concluded that "the state court's finding [was] clearly contradicted by the record." J.A. 747.

The district court similarly dispatched with the lack of an entry on Smallwood's time sheet for November 20, 2001. Citing a later entry "marked 'File Review Witness Interview' on November 30, 2001," the court suggested that "[a]ny discrepancy in dates or record keeping error is consistent with Ruffin's testimony that she and Smallwood did not always list everything they did on their attorney time sheets and Smallwood's legal practices." *Id.* Thus, the court found Hyman "ha[d] rebutted the state court's findings by

clear and convincing evidence." *Id.*

Next, the district court turned to the SCNC's application of *Strickland* to resolve Hyman's claims. The court found that the SCNC's analysis was "an objectively unreasonable application of clearly established law," J.A. 748, because the exculpatory-witness IAC claim fell under *Sullivan*'s narrower purview. Conducting a de novo review, the court determined that Smallwood acted under an actual conflict of interest, which adversely affected her representation and entitled Hyman to habeas relief.

Alternatively, the district court determined the SCNC unreasonably applied *Strickland*. It first found that "Smallwood's failure to withdraw at trial and testify as a witness on behalf of [Hyman] was objectively unreasonable." J.A. 749. "The outcome of this case was dependent upon testimony from two eye-witnesses for each side, without any physical evidence," meaning it would have been "objectively reasonable to pursue a strategy to impeach Speller and bolster the evidence that Demetrius Jordan committed the murder." J.A. 749–50. Next, the court found that Smallwood's failure to withdraw prejudiced Hyman because "Smallwood's testimony regarding her prior conversation with Speller would have served to undermine Speller's credibility," which was especially significant given that the State's case against Hyman had "little physical evidence" and "hinged on witness credibility." J.A. 749–51.

The State filed a timely notice of appeal, and the district court stayed its order. We have jurisdiction under 28 U.S.C. § 1291. *See also* Fed. R. App. P. 22(b)(3) ("A certificate of appealability is not required when a state or its representative . . . appeals.").

II.

A.

We review the district court's order granting habeas relief under § 2254 de novo. *MacDonald v. Moose*, 710 F.3d 154, 159 (4th Cir. 2013). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal courts may "entertain" an application for a writ of habeas corpus from an inmate in state custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In doing so, we follow "Congress' prohibition on disturbing state-court judgments . . . absent an error that lies beyond any possibility for fairminded disagreement." *Mays*, 141 S. Ct. at 1146.

To that end, we cannot grant habeas relief under § 2254 unless the MAR court's decision: (1) "was contrary to" clearly established Supreme Court case law; (2) "involved an unreasonable application" of the same; or (3) "was based on an unreasonable determination of the facts in light of the" record before it. 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100 (2011). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam). Though this case touches on each of these avenues for relief, the third one controls here.

For a determination of fact to be "unreasonable," it must be "sufficiently against the weight of the evidence." *Williams v. Stirling*, 914 F.3d 302, 312 (4th Cir. 2019) (quoting *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010)). Merely being "incorrect or erroneous" is not enough. *Id.* Indeed, "[a] state court's factual determinations are presumed correct, and the petitioner must rebut this presumption by clear and convincing evidence." *Bennett v. Stirling*, 842 F.3d 319, 322 (4th Cir. 2016); *accord* 28 U.S.C. § 2254(e)(1). "We must

be especially deferential to the state court's findings on witness credibility, and we will not overturn the court's credibility judgments unless its error is stark and clear." *Elmore v. Ozmint*, 661 F.3d 783, 850 (4th Cir. 2011). As a result, "[a] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Rather, the determination must lack support from or be contrary to the record to warrant the extraordinary step of granting habeas relief. *See Merzbacher v. Shearin*, 706 F.3d 356, 368 (4th Cir. 2013) ("[D]isagreement alone is not enough. The federal court must conclude not only that the state court's determination was wrong, but that it was unreasonable in light of the evidence presented, that is, it is not 'debatable among jurists of reason.'").

This is a high bar. And it is one that Hyman did not meet here.

B.

Hyman's exculpatory-witness IAC claim is based on contradictory facts, which are subject to two interpretations. On the one hand, as the MAR court found, the record evidence suggests the alleged conversation between Smallwood and Speller never took place. At the very least, there is limited credible evidence to support Hyman's claim that it did. Smallwood simply made it up. She also fabricated her notes. And then Smallwood—who was later disbarred for embezzling funds and lying to her clients, opposing counsel, the State Bar, and the court—tried to enter those knowingly false notes into evidence at Hyman's first-degree murder trial. After reviewing the record, the SCNC held that competent evidence supported the version of events that the MAR court credited through

its factual findings.

On the other hand, as the district court found, the facts could reflect that Smallwood, a seasoned defense attorney, simply forgot what by all accounts would have been an unforgettable conversation—one in which the State's key witness exculpated her client. She also overlooked the fact that she took detailed notes of that conversation throughout her trial preparation, and designated her co-counsel to handle Speller's cross-examination. It took Speller mentioning Smallwood by name during his direct examination at Hyman's trial to refresh her memory. And only then did Smallwood recall the discussion, remember that she took exculpatory notes, and somehow find those notes (which she fortuitously had with her in the courthouse) during a fourteen-minute recess. Upon locating those notes, Smallwood further discovered that they directly contradicted Speller's incriminating testimony. With no deference to the MAR court, the district court held that any conclusion other than this contrived sequence of events was "clearly contradicted by the record." J.A. 747.

In truth, either version of events would be subject to debate. And neither paints Smallwood in a favorable light. It is not up to us, however, as a federal court reviewing a state court's decision, to determine which of the two interpretations was the most likely to have occurred. *See Wood*, 558 U.S. at 301 ("[E]ven if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the [state] court's determination." (cleaned up)). Rather, we must simply ask whether the state court's resolution of this dispute—here, its finding that there was no "credible evidence" that the November 20, 2001, conversation occurred, J.A. 318 ¶¶ 32–

34—is adequately supported by the record. The answer is assuredly yes.

To begin, *no* witness—including Smallwood—ever testified that a conversation of the nature memorialized in Hyman's MAR Exhibit 1 took place on November 20, 2001. Ruffin verified that Speller and Smallwood spoke in the parking lot of her office at some point, but she also made clear that she never heard him make any of the statements recounted in Smallwood's notes. Speller likewise testified that he spoke with Smallwood "in the parking lot at [their] office," but repeatedly denied the veracity of the contents of Hyman's MAR Exhibit 1. *E.g.*, J.A. 113–17. And neither Ruffin nor Speller provided the date this conversation occurred.

