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

BRANDON WAYNE HEDRICK,	)	
	)	
Petitioner,	)	**Civ. Action No. 7:03CV0219**
	)	
v.	)	**MEMORANDUM OPINION**
	)	
WILLIAM PAGE TRUE, Warden	)	**By: Samuel G. Wilson,**
Sussex I State Prison,	)	**Chief United States District Judge**
	)	
Respondent.	)	

There is no dispute but that Brandon Wayne Hedrick and an accomplice robbed and had sex with Lisa Yvonne Alexander Crider, abducted her at gunpoint, drove her to a remote location near a river, dragged her to the riverbank as she cried and begged for mercy, shot her in the face at close range with a shotgun, and returned to their apartment and went to sleep. In fact, against the advice of counsel, whom Hedrick now disparages, Hedrick spoke with law enforcement officials and admitted as much. Hedrick, however, disputes evidence that he raped and forcibly sodomized Crider, and he contends he only intended to scare, not kill, her. He now brings this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 blaming his counsel for his conviction and death sentence. But from a thorough review of the record, the court cannot identify anything counsel did or did not do that prejudiced Hedrick and finds no other ground to grant Hedrick's petition and accordingly dismisses it.

I. THE FACTS

In affirming Hedrick's conviction and sentence on direct appeal, the Supreme Court of Virginia summarized the facts as follows:

> On May 10, 1997, William K. Dodson, Trevor Jones, and the defendant were

together at Jones' apartment in Lynchburg. The defendant and Jones decided to leave the apartment and drive to an area in downtown Lynchburg where they could find some prostitutes. Dodson remained at the apartment.

Jones drove his truck to an area near Fifth and Madison Streets in Lynchburg where the defendant and Jones met two prostitutes. The defendant and Jones gave the prostitutes money, asked them to purchase a small quantity of crack cocaine, and returned to Jones' apartment with the women. The defendant and Jones smoked the crack cocaine that they purchased, and the women smoked their own cocaine. Jones, the defendant, and Dodson had sexual relations with the prostitutes. The defendant and Jones, along with the women, returned to the area near Fifth and Madison Streets. The defendant and Jones gave the women $50 and asked them to purchase some more crack cocaine. The women took the money but never returned.

The defendant and Jones then rode around in Jones' truck for about 45 minutes. They met two different prostitutes and returned with them to Jones' apartment. The defendant and Jones drank bourbon, smoked marijuana, and had sexual relations with the women. Dodson, who was still at Jones' apartment, was asleep when these women were present.

Around 11:00 p.m., the defendant and Jones, along with the prostitutes, left the apartment and returned to the area near Fifth and Madison Streets. After the women left Jones' truck, Jones observed Crider "walking down the road." Jones, who had met Crider previously, told the defendant that Crider's boyfriend was a seller of crack cocaine. The defendant and Jones decided to "pick up" Crider, have sexual relations with her, and rob her because they thought she may have crack cocaine in her possession.

Jones approached Crider and "asked if she wanted to have sex." Crider got into Jones' truck, and the defendant, Jones, and Crider went to Jones' apartment. Once they arrived at the apartment, Jones paid Crider $50 and had sexual intercourse with her. The defendant did not have sexual relations with Crider at the apartment.

After Jones had sexual intercourse with Crider, he left his bedroom while Crider was "getting dressed." Jones went to a living room and spoke with the defendant. The defendant and Jones devised a plan in which the defendant would pretend to rob both Jones and Crider. Jones did not want Crider to know that he was involved in the robbery because Crider knew where Jones lived, and Jones was afraid that Crider's boyfriend would retaliate against him.

Jones told the defendant to leave the apartment, go to Jones' truck, and get

Jones' shotgun. While the defendant was retrieving the shotgun, Jones told Crider that he had lost his keys, and she began to help him look for the supposedly lost keys. Jones went into the kitchen, got some duct tape, returned to the bedroom, and placed the tape there. Jones also got a set of handcuffs. When the defendant entered the house with the shotgun, Jones and Crider were in the kitchen. The defendant "racked" the pump on the shotgun to "get [Crider's] attention," and the defendant "motioned for" Crider and Jones and told them to go into Jones' bedroom.

The defendant ordered Jones to empty Crider's pockets, and Jones took the $50 bill that he had paid Crider, cigarettes, and a cigarette lighter. The defendant told Jones to place the handcuffs on Crider. Jones did so. Jones also covered Crider's eyes and mouth with duct tape, and he placed a shirt over her face. The defendant took Crider out of the apartment and placed her in Jones' truck.

