

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

PERCY LAVAR WALTON,)	
)	Civil Action 7:99CV00940
Petitioner,)	
)	
v.)	<u>Memorandum Opinion and Order</u>
)	
RONALD J. ANGELONE, Director)	
Virginia Department of Corrections,)	By: Samuel G. Wilson
)	Chief United States District Judge
Respondent.)	

This matter is before the court on Walton’s motion under Rule 59(e) to alter or amend the court’s judgment of March 27, 2002 dismissing Walton’s petition under 28 U.S.C. § 2254 for writ of habeas corpus. For the reasons that follow, the court denies Walton’s motion.

I.

The facts of this case are set forth fully in the court’s previous opinions. To summarize, Walton murdered three people; he plead guilty to the murders; Judge Ingram sentenced him to death; and the Supreme Court of Virginia affirmed the sentence. On August 9, 1999, the Supreme Court of Virginia denied Walton’s state habeas petition. On September 8, 1999, Walton filed a petition for rehearing and attached to the petition an affidavit from Dr. Ruben Gur and a neuropsychological report of Walton from Dr. Jeffery Kreutzer. The respondent moved the court to strike these documents because they were untimely. On November 9, 1999, the Supreme Court of Virginia granted respondent’s motion to strike and denied Walton’s petition for rehearing.¹

¹ Walton did not present to the Supreme Court of Virginia any opinions or reports by Doctors Pandurangi or Barnard-Dupree.

Walton filed his federal habeas petition accompanied by numerous reports and affidavits in this court. Given the conflicting affidavits from Walton's trial counsel, Lawrence Gott, the court granted Walton an evidentiary hearing on the limited issue of Gott's alleged ineffective assistance regarding Walton's competency to stand trial. The court held an evidentiary hearing on May 16, 2001 and heard testimony from Gott, Dr. Stanton Samenow, Walton's mental health expert during his guilty plea and sentencing proceedings, and Dr. Miller Ryans, another mental health expert appointed by the trial court to evaluate Walton. During the evidentiary hearing in this court, Walton also attempted to call Doctors Anand Pandurangi, Ruben Gur and Jeffery Kreutzer to testify that Walton was not competent to plead guilty and be sentenced and Dr. Dafferlin Barnard-Dupree to testify that Dr. Ryans' evaluation of Walton fell below the standard of care for a forensic psychiatrist. The court took the reports and affidavits of these doctors under advisement, but did not allow these doctors to testify at the evidentiary hearing. On March 27, 2002, this court denied Walton's petition for habeas corpus.

Walton has now filed a motion to alter or amend the judgment of the court. Walton argues that the court should have allowed him to present the evidence from Doctors Pandurangi, Gur, Kreutzer and Barnard-Dupree at the evidentiary hearing, that the court failed to address some of Walton's claims in his habeas petition, that the court unreasonably relied on a questionnaire filled out by Walton, and that the court should have allowed Walton an evidentiary hearing regarding his Massiah claim.

II.

The court should grant relief under Rule 59(e) in three circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not

available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Pacific Insurance Co. v. American National Fire Insurance Co., 148 F.3d 396, 403 (4th Cir. 1998).

Walton bases his motion on the third circumstance.

Walton primarily argues that the court erred in not allowing Doctors Pandurangi, Gur, Kreutzer and Barnard-Dupree to testify at the evidentiary hearing and that the court should not have made determinations regarding Walton’s substantive incompetence claim, the prejudice prong of his ineffective assistance of counsel claims, and his claim that he did not knowingly, voluntarily and intelligently enter a guilty plea without first hearing testimony from these doctors.²

Walton argues:

It is manifestly unjust . . . for the court to make determinations on prejudice and substantive incompetence—issues as to which it granted an evidentiary hearing, as to which counsel was present with witnesses who were prepared to testify, but as to which the court refused to allow testimony. . . .

Similarly, the court may conclude that Walton’s substantive incompetence claim is defaulted, but it may not make a determination that Walton failed to prove he was incompetent to be tried and sentenced.

Walton misreads the court’s opinion. The court did not decide the merits of Walton’s substantive incompetence claim. As Walton recognizes, Walton defaulted that claim. Consequently, the court did not intend to resolve that claim without first determining Walton’s ineffective assistance claim—a claim the court considered a predicate to the incompetence claim. Although the court decided both the performance and prejudice prong of Walton’s ineffective assistance claim, it never decided *de novo*, as Walton argues, that Walton was competent.