In contrast, Smallwood testified that she had only one meeting with Speller, which she claims took place in her office, not the parking lot.[9] Still, Smallwood *never* testified that the alleged conversation reflected in Hyman's MAR Exhibit 1 took place on November 20, 2001. To the contrary, during the 2005 remand hearing, Smallwood represented that "the conversations [she] had with Mr. Speller pertaining to Mr. Hyman took place from an investigatory standpoint *after the fact of my representation* of [Speller] and incident to my preparation for the Hyman trial." J.A. 175 (emphasis added); *see also* J.A. 173 (testifying that she was "not certain of the date that Mr. Speller's case came about but" or whether "Mr. Hyman had even been charged with murder at that time"); J.A. 179 ("Q: [A]s I understand what you are saying that happened, at least to your recollection, [your

[9] This testimony directly contradicts her line of questioning during Speller's cross-examination when she suggested the parking lot conversation was "the second time we talked about this." J.A. 121.

conversation with Speller occurred] after you were done representing [him]?; A: Correct; Q: So at some point post probation hearing?; A: Yes."). But that would have been impossible, since the record shows that Smallwood represented Speller at his probation revocation hearing on September 26, 2002, ten months *after* the alleged November 20, 2001, conversation allegedly took place, and sixteen months after Hyman's arrest for murder. *See* J.A. 182, 278. The fact that Smallwood's "Attorney Time Sheet" detailing her representation of Hyman contained no entry on November 20, 2001, lends additional credence to the MAR court's factual findings. *See* J.A. 287.

High's testimony at the MAR evidentiary hearing also objectively supports the finding that "the conversation purportedly memorialized in Hyman's MAR Exhibit 1 never took place." J.A. 319 ¶ 35. Smallwood's decision before trial that High would be responsible for cross-examining Speller—a decision based "on several factors including whether each attorney knew the witness," J.A. 314 ¶ 19—strongly suggests that the alleged November 20, 2001, interaction did not occur. Indeed, High "testified that he was not aware of *any conversation* between Speller and Ms. Smallwood or *any notes* regarding a conversation between the two before trial." J.A. 314 ¶ 20 (emphases added). At the very least, as the SCNC observed, that High lacked this potentially case-altering knowledge "raises questions about the validity of" Hyman's exculpatory-witness IAC claim. *Hyman*, 817 S.E.2d at 172.

Stated succinctly, there is more than ample record evidence to support the MAR court's conclusion, which, again, is "presumed to be correct." 28 U.S.C. § 2254(e)(1); *Bennett*, 842 F.3d at 322. In reaching the opposite conclusion, the district court cited the

well-established standards for assessing a state court's factual findings on federal habeas review, but then ignored them. In particular, the district court made its own witness credibility determinations without hearing a single witness.

For example, the district court discounted the MAR court's credibility findings by dismissing High's testimony based on his strained relationship with Smallwood, while also assuming that Smallwood's testimony about the conversation must be true, because to conclude otherwise would suggest that she perjured herself. In doing so, however, the court disregarded our prior instruction to "be especially deferential to the state [MAR] court's findings on witness credibility." *Elmore*, 661 F.3d at 849.

This deference is especially significant here, because Judge Grant presided over *all* of the proceedings in this case, including the trial, the 2005 remand hearing, and the MAR evidentiary hearing. *See Merzbacher*, 706 F.3d at 364 ("[U]nder § 2254 federal habeas courts have no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."). Thus, even though neither Smallwood nor Speller testified at the MAR evidentiary hearing, Judge Grant was still able to make credibility determinations about all who appeared before him. In doing so, Judge Grant determined Smallwood's testimony was incredible and instead chose to credit High's statements. That finding was not an irrational or unreasonable conclusion based on all the facts, particularly given Smallwood's propensity for lying and the misrepresentations that led to her disbarment. Indeed, Judge Grant found that she made "false statements to the Superior Court and . . . the North Carolina Bar's Grievance Committee" between 2002 and 2004, which is notable since Hyman's trial occurred in September 2003. J.A. 317–18 ¶

30.[10]

As a federal court reviewing a state court's decision, the district court erred in reweighing those credibility determinations of witnesses who never appeared before it. The court never suggested that the MAR court's credibility determinations amounted to a "stark and clear" error. *Elmore*, 661 F.3d at 850. And Hyman has offered no basis for us to find so now.

The district court also erred by fashioning its own justification to explain away the missing entry on Smallwood's "Attorney Time Sheet" for the date on which her alleged conversation with Speller supposedly occurred. Glossing over this omission entirely, the district court suggested its absence was insignificant because there was a later entry "marked 'File Review Witness Interview' on November 30, 2001," J.A. 747; *see* J.A. 287, which it suggested must have been a mislabeled reference to the meeting. But this abject speculation hardly qualifies as evidence that "the state court's determination was wrong," much less that "it was unreasonable." *Merzbacher*, 706 F.3d at 368.

In short, we are not free to reweigh evidence or interpose our own interpretations of the facts when reviewing a § 2254 petition, even if we disagree with them or believe they are wrong. Because the district court did just that, we must reverse its decision.

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[10] Smallwood's disbarment order—which Judge Grant reviewed during the MAR evidentiary hearing—revealed that she also embezzled approximately $122,241.25 from Ruffin and misappropriated $33,335.00 from one client and $2,454.67 from another. Smallwood further failed to reschedule a noticed deposition despite being aware of her clients' conflict, lied to opposing counsel about the reason her clients were absent, failed to appear for a hearing on her clients' behalf to defend against a motion to dismiss, lied to her clients about the status of their case, and lied to the court about her efforts to reschedule the deposition.

C.