Dodson, who had been asleep in the living room, woke up when he heard the sound caused when the defendant "racked" the pump on the shotgun. In response to Dodson's question, "what . . . is going on?", Jones responded that, "this is one of the girls that ripped us off; we're just going to scare her."

The defendant, Jones, and Crider left the apartment about 1:00 a.m. Jones sat in the driver's seat. The defendant and Crider were in the backseat of the truck. The defendant removed the shirt and duct tape from Crider. After riding around in the truck for some time, the defendant decided that he wanted to have sexual intercourse with Crider. The defendant told Crider that he "wanted some ass." The defendant warned her, "don't try anything; I got a twenty-five," referring to a .25-caliber pistol. Jones stopped the truck and got out. The defendant raped Crider.

After the defendant raped Crider, he got out of the truck and spoke with Jones. The defendant told Jones that the defendant did not want to return Crider to the downtown area of Lynchburg because he was "afraid something might happen." The defendant, because he had just raped Crider, was afraid that "she might come back on him with her boyfriend." The defendant and Jones had a brief conversation, "about killing" Crider, and decided to do so.

The defendant and Jones got back into the truck. Crider was crying. She was "upset" and "scared." Jones drove the truck as he and the defendant tried to find a good location to kill Crider. As the defendant and Jones continued to look for a place to kill Crider, Jones drove the truck into Appomattox County. Crider, who "kind of figured" that the defendant and Jones intended to harm her, pled, "don't kill me; I got two kids." She was "sniffling and crying."

Crider, continuing to plead for her life, asked: "Is there anything I can do to make ya'll not do this?" The defendant responded, "if you suck my dick, I'll think about it." Crider then performed oral sodomy on the defendant.

Jones continued to drive the truck, and he proceeded on a road in Appomattox County and drove onto a "pull-off" space on a "back road" near the James River. The defendant got out of the passenger side of the truck with the shotgun, and Jones took Crider out of the truck. Jones removed the handcuffs from Crider because he was afraid that his fingerprints were on them. The defendant and Jones put gloves on their hands to avoid leaving their fingerprints at the crime scene.

The time was now "daybreak." Crider, who was crying, continued to beg the defendant and Jones not to kill her, saying, "I got two kids." After Jones had removed the handcuffs from Crider, he bound her hands together with duct tape. He also placed duct tape around her mouth and around her eyes. The defendant was standing, watching with the shotgun in his hands.

The defendant, Jones, and Crider walked toward the river bank. Jones led Crider because she was "blindfolded." Jones "turned [Crider and] faced her back to the river." Jones turned to the defendant, who was armed with the shotgun, and said, "do what you got to do." Jones began to walk to the truck. When Jones was within 10 feet from the truck, he heard a gunshot.

The defendant returned to the truck with the shotgun and told Jones that Crider "went into the river." Jones took the shell from the shotgun so that it would not be present at the scene. The defendant and Jones returned to Lynchburg. They disposed of the shotgun shell, duct tape, and other evidence en route to Lynchburg. They arrived at Jones' apartment at about 6:30 or 7:00 a.m. on Sunday morning, and went to sleep.

The defendant and Jones subsequently fled Virginia, and they were arrested in Lincoln, Nebraska. The shotgun that the defendant used to kill Crider was found in Jones' truck, which he had driven to Nebraska.

Hedrick v. Commonwealth, 513 S.E.2d 634, 636-38, (Va. 1999), *cert. denied*, 528 U.S. 952 (1999).

A. Jury Selection and the Guilt Phase of Trial

An Appomattox County grand jury indicted Hedrick on the following charges: capital murder

in the commission of a robbery; capital murder in the commission of forcible sodomy; capital murder in the commission of a rape; abduction;[1] robbery; forcible sodomy; rape; and use of a firearm in the commission of a murder.

During voir dire, all prospective jurors except one admitted to hearing about the case. After extensive questioning, the judge excused three who stated that they had formed opinions as to Hedrick's guilt which they could not set aside, one who was related to an investigator in the case, one who stated he may be biased because of his employment by the Commonwealth, and two who stated after extensive questioning by the judge and Commonwealth's Attorney that they could not impose the death penalty in any circumstance. The judge did not excuse other venire members who stated that they could set aside their opinions and base their verdict solely upon the evidence presented at trial.

The state first called Edna Alexander, Crider's grandmother. Alexander explained Crider's whereabouts the day before her murder and displayed pictures of Crider and Crider's son to the jury. During cross-examination, Alexander stated that Crider had spent time in jail for drug possession and that she did not know Crider's employment status at the time of her death.