² Specifically, Walton asks the court to amend its opinion to delete the determinations regarding Walton’s substantive incompetence claim and the prejudice prong of Walton’s ineffective assistance of counsel claims and re-open the proceedings to allow Walton to present evidence that the court did not allow Walton to present at the evidentiary hearing.

Rather, when the court decided the prejudice prong it decided that Walton had not shown “that there is a reasonable probability Judge Ingram would have reached a different decision if he had conducted a formal competency hearing.” Walton objects to the court deciding the prejudice prong of his ineffective assistance claim without hearing from his experts. However, the prejudice prong of Walton’s ineffective assistance claim is not decided by experts Walton drums-up after the fact. See Washington v. Murray, 952 F.2d 1472, 1482 (4th Cir. 1991) (stating that the after-the-fact opinions of experts who simply disagree with the opinions of the experts who examined defendant at trial do not establish a claim for ineffective assistance of counsel). Since the court has determined that Gott reasonably relied on Samenow and Ryans, the prejudice prong hinges on whether there is a reasonable probability that Judge Ingram would have concluded that Walton was incompetent if Judge Ingram had conducted a formal competency hearing at which *Samenow* and *Ryans* testified. Regardless of the opinions of Gur, Kreutzer, Pandurangi and Barnard-Dupree, there is not a reasonable probability that Judge Ingram would have disregarded the opinions of the court-appointed mental health experts, Samenow and Ryans, which indicated that Walton was competent.³

As for Walton’s claim regarding the validity of his guilty plea, the court notes that Walton was trying to turn this claim into an incompetency claim—a claim Walton defaulted. Even if

³ Furthermore, Walton cannot present the testimony Barnard-Dupree for the purpose of attacking the qualifications and methodology of Dr. Ryans because Walton does not have a “right to effective assistance of expert witnesses distinct from the right to effective assistance of counsel.” Poyner v. Murray, 964 F.2d 1404, 1418 (4th Cir. 1992). “A clear overtone to the argument is the proposition that if a defense attorney has not produced a witness who would agree with the after-the-fact diagnosis presently presented, then the attorney is ineffective. We reject this proposition as we did its corollary in Wayne v. Murray, 884 F.2d 765 (4th Cir. 1989).” Id.

Walton was allowed to litigate the competency issue in the context of a knowing, voluntary and intelligent guilty plea claim, the testimony from Doctors Gur, Kreutzer, Pandurangi and Barnard-Dupree would not entitle Walton to relief. Walton had the burden of rebutting with clear and convincing evidence Judge Ingram's finding that Walton knowingly, voluntarily and intelligently entered a guilty plea. 28 U.S.C. § 2254(e)(1). The evidence from Doctors Gur, Kreutzer, Pandurangi and Barnard-Dupree would not have risen to the level of clear and convincing evidence required by § 2254(e)(1). These doctors examined Walton, if at all, years after his guilty plea and sentencing hearings. What little light these doctors could have shed upon Walton's mental state at that time could not rise to the level of clear and convincing evidence necessary to rebut the state trial judge's finding that Walton knowingly, voluntarily and intelligently entered a guilty plea.

Also, the court did not need to allow these witnesses to testify because the court had already expanded the record to permit the inclusion of the reports and affidavits of Doctors Gur, Kreutzer and Pandurangi and held an evidentiary hearing to hear the testimony of Gott, Ryans and Samenow. The Fourth Circuit has "long held that the need for an evidentiary hearing may be obviated by such expansion of the record." Cardwell v. Greene, 152 F.3d 331, 338-39 (4th Cir. 1998), overruled on other grounds by Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000) (citing Raines v. United States, 423 F.2d 526, 529-30 (4th Cir. 1970)). The court considered the reports and affidavits of Doctors Gur, Kreutzer and Pandurangi when deciding Walton's petition. See Walton v. Angelone, Case No: 7:99cv00940, Slip Opinion at 14, 37-38 (W.D. Va. March 27, 2002). Thus, Walton has "failed to forecast any evidence beyond that already contained in the record, or otherwise to explain how his claim would be advanced" by the testimony of Doctors Gur,

Kreutzer, Pandurangi and Barnard-Dupree. Caldwell, 152 F.3d at 338.