Having determined that the MAR court's factual findings were neither "incorrect by clear and convincing evidence" nor "'objectively unreasonable' in light of the record before [it]," *id.* at 364, our review of Hyman's exculpatory-witness IAC claim ends there. Whether *Sullivan* or *Strickland* would supply the clearly established law, Hyman has failed to carry his burden to secure habeas relief because he has no claim. He has failed to upend the state court's conclusion that the alleged November 20, 2001, conversation between Speller and Smallwood never occurred, meaning he has not shown that she was operating under any conflict of interest during his trial. Nor has he demonstrated that Smallwood possessed any information to impeach Speller's testimony had she withdrawn from her representation. *See Hyman*, 817 S.E.2d at 173 ("In the event that the conversation between Ms. Smallwood and Mr. Speller never happened, Ms. Smallwood could not have properly contradicted Mr. Speller's trial testimony from the witness stand because any testimony that she might have given to that effect would have been perjured."). In short, there is no factual support for the lone claim raised in his § 2254 petition.[11]

[11] The State also asks us to vacate the district court's initial order granting Hyman's § 2254 petition, arguing that he had not yet exhausted his exculpatory-witness IAC claim when the court entered its judgment. We need not reach this issue, however, because the district court's second order superseded its first. *See* J.A. 743 n.9 ("To the extent [the State] urges the court to vacate its March 31, 2010, order stating that [Hyman's] claim was unexhausted on that date, the court declines. The court, however, now has considered the record as a whole and enters *a new judgment* as set forth below." (emphasis added)). As a result, we find the district court's earlier order is neither enforceable nor before us.

III.

At first glance, it is hard to see where the dissenting opinion diverges from this analysis. Indeed, the first seventeen pages consist of background information we have already set out, *compare supra* pages 3–22, *with* Diss. Op. 35–44, 46–47, a summary of a state court opinion that has no bearing on Hyman's § 2254 petition, *see supra* note 8 (discussing Diss. Op. 44–46), and generalized findings that are irrelevant to the dissent's ultimate reasoning, *see* Diss. Op. 49–51. Further, the dissent makes clear that it does not "quarrel with [us] that the record evidence is sufficiently supportive of the [MAR] court's findings" that the purported conversation between Smallwood and Speller never occurred. Diss. Op. 51.

Despite this apparent agreement, the dissent suggests that we have somehow "go[ne] awry in prematurely concluding [our] analysis" based on its novel and unilateral determination that "Hyman was unconstitutionally convicted." Diss. Op. 52. According to the dissent, if Smallwood did, in fact, "contrive[] the Speller conversation" and "purposefully made use of falsified evidence in a capital murder trial," that alone "*should* be a per se Sixth Amendment violation" warranting § 2254 relief. *Id.* (emphasis added).

The problem for our dissenting colleague, however, is that Hyman *never* presented such a claim for our review—not in his § 2254 petition, his briefs before this Court, or during oral argument. Nor did Hyman make any argument or claim to that effect before the state trial court, the MAR court, the North Carolina Court of Appeals, or the SCNC. *See Shinn v. Ramirez*, 142 S. Ct. 1718, 1730–31 (2022) ("[T]he States possess primary authority for defining and enforcing the criminal law, and for adjudicating constitutional

challenges to state convictions." (cleaned up)). Rather, as our colleague readily concedes, this untested theory for relief appears for the first time ever in the dissent itself. *Compare* Diss. Op. 52 (acknowledging that the theory on which it would grant relief was "not precisely in the manner outlined by the exculpatory witness claim"), *with* J.A. 19 (Hyman's § 2254 petition raising a single claim for relief based on the assertion that his "Sixth Amendment right to the effective assistance of conflict-free counsel was violated by . . . Smallwood's position as a witness to a highly material prior inconsistent statement by a key State's witness (her former client), directly contradicting his trial testimony and exonerating [Hyman] of this crime").

The dissent's approach is plainly not permitted under AEDPA's demanding strictures, which Congress "enacted . . . to advance the finality of criminal convictions." *Mayle v. Felix*, 545 U.S. 644, 662 (2005). Nor, as the dissent proposes, does AEDPA give the federal courts unfettered discretion to grant relief wherever they see fit. *See Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022) ("When Congress supplies a constitutionally valid rule of decision, federal courts must follow it. In AEDPA, Congress announced such a rule."). As an institution limited in power to resolving only "[c]ases" and "[c]ontroversies" between parties, U.S. Const. art. III, § 2, it is axiomatic that we may "review[] only the claims presented in the § 2254 petition," not those of our own creation, *Folkes v. Nelsen*, 34 F.4th 258, 267 (4th Cir. 2022); *see also* Rules Governing Section 2254 Cases in the United States District Courts, R. 2(c)(1)–(2) (requiring petitions to "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground"). Put another way, we are simply not at liberty to grant the extraordinary remedy

of a writ of habeas corpus premised on supposed constitutional violations not raised by a petitioner tried and convicted of crimes in state court. *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam) (observing that Congress enacted AEDPA to "impose[] important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases" due to its "respect[] [for] the authority and ability of state courts and their dedication to the protection of constitutional rights"); *Harrington*, 562 U.S. at 102–03 (observing that federal habeas review cannot serve as "a substitute for ordinary error correction through appeal").

"At all times, the petitioner is responsible for identifying the allegedly deficient performance that the federal court is to review. And once the petitioner has identified specific conduct in his petition, he is constrained to rely *only on that conduct*." *Folkes*, 34 F.4th at 268 (emphasis added). Thus, contrary to the dissent's approach, we cannot retroactively fashion those claims into something we later conjecture may warrant relief. *See Shinn*, 142 S. Ct. at 1739 (holding that a federal court "may *never* needlessly prolong a habeas case, particularly given the essential need to promote the finality of state convictions" (cleaned up)); *Shoop*, 139 S. Ct. at 509 (vacating a decision in which the Sixth Circuit expanded the scope of the petitioner's § 2254 claim through requests for supplemental briefing); *id.* at 508 n.2 (noting that "the petition plainly did not encompass" the argument upon which the Sixth Circuit granted relief); *Folkes*, 34 F.4th at 269 ("Nothing authorizes [this Court] to expand or contract a petitioner's claim sua sponte.").

In creating on appeal a new claim for Hyman and suggesting that we should grant habeas relief on that different ground, our dissenting colleague would have us "cross[] the

line between jurist and advocate." *Folkes*, 34 F.4th at 269. That is a request we must decline.

IV.

Accordingly, we vacate the district court's judgment and remand with instructions to dismiss Hyman's § 2254 petition.