The state also called Bill Dobson. Dobson testified that he had met Hedrick before the night of the murder, but did not know Hedrick well. Dobson testified that he saw Hedrick, who was armed with a shotgun, direct Crider and Jones into the bedroom, and a few minutes later, saw Crider with a shirt or towel wrapped over her head. When Hedrick, Jones, and Crider were leaving, Dobson asked

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[1] The grand jury actually indicted Hedrick for capital murder during an abduction with intent to defile and abduction with intent to defile. At trial, however, the Commonwealth dismissed the capital murder during an abduction charge and amended the abduction with intent to defile charge.

Jones what was happening. Jones told Dobson that Crider had stolen fifty dollars from them and that they were returning her to where they had picked her up. Dobson testified that when he learned of Crider's death a couple of days later, he realized Jones and Hedrick may have been involved, so he told what he knew to the police. During cross-examination, Dobson admitted that he was a convicted felon, but denied supplying drugs to Jones and Hedrick and denied that he was drunk at Jones's apartment. He also stated that no one was smoking marijuana that night, but that Hedrick and Jones drank some whiskey.

The state next called Jones to testify. During direct examination, Jones admitted that he hoped he would receive favorable treatment because of this assistance, that he was a convicted felon, and that he made inconsistent statements to the police about the murder. Jones further testified that, despite his earlier statements to the contrary, he and Hedrick only smoked a small amount of crack cocaine before abducting Crider. In addition, Jones testified that he and Hedrick shared some whiskey and marijuana as well. Jones stated that Dobson arrived at his apartment drunk and brought some marijuana. Jones then provided a narrative of the entire night's events. During cross-examination, Hedrick's counsel attempted to emphasize Jones' leadership role in the crimes.

The state next called Officer Williamson of the Appomattox County Sheriff's Office. Williamson testified that he interviewed Hedrick on two occasions: the first a few days after the death of Crider, the second a month later. During the first interview, in which Hedrick refused to make a taped statement or sign a written statement, Hedrick initially denied knowing Crider. Williamson testified that upon learning that Dobson had spoken to the police and that the police were also interviewing Jones, Hedrick changed his story. Hedrick admitted to bringing Crider back to Jones'

apartment and to having consensual sexual intercourse with Crider there. Hedrick claimed to have used a condom. Hedrick stated to Williamson that he and Crider smoked crack cocaine while at Jones' apartment. Hedrick then confessed to robbing and kidnapping Crider and to taking her to the river. Hedrick told Williamson that he meant to fire over Crider's head, even demonstrating how he aimed, but that he accidently hit Crider. Hedrick also told Williamson that he and Jones wore gloves to avoid detection.

Williamson testified that Hedrick's lawyers were present at the second interview. During this interview, Hedrick claimed that he never intended to shoot the gun; rather, the gun accidently discharged when Jones handed it to him. Hedrick once again claimed that he had protected sexual intercourse with Crider and that Crider smoked crack cocaine. When asked whether Crider pled for her life, Hedrick responded that it was possible. Hedrick's counsel did not cross-examine Williamson.

The state's next witness was John Richard Holt, a Special Agent with the Virginia State Police. Holt was present during both of Hedrick's interviews, and his recollection of the interviews was very similar to Williamson's. Holt stated that he was the one who initially suggested that Hedrick shot Crider accidently as a ploy to get Hedrick to confess to the crime. During cross-examination, Holt stated that during the first interview with Hedrick, they initially talked about Hedrick's other criminal conduct. Holt also stated that he did know Hedrick was the triggerman until Hedrick confessed.

Dr. David Oxley, a deputy chief medical examiner for the Commonwealth of Virginia, qualified as an expert witness on the subject of forensic pathology and testified for the state. Dr. Oxley stated that a toxicology report on Crider revealed the presence of no illegal or prescription drugs at the time of her death. On cross-examination, Dr. Oxley stated that the autopsy revealed no physical evidence of

forced sex and no sperm in Crider's stomach.

Elizabeth Bush, a forensic scientist and a qualified expert on the DNA testing, also testified. She stated that semen found in Crider's vagina was consistent with Hedrick's DNA and inconsistent with Jones' DNA. She further testified that the possibility of a person other than Hedrick providing the sperm found in the Crider's vagina was one out of 260,000 in the Caucasian population, one out of 1,000,000 in the Hispanic population, and one out of 8,000,000 in the Black population.

The state's final witness was Richard Van Roberts, an expert firearms examiner. Roberts concluded that the muzzle of the shotgun was approximately three to seven feet from Crider when the gun discharged.