In conclusion, since most of Walton's claims were procedurally defaulted, the ineffective assistance of counsel claims were the prism through which the court viewed Walton's substantive claims. Most of Walton's arguments regarding Gott's alleged ineffective assistance could have been decided easily by the court without an evidentiary hearing. However, given the inconsistency between several of Gott's affidavits, the court decided that an evidentiary hearing was necessary to determine what Gott knew or should have known about Walton's competency to stand trial. To this end the testimony of Gott, Samenow and Ryans was relevant. During the evidentiary hearing, however, it became clear that Walton was attempting to use the evidentiary hearing as gateway for the introduction of evidence regarding Walton's other substantive claims and evidence that Walton failed to properly submit in state court. By ordering an evidentiary hearing, the court did not open the door for Walton to introduce evidence that was immaterial to the ineffective assistance claim and that was not properly submitted in state court. After reviewing the record and relevant law, the court finds that it did not err in refusing to hear testimony from Doctors Gur, Kreutzer, Pandurangi and Barnard-Dupree at the evidentiary hearing.⁴

⁴ The respondent argues since Walton did not present any evidence from Doctors Pandurangi and Barnard-Dupree to the Supreme Court of Virginia and since the Supreme Court of Virginia struck the affidavit and report from Doctors Gur and Kreutzer because they were untimely, Walton is now procedurally bared from presenting this evidence in a federal habeas proceeding. See Burket v. Angelone, 208 F.3d 172, 185-186 (4th Cir. 2000), Swan v. Taylor, 1999 U.S. App. LEXIS 2472, *20-21 (4th Cir., Feb. 18, 1999). Furthermore, the respondent argues that Walton failed to develop the factual basis for his claim, within the meaning of § 2254(e)(2), during trial and during state habeas review. The court did not address these issues in its March 27, 2002 opinion and order and does not think it necessary to decide these issues on this motion to alter or amend judgment.

III.

Walton argues that the court failed to consider his claims that Gott withheld important information from Ryans, unreasonably relied on Ryans' evaluation even though Gott knew or should have known that the evaluation was deficient, and unreasonably failed to object to the trial court's refusal to hospitalize Walton. The court, however, did consider these claims and found them to be without merit.

IV.

Walton argues that the court unreasonably relied on Walton's completion of a thirty-nine page questionnaire when Walton left parts of the questionnaire blank and provided inaccurate answers to some of the questions. After consideration of Walton's arguments, the court notes that the questionnaire was not a necessary underpinning to the court's decision. The questionnaire was just one piece of circumstantial evidence among other evidence that the court considered. In any event, however, it was not unreasonable to consider the questionnaire.

V.

Walton argues that the court should have conducted an evidentiary hearing on Walton's ineffective assistance of counsel claim regarding Gott's alleged failure to uncover a Massiah claim. Specifically, Walton wants the court to hear testimony from inmates Leslie Robertson and Everett Hubbard. The respondent points out that much of this evidence would be inadmissible hearsay. The court notes that it considered the affidavits submitted by Walton from these two inmates for what they were worth. See Walton v. Angelone, Case No: 7:99cv00940, Slip Opinion at 31, n.19 (W.D. Va. March 27, 2002). Walton has failed to forecast any evidence other than what is already contained in the record that would advance his Massiah claim. Furthermore, the court

need not hear testimony to make credibility determinations because even if Robertson and Hubbard's affidavits were true, Walton is not entitled to relief because he failed to prove that Gott's performance was objectively unreasonable.⁵

VI.

For the reasons stated, the court denies Walton's motion to alter or amend the court's judgment of March 27, 2002. The court will enter an appropriate order this day.

ENTER: This 24th day of June, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

⁵ Walton maintains that Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002), requires that the court hold an evidentiary hearing. The court, however, disagrees for the foregoing reasons.

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v.)	<u>FINAL ORDER</u>
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RONALD J. ANGELONE, Director)	
Virginia Department of Corrections,)	By: Samuel G. Wilson
)	Chief United States District Judge
Respondent.)	

For the reasons stated in the court's accompanying memorandum opinion, it is **ORDERED** and **ADJUDGED** that Walton's motion under Rule 59(e) to alter or amend the court's judgment of March 27, 2002 is **DENIED**.

ENTER: This 24th day of June, 2002.

CHIEF UNITED STATES DISTRICT JUDGE