VACATED AND REMANDED WITH INSTRUCTIONS

KING, Circuit Judge, dissenting:

In rejecting Terrence Hyman's Sixth Amendment claim, my colleagues have based their decision solely on the state trial court's finding that the exculpatory conversation between lawyer Smallwood and witness Speller never occurred. But that analysis is unduly circumscribed. Even if "Smallwood simply made it up" and "also fabricated her notes," *see ante* at 24, Hyman was nevertheless denied his right to the effective assistance of counsel, a constitutional right that is "critical to the ability of the adversarial system to produce just results," *see Strickland v. Washington*, 466 U.S. 668, 685 (1984). Simply stated, the falsification of evidence by a criminal defense lawyer in a capital murder case must qualify as constitutionally ineffective assistance. In these circumstances, Hyman is entitled to the relief awarded by the district court in the Eastern District of North Carolina. I therefore dissent, and I would affirm the award of habeas corpus relief.

I.

A.

The criminal charges against Hyman grew out of a May 2001 brawl at the L&Q Social Club in Bertie County, North Carolina. During that altercation, bar patron Ernest Lee Bennett, Jr., was shot and killed. Four suspects were arrested and indicted for Bennett's murder: they were Demetrius Jordan, Telly Swain, Julius Swain, and petitioner Hyman. After two years in pretrial detention, Demetrius Jordan and Telly Swain gave statements to investigators that implicated Hyman in the Bennett shooting. Jordan and Swain were then cleared of murder charges. Following Jordan's release, his associate

Derrick Speller — a bar patron also present at the brawl — approached the authorities and likewise identified Hyman as the shooter.

On August 25, 2003, Hyman's case proceeded to a jury trial in the Superior Court of Bertie County, where he was represented by lawyers Teresa Smallwood and Hackney High. Notably, the prosecution presented no physical evidence connecting Hyman to the Bennett murder. Although about 50 bar patrons were present when the 2001 shooting occurred, only four witnesses were able to testify as to the identity of the shooter. The prosecution offered testimony from Derrick Speller and Robert Wilson, and both proclaimed that they saw Hyman shoot Bennett. For his part, Speller testified that he saw Hyman enter the bar with a firearm. Speller also said that Hyman shot Bennett three times — twice inside the bar and once more outside. Speller asserted that, while running from the bar, he saw Demetrius Jordan fire a nine-millimeter handgun into the air, and not at Bennett.

Demetrius Pugh, another bar patron, testified on Hyman's behalf. Pugh said that he saw Demetrius Jordan shoot Bennett four times with a .380 caliber handgun — twice inside the bar, and twice outside — and once more with a nine-millimeter handgun, before firing several more rounds from that handgun into the air. Finally, Lloyd Pugh — the owner of the L&Q and unrelated to Demetrius Pugh — testified that, as he heard gunshots being fired, he attempted to break up the brawl and saw Hyman — who was unarmed — in the crowd.

Relevant here, during direct examination the prosecution inquired whether Speller had spoken with anyone regarding Hyman's case prior to the trial. In response, Speller

admitted that he had discussed the case with "Teresa" — that is, Hyman's defense lawyer Teresa Smallwood. *See* J.A. 110.[1] Speller said that Smallwood had requested his help with the matter. Following a bench conference sought by the defense and a 14-minute recess, Smallwood advised lawyer Hackney High, who was about to cross-examine Speller, that she had once represented Speller in an unrelated probation proceeding and would handle his cross-examination. In that examination, Smallwood informed Speller that he had "caught [Smallwood] a little off guard because [she] couldn't remember" their conversation about Hyman's case, but that his mention of it had prompted her, during the trial recess, to retrieve her notes of their discussion. *Id.* at 114.

Smallwood's cross-examination of Speller — which Hyman has since characterized as "disastrous," *see* J.A. 707 — focused heavily on Smallwood's earlier representation of Speller and the conversation regarding Hyman's murder case that the two purportedly had. By her questioning of Speller, Smallwood sought to establish that, in a conversation at her law office during the probation proceedings, Speller had identified Demetrius Jordan — rather than Hyman — as Bennett's killer. Smallwood asserted in her questions that Speller had offered to help her "in any way [he] could," and that Speller had hesitated to come forward "because [he] had been hustling for Turnell Lee and Demetrius Jordan and them dudes was lethal" and "would off [him] in a minute." *Id.* at 115-16. Speller, however, denied each of the factual assertions in Smallwood's leading questions.

[1] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

Speller insisted that the only conversation he had with Smallwood about Hyman's case was in the parking lot of Smallwood's law office, that Smallwood's law partner Tonza Ruffin was present, and that he said "at that time that [he] couldn't help [Smallwood] on this case, that [he] would harm [Hyman] more than [he] could help him if [he] was brought on the stand to testify." *See* J.A. 120. Smallwood also represented in her questions that Speller had told her that Demetrius Jordan "shot the guy then ran out the back door," and that Speller had "said [he] saw Demetrius with a three-eighty and a nine millimeter." *Id.* at 122. But Speller was adamant that he and Smallwood "never had this conversation that [Smallwood was] talking about, never." *Id.*

The trial court declined to permit Smallwood to show Speller her notes of the conversation, and it did not allow Smallwood's notes into evidence. The court also prohibited the jury from considering Smallwood's questions to Speller as substantive evidence. Important in Hyman's efforts to overturn his murder conviction — and relevant here — Smallwood failed to seek to withdraw as Hyman's counsel after her cross-examination of Speller. And she did not seek to take the witness stand and testify regarding Speller's prior inconsistent statements, as documented in her notes. On September 12, 2003, the jury found Hyman guilty of first-degree murder. The trial court thereafter imposed a life sentence without parole.

B.

In his 2005 direct appeal to the Court of Appeals of North Carolina, Hyman asserted, inter alia, that his Sixth Amendment right to effective and conflict-free counsel had been abridged in the trial proceedings. Hyman presented the state court of appeals with two

alternative bases for relief on his Sixth Amendment claim. First, Hyman maintained that the trial court erred in failing to inquire into a potential dual-representation conflict of interest when it learned of Teresa Smallwood's prior representation of Derrick Speller (the "dual representation claim"). Second, Hyman argued that, following Speller's repudiation of his alleged conversation with Smallwood, Smallwood had rendered constitutionally ineffective assistance of counsel by failing to withdraw from her representation and failing to testify as an exculpatory witness to impeach Speller's account of the Bennett murder (the "exculpatory witness claim").