The defense's only witness was Hedrick. During direct-examination, Hedrick testified that he had abused drugs for several years. Hedrick also testified to currently serving a forty-year sentence for convictions resulting from a series of robberies he committed in order to obtain money to purchase drugs. Hedrick claimed Dobson brought methamphetamine with him to Jones' apartment on May 10, 1991, and that Hedrick, Jones, and Dobson consumed narcotics and drank alcohol. Hedrick then stated that he and Jones left the apartment several times in order to find crack cocaine and to pick up prostitutes, including Crider. Although Hedrick initially did not mention having sex with Crider, his attorneys questioned him about this and he stated that he had consensual sex with her at Jones' apartment, but could not remember whether he used a condom. Hedrick testified that it was Jones' idea to rob Crider and that he was simply following Jones' directions. Hedrick also testified that he was "real messed up" at the time of the abduction due to his drug use. Hedrick testified that Jones led him and Crider to the river, handed him a gun, and ordered him to shoot over Crider's head. Hedrick

testified that he obeyed Jones' order, but accidently hit Crider.

During cross-examination, the Commonwealth's Attorney extensively questioned Hedrick regarding the inconsistencies between his testimony and his earlier statements to the police about whether the gun accidently discharged, whether Crider smoked crack cocaine, and whether Hedrick used a condom. When asked whether the police first suggested that the shooting may have been an accident, Hedrick testified that "[y]es, [he] thought they said something like that." When asked whether he denied knowing Bill Dobson during the interview, Hedrick stated that he had because he did not know Bill Dobson by name at that time. At one point, Hedrick asked to see and was given a transcript of his June 10th statement to the police in order to answer the Commonwealth's questions.

During closing arguments, the Commonwealth's Attorney argued that Hedrick's testimony was unbelievable and that Jones' testimony was consistent with the evidence. The Commonwealth's Attorney at one point stated that "[n]ot guilty means [Hedrick] gets to walk right out that door. That means he gets to take [the] shotgun with him." Hedrick's counsel argued that Hedrick's admission that he was the triggerman made the rest of his testimony more believable, and that he had consistently denied raping or sodomizing Crider.

The jury found Hedrick guilty of all charges.

B. Witness Testimony During the Sentencing Phase of Trial

During the sentencing phase, the defense called fifteen witnesses. Witnesses included Hedrick's family members, friends, and clergy, who testified about Hedrick's character and remorse for the killing. Family members in particular stressed that Hedrick grew-up in a loving, two-parent family and had the support of aunts, uncles, and grandparents. In addition, the defense called Dr. Gary

Hawk, a court-appointed clinical psychologist. Dr. Hawk testified that he had tested and interviewed Hedrick on two occasions, had reviewed Hedrick's school and various other records, and had met with many of Hedrick's family members. Dr. Hawk opined that Hedrick's lack of intelligence, immaturity, characterized by a reduced ability to delay gratification and a lack of self-reliance and judgment, and intense drug abuse coalesced to diminish Hedrick's ability to reflect and deliberate at the time of the murder. In support of his conclusion, he testified that Hedrick's IQ was 76, a score that Dr. Hawk opined was well below average but did not suggest mental retardation, and that Hedrick had experienced many academic and truancy problems in grade school. He indicated that Hedrick began using drugs and alcohol at an early age and that the abuse intensified rapidly in the year before the murder. He also testified that Hedrick exhibited various symptoms of depression while in jail, had taken antidepressant medication, and had attempted suicide on at least one occasion.

To rebut Dr. Hawk's testimony, the Commonwealth called Dr. Evan Nelson, a clinical psychologist, who reviewed Dr. Hawk's test data and report. Dr. Nelson testified that Hedrick had a pattern of problematic behavior in structured situations and with authority figures. As a result, Dr. Nelson disputed Dr. Hawk's conclusion that Hedrick was immature and concluded that Hedrick's behavior stemmed from a personality trait. Dr. Nelson also opined that Hedrick exhibited the characteristics of a psychopath.

The Commonwealth also adduced the following evidence. Hedrick had been convicted of three different robberies. In two of the robberies, Hedrick was armed with a "Rambo type knife," and in the third robbery, Hedrick pointed a shotgun at a hotel clerk. Further, after Hedrick had been arrested for murder, he tried to take a deputy sheriff's gun while being transported between jails, scaled

a fence while in jail, jammed a wire into the lock of his cell in an attempt to open the door, broke a metal support to his sink, destroyed the sink, smashed a window, and pummeled a trash can. One officer testified that Hedrick stated he shot Crider accidently, that he "hated niggers," and that he "really just wanted to go downtown, get some dope, and kill niggers on the corner." Another inmate testified that Hedrick stated "just another nigger dead."

The jury recommended a sentence of three life terms plus thirteen years for the non-capital offenses, and finding both "future dangerousness" and "vileness," see Va. Code Ann. § 19.2 - 264.2, the jury recommended a sentence of death for the capital murder offenses. The Circuit Court sentenced Hedrick in accord with the jury's recommendations.

II. PROCEDURAL HISTORY

A. State Proceedings

The Supreme Court of Virginia affirmed the sentence on February 26, 1999. Hedrick, 513 S.E. 2d at 642. The Supreme Court of the United States denied Hedrick's petition for a writ of certiorari on October 18, 1999. Hedrick v. Virginia, 528 U.S. 952 (1999).

Hedrick filed a petition for a writ of habeas corpus with the Supreme Court of Virginia. That court referred Hedrick's ineffective assistance claims to the Circuit Court of Appomattox County for an evidentiary hearing on those claims. In the course of those proceedings Hedrick deposed both of his trial attorneys, James P. Baber and Lee R. Harrison, and the Circuit Court considered that testimony in its findings. Baber testified that he had been a Commonwealth's Attorney for sixteen years, that he met with Hedrick and Harrison many times to discuss the case, that Hedrick told him not to present evidence regarding a bad childhood because it was not true, that Hedrick never informed him about

threats from Jones, that he viewed Hedrick's testimony as necessary for any defense, that he decided attempting to redirect Hedrick would be futile, that he viewed the accidental shooting theory as incredible due to the close distance, and that Hedrick could read and write. Harrison testified that he met with Baber on many occasions to discuss the case, that he did not object to Alexander's testimony because he was concerned that objecting to a sympathetic witness would displease the jury and because her testimony opened the door to certain evidence regarding Crider's character, that Hedrick told him he was going to make a statement to the police regardless of the advice of counsel, that he reviewed Hedrick's prior statement with Hedrick and informed Hedrick that further statements may be inconsistent, that Hedrick never told him of an assault by Jones, and that any communication problems with Baber were limited to one instance where Baber did not promptly deliver information. The attorneys also testified that they made a tactical decision to emphasize Jones' leadership role.

Both attorneys testified that they did not submit a voluntary intoxication instruction because there was no evidence that Hedrick consumed a quantify of drugs during the night sufficient to cause him to not know what he was doing the next morning. The attorneys also noted that Hedrick's claim that he intended to scare Crider by firing the gun made a voluntary intoxication instruction useless.

After the evidentiary hearing, the Circuit Court submitted its Findings of Fact and Conclusions of Law to the Supreme Court of Virginia, concluding that Hedrick's ineffective assistance of counsel claims lacked merit. While his petition was pending, Hedrick authored a letter to the Supreme Court of Virginia expressing his desire to withdraw his petition and expedite his execution date. In his notarized letter, Hedrick stated the following:

My attorneys will not do what I say when I tell them I wish to withdraw my appeals.

> My attorneys are against the death penalty and I am for the death penalty, so there is a conflict of intrest [sic] there. I believe [sic] in the Bible, and if someone takes a life then that person should have his life taken as well. I am guilty of the charges in which Im [sic] being obtaind [sic] for. What I did was cruel and selfes [sic], I had no disregard [sic] for human life, there for [sic] I should be punished, for my sake and the sake of my victim. There for [sic] since my attorneys will not abide by my demand, I personaly [sic] write my owne [sic] motion to withdraw my habius corbus pititeon [sic] and to have a [sic] execution date set as soon as possibal [sic]. Thank you for your time in this matter.

Hedrick, 570 S.E.2d at 945-46. After receiving the letter, the Supreme Court of Virginia received another letter from Hedrick's counsel, stating Hedrick's desire to proceed with his habeas petition. Consequently, the Court directed the Circuit Court to conduct an evidentiary hearing on Hedrick's desire to pursue his habeas petition. After the hearing, the Circuit Court concluded that Hedrick wished to proceed with his petition for habeas corpus, and on November 1, 2002, the Virginia Supreme Court denied Hedrick's petition. The Court adjudicated Hedrick's ineffective assistance of counsel claims on the merits, but found his remaining claims procedurally barred. Hedrick v. Warden of Sussex I State Prison, 570 S.E. 2d 840 (Va. 2002) (hereinafter Hedrick II).