Addressing Hyman's dual representation claim, the state court of appeals explained that, under the Supreme Court's 1980 decision in *Cuyler v. Sullivan*, a Sixth Amendment claim premised on a lawyer's conflict of interest requires a showing that, first, the defendant's lawyer operated under an actual conflict of interest and, second, that the conflict "adversely affected his lawyer's performance." *See* 446 U.S. 335, 348 (1980). Although the court agreed that Smallwood's representation of both Speller and Hyman produced an actual conflict of interest, it remanded the proceedings to Bertie County for the trial court to determine whether Smallwood's conflict of interest had undermined Hyman's defense, within the meaning of *Cuyler*. The court of appeals did not, however, acknowledge or otherwise address Hyman's exculpatory witness claim.

On remand, the trial court conducted an evidentiary hearing at which Smallwood testified. Smallwood therein recounted the brevity of her prior representation of Speller, which had been principally handled by her law partner, Tonza Ruffin. After reviewing records from Smallwood's representations of Speller and Hyman, the trial court denied

relief on the dual representation claim in November 2005, ruling that Smallwood's conflict of interest had no adverse impact on her defense of Hyman in the Bennett murder case. Hyman sought further review by the state court of appeals, but in April 2007 that court affirmed the trial court's rejection of the dual representation claim. In May 2008, Hyman sought certiorari in the Supreme Court of North Carolina, requesting consideration of the exculpatory witness claim that the state court of appeals had failed to resolve. Rebuffing that invitation, however, the state supreme court summarily denied Hyman's petition in December 2008.

C.

In May 2008, while the North Carolina state court proceedings were yet ongoing, Hyman turned to the federal court system, filing a petition for habeas corpus relief in the Eastern District of North Carolina.[2] In his 28 U.S.C. § 2254 petition, Hyman pressed the exculpatory witness claim that had languished in the North Carolina courts. Specifically, Hyman maintained that he was denied the effective assistance of counsel by virtue of Smallwood's conflict between her roles as defense counsel and as an exculpatory witness, thereby making relief under *Cuyler* appropriate.

[2] Hyman initiated his habeas corpus proceedings in the federal district court contemporaneous with the filing of his petition for certiorari in the Supreme Court of North Carolina. To allow Hyman to exhaust his state remedies, as required by 28 U.S.C. § 2254, the district court stayed the federal proceedings in October 2008, pending a ruling on the certiorari petition. Following the state supreme court's denial of that petition, the district court lifted its stay in January 2009.

Granting habeas corpus relief in March 2010, the federal district court ruled that Hyman had properly exhausted the exculpatory witness claim in the North Carolina courts because both the state court of appeals and the state supreme court "were given a full and fair opportunity to consider the substance of [the] claim." *See Hyman v. Beck*, No. 5:08-hc-02066, at 10-11 (E.D.N.C. Mar. 31, 2010), ECF No. 28. On the merits, the court applied *Cuyler* and explained that "[o]nce a petitioner shows an actual conflict adversely affected his representation by counsel, prejudice is presumed, and he is entitled to relief." *Id.* at 12. The court ruled that, as an exculpatory witness to events at issue in Hyman's case, Smallwood had a conflict "with great potential for adverse effect." *Id.* at 14 (citing *Rubin v. Gee*, 292 F.3d 396, 401-02 (4th Cir. 2002)). And by failing to "testify herself and proffer impeaching testimony" that "may have changed the outcome of the trial," Smallwood permitted her conflict of interest to impair her performance. *Id.* at 15. Accordingly, the district court concluded that Hyman was denied his Sixth Amendment right to the effective assistance of counsel, and that the North Carolina courts' implicit conclusions to the contrary marked an objectively unreasonable application of federal law, as contemplated by 28 U.S.C. § 2254(d)(1).

The respondents (hereinafter the "State") then timely appealed to this Court.[3] In August 2011, we stayed the State's appeal pending further state court proceedings, explaining that we were unable to ascertain whether the exculpatory witness claim on

[3] The public officials named as respondents in Hyman's habeas corpus proceedings have changed several times since Hyman first filed his § 2254 petition in 2008.

which the federal district court awarded relief had been properly exhausted in the North Carolina courts. *See Hyman v. Keller*, No. 10-6652, slip op. (4th Cir. Aug. 10, 2011). More specifically, we observed that "neither the Court of Appeals nor the Supreme Court of North Carolina has directly confronted the procedural or substantive propriety of the exculpatory witness [claim]," and, "[u]nfortunately, the basis for the North Carolina courts' lack of attention to [the claim] is unclear — perhaps they did not consider that . . . claim to be fairly presented, perhaps they meant to implicitly reject it on the merits, or perhaps they simply overlooked it." *Id.* at 26. In any event, we concluded that "the doctrines of federalism and comity constrain[ed] us to provide the North Carolina courts with an opportunity to weigh in on" Hyman's exculpatory witness claim. *Id.* at 29.

D.

1.

Following our stay of the federal habeas corpus proceedings, the state trial court in Bertie County granted Hyman postconviction discovery. In July 2013, Hyman filed a motion for appropriate relief ("MAR") with the trial court, by which he once again raised the exculpatory witness claim. The trial court convened an evidentiary hearing in June 2014, in which Hyman presented evidence from four lawyers: Hackney High, Tonza Ruffin, and two others who had represented Hyman in his direct appeal and in the federal district court. Hyman's efforts to call Teresa Smallwood proved unavailing, as she had been disbarred for unrelated misconduct and had left North Carolina.

The 2014 MAR hearing yielded competing evidence as to whether Smallwood's conversation with Speller had occurred. On the one hand, Hyman introduced Smallwood's

handwritten notes — found in Hyman's case file — which were stamped as "Defendant's Exhibit 1" for Hyman's trial. *See* J.A. 281. The notes were consistent with the Speller cross-examination and read as follows:

> 11/20/01
> Derrick Speller
> saw the whole thing
> Demet had a .380 and a 9 mm.
> He shot the guy and then ran out the back door
> Somebody else shot at the guy with a chrome looking small gun but "I don't know who it was."
> "I heard Demetrius shot him again outside but I don't know for sure."
> "I think it was a 9 mm he (Demet) had outside.
> --Never gave a statement to police because he hustled for Demet and Turnell and them [dudes] are lethal.
> can you shoot me a couple of dollars

Id. Tonza Ruffin identified the handwriting in the notes as being Smallwood's, and recalled being present in the law office parking lot during a conversation between Smallwood and Speller. Ruffin related that, prior to Hyman's trial, she "was under the impression that [Derrick] Speller had information that would be helpful to the case." *Id.* at 476. Ruffin also did not rule out the possibility that Smallwood had other conversations with Speller that she was not present for.