B. Federal Proceedings

On April 1, 2003, Hedrick filed a motion in this court to stay his scheduled April 3, 2003 execution, a notice of intent to file for a writ of habeas corpus, and a motion to appoint counsel. This court stayed Hedrick's execution pending consideration of his federal habeas petition and appointed counsel. However, on July 21, 2003, this court received the first of three handwritten letters by Hedrick requesting that his counsel withdraw, not pursue his habeas petition, and allow his execution to proceed. Upon receipt of Hedrick's requests, this court ordered counsel to respond. On July 25, 2003, Hedrick filed another letter, professing his innocence and requesting that counsel be allowed to

pursue his petition for habeas corpus. That same day, Hedrick, through counsel, filed a petition for habeas corpus. In that petition, Hedrick sets forth the following as grounds for federal habeas relief:

I. Hedrick is actually innocent of rape and forcible sodomy.

II. Hedrick did not receive effective assistance of counsel.

A. Counsel failed to adequately investigate and prepare for trial.

B. Counsel failed to effectively communicate.

C. Counsel failed to develop guilt phase theories.

D. Counsel failed to investigate and present mitigating evidence at the penalty phase.

E. Counsel failed to effectively cross-examine Trevor Jones.

F. Counsel mishandled Hedrick as a witness.

G. Counsel failed to cross-examine law enforcement officers.

H. Counsel elicited damaging testimony.

I. Counsel failed to challenge venue based upon pretrial publicity.

J. Counsel inadequately conducted voir dire.

K. Counsel failed to object to venue.

L. Counsel failed to submit and argue critical jury instructions.

1. A voluntary intoxication instruction.

2. A cautionary instruction regarding accomplice testimony.

3. Unanimity instructions.

M. Counsel failed to object to improper evidence.

N. Counsel failed to object to improper closing argument.

O. Counsel failed to preserve and argue meritorious issues on appeal.

III. The Circuit Court failed to address the cumulative impact of evidence of counsel's deficient performance and resulting prejudice.

IV. The evidentiary hearings in state court violated Hedrick's constitutional rights.

A. The state court improperly refused to allow Hedrick an opportunity to examine the prosecutor's files.

B. The state court failed to make proper findings of fact or resolve factual disputes.

V. Virginia's capital sentencing scheme does not "channel jury discretion at the eligibility phase" in violation of the Eight and Fourteenth Amendments.

A. "Aggravated battery," as defined in Virginia is impermissibly vague in violation of the Sixth, Eighth, and Fourteenth Amendments.

B. The Virginia Supreme Court impermissibly expanded the definition of "aggravated battery" to include all capital crimes and all aspects of the crime.

C. Virginia's vague definition of "aggravated battery" prevented Hedrick from presenting a full and complete defense.

D. Virginia's vague definition of "aggravated battery" failed to provide appropriate guidance to the jury and the Circuit Court at sentencing.

E. The presence of other valid aggravators cannot cure an unconstitutional aggravator.

VI. The Commonwealth and jury acted improperly.

A. The Commonwealth failed to disclose favorable, discoverable information to Hedrick.

B. Jurors failed to consider evidence presented at sentencing prior to recommending the death penalty and improperly relied on prayer and religious teachings during deliberations.

VII. The trial court violated Hedrick's Fifth, Sixth, and Fourteenth Amendment rights.

A. The court improperly admitted inflammatory photographs of the victim.

B. The court improperly denied Hedrick's request for a bill of particulars.

C. The court improperly denied a defense-proffered jury questionnaire.

VIII. Hedrick's execution is barred by Atkins v. Virginia.

IX. Hedrick's death sentence was imposed in reliance on unconstitutionally arbitrary and incomplete verdict forms.

All Hedrick's claims are either exhausted within the meaning of 28 U.S.C. § 2254(b) because he presented them to the Supreme Court of Virginia on direct appeal or state habeas review, or they are defaulted because he never presented them to the Supreme Court of Virginia and could not present them to that court now. See Va. Code § 8.01 - 654.1 (providing that a death row inmate may file a habeas petition no later than 60 days after denial of certiorari on direct appeal or, if indigent, no later than 120 days after counsel is appointed to represent him in state habeas proceedings); Gray v. Netherland, 518 U.S. 152, 161-62 (1996) (holding that since Va. Code § 8.01 - 654(B)(2) precludes review of petitioner's claim in any future state habeas proceeding, his claim is procedurally defaulted).

Respondent has moved the court to dismiss Hedrick's petition.

III. CLAIMS ON THE MERITS (CLAIM II)

A. Standard of Review

Hedrick raises fifteen ineffective assistance of counsel claims which the state court adjudicated on the merits. When reviewing a claim adjudicated on the merits in state court, a federal court may grant habeas relief only if the state court's adjudication: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1), (d)(2). A state court adjudication is considered "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A state court decision constitutes an "unreasonable application" of clearly established federal law if the court identifies the governing legal principle, but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. Where a federal habeas court determines that the state court applied federal law incorrectly, it may not grant relief unless it also finds that the incorrect application is unreasonable. Id. at 411. "It is not enough that a federal habeas court, in its 'independent review of the legal question' is left with a 'firm conviction' that the state court was 'erroneous'... Rather, that application must be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (quoting Andrade v. Attorney General of the State of California, 270 F.3d 743, 753 (9th Cir. 2001)).

B. Analysis

This court finds that the Supreme Court of Virginia's thoughtful, comprehensive adjudication of Hedrick's non-defaulted ineffective assistance of counsel claims was neither contrary to, or involved an unreasonable application of, clearly established Federal law, nor was based on an unreasonable determination of the facts; consequently, the court dismisses these claims.

Under the Sixth Amendment, a criminal defendant must have sufficiently competent assistance of counsel to ensure a fair trial. Strickland v. Washington, 466 U.S. 668, 685 (1984). To establish an ineffective assistance of counsel claim, the defendant must show both a deficient performance and a resulting prejudice. Id. at 687. To show deficient performance, the defendant must establish that under the circumstances at the time of the representation, "counsel's representations fell below an objective standard of reasonableness." Id. at 687-88. There is a strong presumption that counsel's performance was within the range of competence demanded of attorneys defending criminal cases, and the court must defer to counsel's strategic decisions, avoiding the distorting effects of hindsight. Id. at 688-89. To show prejudice, a defendant must establish that counsel's errors "actually had an adverse effect on the defense." Id. at 693. The defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In assessing penalty phase prejudice, a court must "evaluate the totality of the available mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceeding–in reweighing it against the evidence in aggravation." Williams v. Taylor, 529 U.S. 362, 397-98 (2000).[2] However,

[2] In the state habeas adjudication, the Supreme Court of Virginia stated "[i]n making [the Strickland prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of

"a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . ." Id. at 697.

Here, the Supreme Court of Virginia correctly identified Strickland as governing the analysis of Hedrick's ineffective assistance of counsel claims. See Bell v. Cone, 535 U.S. 685, 697-98 (2002). Therefore, the court turns its attention to whether the state court's adjudication of Hedrick's non-defaulted claims involved an unreasonable application of Strickland, or, that is, whether the Supreme Court of Virginia "applied Strickland to the facts of [Hedrick's] case in an objectively unreasonable manner," id. at 699, and whether the Court unreasonably determined the facts.

1. Ineffective Assistance: Failure to investigate and prepare–(Claim II.A)

Hedrick contends his attorneys, James P. Baber and Lee R. Harrison, were ineffective because they failed to adequately investigate and prepare for trial. On state habeas, the Supreme Court of Virginia found that the claim had no merit. Having reviewed the record and applicable law, this court finds that the Supreme Court of Virginia's adjudication was reasonable and therefore denies relief.

Hedrick claims his trial was "an excruciating mismatch" because while the Commonwealth of Virginia was represented by a "regionally acclaimed expert capital prosecutor," neither one of Hedrick's attorneys had ever completed a single capital trial. Hedrick also alleges that by not

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the evidence before the judge or jury." Hedrick v. Warden of the Sussex State I Prison, 570 S.E.2d 840, 847 (Va. 2002) (hereinafter Hedrick II). Consequently, Hedrick argues the Supreme Court of Virginia misapplied federal law because it failed to consider and weigh evidence adduced during the habeas proceeding when making the sentencing phase prejudice determination. A thorough reading of Hedrick II, however, reveals that the Supreme Court of Virginia never excluded evidence from their prejudice analysis because the evidence was not adduced at trial. Consequently, the Supreme Court of Virginia did not misapply federal law.

interviewing friends and family, obtaining school records revealing his "borderline intellectual abilities," or obtaining records revealing Hedrick's father's history of drug and alcohol addiction, counsel failed to effectively investigate his background. Hedrick also claims that counsel did not speak to certain witnesses before they testified, failed to obtain experts, and did not speak with Dr. Hawk until after the guilt phase of the trial.