On the other hand, Hackney High testified that, prior to the trial, Smallwood did not mention any previous conversations she had with Speller, or any notes memorializing the same. The first time High was aware of Smallwood's notes was when Smallwood told him — at the last minute — that she would cross-examine Speller at trial. The State also introduced an "attorney time sheet" of Smallwood's, which Ruffin confirmed had no entry for November 20, 2001 — the date of the Speller conversation according to Smallwood's

notes. *See* J.A. 492. And there was no specific entry for an interview of Speller on any other date.

By a May 2015 order, the trial court denied Hyman's MAR, ruling that the exculpatory witness claim was procedurally barred and, alternatively, that the claim was without merit. In addressing the merits, the court preliminarily resolved that the claim was governed by *Strickland v. Washington*, 466 U.S. 668 (1984), rather than by *Cuyler*, because *Cuyler* applies only to attorney conflicts arising from dual representation. Proceeding on the assumption that proof of Smallwood's alleged conversation with Speller was critical to Hyman's claim, the court found that Hyman had "presented no credible evidence . . . that the conversation which Ms. Smallwood claimed at trial that she had with Speller ever took place; that [Smallwood's notes] [were] taken contemporaneously with any conversation between Ms. Smallwood and Speller; and that the purported conversation . . . took place on the date appearing on [the Smallwood notes]." *See* J.A. 318, 326-27. The trial court indicated that it could not "definitely find" that any of the foregoing occurred, thereby implying that Smallwood had manufactured her conversation with Speller and the notes relating to it. *Id.* at 318. And with that, the court ruled that Hyman had failed to demonstrate either deficient performance or prejudice under *Strickland*.

2.

Hyman thereafter sought review of the trial court's MAR order in the North Carolina Court of Appeals. By a divided decision in February 2017 — inexplicably treated by today's panel majority as "irrelevant," *see ante* at 19 n.8 — the state court of appeals reversed. *See State v. Hyman*, 797 S.E.2d 308 (N.C. Ct. App. 2017). The court first ruled

that, because Hyman had adequately presented the exculpatory witness claim in his direct appeal, the claim was not procedurally barred. Moving to the merits, the court resolved that the trial court's findings regarding the credibility of Hyman's evidence about Smallwood's conversation with Speller and her notes "were not germane to the adjudication of [the] exculpatory witness claim." *Id.* at 318. That was so, the court of appeals explained, because "at the time of defendant's trial, Smallwood possessed evidence tending to show that Speller made a prior inconsistent statement concerning the identity of the shooter" and "[i]f otherwise competent, . . . Smallwood's testimony would have been admissible and within the purview of the jury to assign weight and credibility thereto." *Id.* In other words, the court recognized that the exculpatory witness claim was properly assessed on the basis of Smallwood's representations at trial, and not on later-developed evidence as to whether those representations were true or false.

Applying *Strickland*, the state court of appeals concluded that Smallwood's performance was constitutionally deficient insofar as "the identity of the shooter was a material issue in [Hyman's] murder trial," Smallwood was "the only witness to Speller's prior inconsistent statement" regarding that identity issue, and Smallwood thus "became a necessary witness at trial with a duty to withdraw." *See* 797 S.E.2d at 320-21. Her failure to do as much, the court reasoned, "fell below an objective standard of reasonableness." *Id.* at 321. The court went on to detail how Smallwood's constitutionally deficient performance prejudiced Hyman's defense. That is, following her "disastrous" Speller cross-examination, Smallwood's testimony could well have "discredit[ed] nearly half the

State's case" and restored credibility to Hyman's version of the relevant events. *Id.* at 321-22.

3.

The State appealed from the relief awarded to Hyman by the North Carolina Court of Appeals. In response, the Supreme Court of North Carolina affirmed in part and reversed in part. *See State v. Hyman*, 817 S.E.2d 157 (N.C. 2018). First, the state supreme court agreed with the court of appeals that the exculpatory witness claim was not procedurally barred. On the merits, however, the state supreme court returned to the trial court's factual findings and held it against Hyman that "the trial court found that the alleged conversation between Ms. Smallwood and Mr. Speller upon which [Hyman's] ineffective assistance of counsel claim rests never occurred." *Id.* at 172. Without explaining how or why proof of that conversation was vital to Hyman's exculpatory witness claim, the supreme court ruled that "the record contains adequate evidentiary support for the trial court's findings" and that "the viability of [Hyman's] ineffective assistance of counsel claim hinges on the extent to which Ms. Smallwood was in a position to properly testify that Mr. Speller made the statements attributed to him." *Id.* at 172-73. The state supreme court thus remanded the proceedings to the state court of appeals for consideration of other MAR claims that are not at issue here. The court of appeals denied relief on those claims in late 2018.

E.

Hyman's case having returned to this Court from the state courts, we vacated our 2011 stay and remanded the proceedings to the Eastern District of North Carolina in

January 2020. We requested reconsideration of the federal district court's prior award of habeas corpus relief, in light of the intervening state court proceedings. And by its decision of April 2021, the district court again awarded Hyman habeas corpus relief on the exculpatory witness claim. *See Hyman v. Hooks*, No. 5:08-hc-02066 (E.D.N.C. Apr. 28, 2021), ECF No. 70. In so ruling, the court acknowledged that the state trial court "made factual findings which are critical to the resolution of this action." *Id.* at 16. Reviewing the evidence from the 2005 remand hearing and the 2014 MAR hearing, however, the district court declared those findings "objectively unreasonable," within the meaning of 28 U.S.C. § 2254(d)(2). *Id.* at 17. And the court concluded that Hyman had "rebutted the state court's findings by clear and convincing evidence as required by § 2254(e)(1)." *Id.* at 19.

Setting the state trial court's findings aside, the federal district court reviewed the exculpatory witness claim under both *Cuyler* (which the court deemed controlling) and *Strickland* (in the alternative). The district court agreed with Hyman that Smallwood should have withdrawn as Hyman's counsel and testified on his behalf as to Speller's inconsistent exculpatory statements. As a result, the court ruled that Hyman had been denied the effective assistance of counsel required by the Sixth Amendment, under both *Cuyler* and *Strickland*. The court thus rejected the state trial court's contrary ruling as an unreasonable application of federal law. In turn, the district court vacated Hyman's conviction and sentence, ordering him unconditionally released within 180 days, absent a new trial. The State thereafter filed a notice of appeal, and the district court stayed execution of its judgment pending appeal.

II.

Departing from the panel majority's attenuated analysis, I would affirm the federal district court's award of habeas corpus relief, albeit on somewhat different grounds. The majority accepts the State's contention that this appeal turns on "the core factual question" of "whether the evidence established that the purported conversation between Teresa Smallwood and Derrick Speller actually occurred." *See* Reply Br. of Appellant 1. In my view, however, grappling with whether the state trial court's findings were adequately supported misses the mark. As the Court of Appeals of North Carolina recognized, the trial court's findings are not germane to the merits of Hyman's exculpatory witness claim. Moreover, whether Smallwood's representations at trial were true or false, Hyman has established a clear Sixth Amendment violation.

Consider the facts from either view: If Speller identified Demetrius Jordan as the actual shooter — as Smallwood would have testified — then Smallwood deprived Hyman of the effective assistance of counsel by opting not to testify on his behalf to that exculpatory conversation. But more importantly, accepting — as my good colleagues do — the state trial court's finding that Smallwood concocted her exchange with Speller, there is a patent Sixth Amendment violation that jumps off the page. In that event, Smallwood departed from the lawyerly duties that she owed to Hyman — her client — and prejudiced Hyman's defense by fabricating evidence in a murder trial, surely running afoul of the Sixth Amendment's demands in so doing. One way or the other, Hyman was convicted and sentenced without the effective assistance of counsel, and the state courts have

unreasonably applied federal law in ruling to the contrary. That being so, I am obliged to dissent.

A.

I will first address what neither the parties nor the majority disputes: that if Smallwood's conversation with Speller proceeded as her notes reflect, her failure to withdraw as counsel and testify as an exculpatory witness on Hyman's behalf amounted to ineffective assistance of counsel, as asserted in the exculpatory witness claim. Consistent with the state courts, I would apply the principles of *Strickland* to Hyman's exculpatory witness claim. By that claim, Hyman maintains that Smallwood was under a conflict between continuing as his lawyer and testifying as a necessary witness. The substance of the exculpatory witness claim goes not to an actual conflict between multiple clients, as would be reviewed under *Cuyler*, but instead to the propriety of Smallwood's conduct at trial. The heart of Hyman's argument thus aligns with *Strickland*'s core inquiry of whether "counsel made errors so serious that [she] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and then whether those errors "were so serious as to deprive the defendant of a fair trial." *See* 466 U.S. 668, 687 (1984). Moreover, whereas prejudice may be presumed under *Cuyler*, it is fully practicable in this situation to assess whether Smallwood's actions impaired Hyman's defense. So I would find that the *Strickland* inquiry is suitable and applicable.

Agreeing with the state court of appeals and the federal district court, it is without question that, if Smallwood's conversation with Speller occurred, she did not conduct herself as the counsel contemplated by *Strickland*. Take first the question of deficient

performance. By her "disastrous" cross-examination of Speller, Smallwood sought to establish that Speller had previously identified Jordan as the shooter — but with Speller's denial of each detail that Smallwood raised, she effectively gave credence to Speller's implication that Hyman was guilty, and she impugned her own credibility. *See* J.A. 707. Smallwood was, by her account, the lone witness to statements that directly contradicted the testimony of the prosecution's "very key witness," but the jury was instructed not to take her questions of Speller as substantive evidence. *Id.* at 1861. As such, Smallwood found herself as an essential and exculpatory defense witness. And her testimony would plainly have been admissible to impeach Speller and support her client in a trial that turned entirely on witness credibility. A reasonable lawyer in such circumstances would have sought to withdraw from the representation and take the witness stand; indeed, Smallwood was under a duty to do so. *See* N.C. Rules of Pro. Conduct 3.7(a) ("A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness . . . ."). But Smallwood instead stayed the course. And she thus failed to render legal assistance to Hyman "within the range of competence demanded of attorneys in criminal cases." *See Strickland*, 466 U.S. at 687.

Strickland's prejudice prong is met just as swiftly and clearly. In assessing prejudice, we inquire whether Hyman has established "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* 466 U.S. at 694. Again, Hyman's trial came down to "a proverbial swearing match." *See Valentino v. Clarke*, 972 F.3d 560, 566 (4th Cir. 2020). By testifying that Speller had previously told her that Jordan — and not her client Hyman — had shot and

killed Bennett in 2001, Smallwood's evidence would have undermined the prosecution's case. That is especially so as the reliability of the prosecution's other eyewitness, Robert Wilson, was placed in serious doubt when Wilson admitted to several felony convictions. Smallwood's evidence would also have been consistent with Demetrius Pugh's identification of Demetrius Jordan as the actual shooter. And, crucially, Smallwood could have used her exculpatory testimony to salvage her own reputation as an effective advocate for her client. There is, then — at the very least — a reasonable probability that, if Smallwood had testified to Speller's prior inconsistent and exculpatory statements, the jury would have reached a different verdict and acquitted her client. Accordingly, if Smallwood's representations regarding the Speller conversation were truthful, Hyman was convicted in the absence of the effective assistance of counsel guaranteed to him by the Sixth Amendment.

B.

Of course, the federal district court accepted the state trial court's findings as being "critical" to the resolution of Hyman's exculpatory witness claim. Since that time, the parties have centered their arguments on the merits of those findings. My friends in the panel majority, for their part, reject the district court's conclusion that the trial court made "an unreasonable determination of the facts in light of the evidence presented" under 28 U.S.C. § 2254(d)(2). And they also reject the proposition that Hyman rebutted the trial court's findings by clear and convincing evidence, as required by § 2254(e)(1). I do not necessarily quarrel with the majority that the record evidence is sufficiently supportive of the trial court's findings — it may be difficult to believe that Smallwood forgot "what by

all accounts would have been an unforgettable conversation." *See ante* at 25. And the 14-minute recess following Derrick Speller's direct examination gave Smallwood an opportunity to manufacture her notes. But the majority goes awry in prematurely concluding its analysis. If, as the trial court found and as the majority accepts, Smallwood contrived the Speller conversation, she purposefully made use of falsified evidence in a capital murder trial — an astounding ethical breach that should be a per se Sixth Amendment violation. The logical end of that fact finding, then, is that Hyman was unconstitutionally convicted, even if not precisely in the manner outlined by the exculpatory witness claim.

Applying *Strickland*'s principles to this view of Smallwood's conduct, it is evident that fabricating evidence is not a "reasonable professional judgment," an "informed strategic choice," or in line with "prevailing professional norms." *See* 466 U.S. at 688, 690-91. As the majority sees it, Smallwood — "an officer of the court and a professional advocate pursuing a result . . . within the confines of the law," *see United States v. Chapman*, 593 F.3d 365, 370 (4th Cir. 2010) — "tried to enter . . . knowingly false notes into evidence at Hyman's first-degree murder trial," *see ante* at 24. In that event, Smallwood would have lied to the court and the jury. That action would have contravened the rules of professional responsibility and the duty of loyalty that Smallwood owed to Hyman. If Smallwood fabricated her conversation with Speller, she necessarily failed to function as the effective counsel envisioned by the Sixth Amendment. As the Supreme Court explained in *Nix v. Whiteside*,

> counsel's duty of loyalty and his overarching duty to advocate the defendant's cause . . . [are] limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.

See 475 U.S. 157, 166 (1986) (internal quotation marks omitted). Of course, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See Strickland*, 466 U.S. at 689. But if resorting to the falsification of evidence as a trial strategy qualifies as one of the "countless ways to provide effective assistance in any given case," *see id.*, I am totally lost as to the lawyer conduct that can amount to objectively deficient performance.

By the same token, a knowing decision by Smallwood to cross-examine Speller about the details of an exculpatory conversation that never occurred necessarily prejudiced Hyman's defense. Smallwood continuously pressed her allegations of Speller's prior inconsistent statements over Speller's repeated denials of the same — "No," "No, it's not," "No, I did not," "No, I never told you that," "I'll say it again. You and I never had this conversation that you are talking about, never," *see* J.A. 115-17, 122 — thereby undermining her own credibility and the viability of Hyman's defense, *see State v. Moorman*, 358 S.E.2d 502, 510 (N.C. 1987) ("A cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause."). And, if the Speller conversation was a farce, then an effort by Smallwood to cure her prejudicial cross-examination by taking the witness stand would have made the situation

worse, in that her only options would then have been to confess her fabrication or to perjure herself. In that sense, the prejudice to Hyman's defense was more severe if Smallwood created the Speller conversation and her notes from whole cloth. There is thus a reasonable probability, one fully "sufficient to undermine confidence in the outcome," that had Smallwood not falsified the Speller conversation, Hyman would not have been convicted of first-degree murder and sentenced to life imprisonment. *See Strickland*, 466 U.S. at 694. The majority's read of this case thus ends up like the ruling of the district court: a manifest violation of the Sixth Amendment.[4]

C.

As my colleagues correctly emphasize, the ability of the federal courts to afford habeas corpus relief to a state prisoner is constrained by the "high bar" of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See ante* at 24. That Hyman is capable of

[4] In responding to my dissenting opinion, my good colleagues do not seek to dispute that a defense lawyer who falsifies evidence in a criminal prosecution in order to assist her client thereby renders constitutionally ineffective assistance of counsel. They simply argue that I have "cross[ed] the line between jurist and advocate," in order to create "a new claim for Hyman." *See ante* at 33–34 (quoting *Folkes v. Nelsen*, 34 F.4th 258, 269 (4th Cir. 2022)). As the panel majority tells it, I have conjured up an obscure violation of the Constitution that was not alleged in Hyman's petition. To the contrary, I would affirm the district court's award of relief on the ground alleged in the exculpatory witness claim: a violation of the Sixth Amendment. And I would do so on the facts and legal principles that Hyman has outlined, consistent with his obligation to "specify all the grounds for relief available to [him]" and "state the facts supporting each ground." *Id.* at 32. Thus, this dissenting opinion does not identify a "new claim for Hyman." In any event, I would not agree that the rules applicable to § 2254 proceedings somehow require us to turn a blind eye to a constitutional violation that is readily apparent from the record. *See Folkes*, 34 F.4th at 294 (Wynn, J., dissenting) ("Courts should not be forced to sit by though clear injustice stares us in the face due to a self-imposed, unnecessarily strict application of procedural rules.").

demonstrating a *Strickland* violation is not alone sufficient for a habeas corpus writ to issue; rather, his exculpatory witness claim must be assessed through the "dual lens" of *Strickland* and AEDPA's deferential standard of review. *See Valentino*, 972 F.3d at 579. That standard bars an award of § 2254 relief unless the underlying state adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law," or otherwise "was based on an unreasonable determination of the facts in light of the evidence presented." *See* 28 U.S.C. § 2254(d)(1)-(2).

At bottom, the federal district court's ruling that the state trial court's factual determinations were objectively unreasonable was irrelevant and unnecessary. That is so because whether the Smallwood-Speller conversation actually occurred is immaterial to Hyman's exculpatory witness claim. Furthermore, however we slice the facts, Hyman was denied the effective assistance of counsel — especially when it is accepted that Smallwood falsified her exculpatory conversation with Speller. And in excusing that transgression, both the state trial court and the state supreme court "identified the correct governing legal principles . . . but unreasonably applied those principles to the facts of [Hyman's] case." *See Elmore v. Ozmint*, 661 F.3d 783, 851 (4th Cir. 2011) (citing *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). I am assured that no "fairminded jurists could disagree" that the state courts wrongly decided Hyman's exculpatory witness claim, insofar as every portrayal of the facts reveals a constitutionally infirm conviction. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The state court rulings thus reflect "error[s] well understood and comprehended

in existing law beyond any possibility for fairminded disagreement," enabling Hyman's § 2254 petition to clear AEDPA's "high bar." *Id.* at 103.

III.

Finally, I agree with my colleagues that "[i]t is not up to us . . . as a federal court reviewing a state court's decision, to determine which of the two interpretations [of Smallwood's alleged conversation] was the most likely to have occurred." *See ante* at 25. In any event, the integrity of the state trial court's findings is a red herring in these proceedings. Irrespective of whether Smallwood "simply made it up," she abridged Hyman's Sixth Amendment right to the effective assistance of counsel. *Id.* at 24. The federal courts, importantly, possess the authority — and indeed the solemn duty — to safeguard that fundamental right. By its decision today, however, our Court fails that obligation and deprives Hyman of the habeas corpus relief awarded to him by the district court.

I respectfully dissent.