In depositions, which were taken before the evidentiary hearing, Baber and Harrison described their investigation and trial preparation concerning Hedrick's diminished intellectual abilities, family life and drug abuse. The Circuit Court credited that testimony in its findings, essentially concluding that counsel's failure to present *cumulative* evidence regarding these subjects was neither deficient performance nor prejudicial, and the Supreme Court of Virginia adopted the Circuit Court's findings. Hedrick II, 570 S.E.2d at 849.[3] The Supreme Court of Virginia also found, based upon counsel's testimony, that Hedrick directed counsel not to investigate or present evidence regarding his "chaotic upbringing," id. at 852-53, and could not fault them for obeying his directions. Id.; see Bolder v. Armontrout, 921 F.2d 1359, 1363 (8th Cir. 1990) (holding that counsel's failure to contact defendant's family was not ineffective assistance due to defendant's request that counsel not contact them). Clearly, the Supreme Court of Virginia did not apply Strickland in an objectively unreasonable manner or unreasonably determine the facts. Accordingly, the court dismisses the claim.

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[3] Furthermore, despite Hedrick's attempts to transform his habeas petition into a battle of resumes, the court notes that the appropriate inquiry is whether counsel effectively represented Hedrick, not how their resumes compared to the Commonwealth's Attorney's. The court adds that the Supreme Court of Virginia found that Baber had practiced law for thirty-nine years and spent sixteen years as a Commonwealth's Attorney, and Harrison had been involved with twelve previous capital murder cases, id., and these findings are a reasonable determination of the facts.

2. Ineffective Assistance: Failure to effectively communicate–(Claim II.B)

Hedrick contends that his counsel failed to effectively communicate with each other. The Supreme Court of Virginia rejected this claim, and this court finds that the decision of the Supreme Court of Virginia was not objectively unreasonable.

Hedrick argues that the communication problems between his two attorneys were so severe as to render their assistance ineffective. In particular, Hedrick points to alleged confusion regarding whether Hedrick would plead guilty, who would conduct voir dire, who would deliver opening and closing statements, who would cross-examine witnesses, who would issue subpoenas, and what records the lawyers would obtain. Hedrick also argues that his attorneys never seriously discussed the prospective testimony of witnesses, a theory of defense for the guilt phase, or which attorney would serve as lead counsel. Consequently, Hedrick concludes that his attorneys' failure to communicate fell below professional norms and prejudiced his defense.

The Supreme Court of Virginia disagreed and found neither deficient performance nor prejudice, id. at 848-49, 852-53. Harrison testified that the communication problems were limited to one instance where Baber failed to promptly provide him with some information. Relying on this testimony, the Supreme Court of Virginia found that the communication problems between Baber and Harrison were quite limited and non-prejudicial. Id. at 848. In any event, the appropriate inquiry is not to ask how well counsel collaborated, but how well counsel investigated and presented the case. For the reasons given in sections III.B.1, III.B.3, and III.B.4 of this opinion, Hedrick cannot show that the Supreme Court of Virginia's determination that counsel effectively investigated and presented a defense is an objectively unreasonable application of Strickland or an unreasonable determination of the facts.

3. Ineffective Assistance: Failure to develop guilt phase theories–(Claim II.C)

Hedrick argues his counsel were ineffective because they failed to develop guilt phase theories. On state habeas, the Supreme Court of Virginia held that the claim had no merit. Having reviewed the record and applicable law, the court finds that the Supreme Court of Virginia's adjudication was reasonable and therefore denies relief.

Hedrick asserts that his counsel should have argued that Hedrick was attempting to shoot over Crider's head to scare her and accidently hit her. Hedrick also argues that counsel should have presented a voluntary intoxication defense and introduced evidence regarding the amount of drugs Hedrick consumed before the murder.

The Supreme Court of Virginia dismissed this claim, reasoning that the jury heard testimony and argument regarding Hedrick's drug abuse and intent to shoot over the victim's head. Id. at 849-50. Hedrick testified that the shooting was accidental; he testified that his drug consumption clouded his judgment; and Hedrick's counsel cross-examined the Commonwealth's witnesses about that drug consumption. The hard truth is counsel had little to work with. Substantial time passed between Hedrick's drug consumption and the murder, and there was substantial evidence of premeditation fortified by Hedrick's own account of events leading up to the murder. Moreover, Hedrick never produced evidence sufficient to satisfy the Supreme Court of Virginia on habeas review that a voluntary intoxication defense was even remotely probable. Consequently, the Supreme Court of Virginia could easily find that defense counsel adduced guilt phase theories, and Hedrick has failed to establish deficient performance or prejudice. Therefore, the adjudication of the Supreme Court of Virginia is neither an objectively unreasonable application of federal law nor an unreasonable determination of the

facts, and the court denies relief on this claim.

4. Ineffective Assistance: Failure to investigate and present mitigating evidence–(Claim II.D)

In his fourth ineffective assistance claim, Hedrick contends that his counsel failed to investigate and present mitigating evidence during the sentencing phase of Hedrick's trial. The Supreme Court of Virginia rejected this claim, and this court finds the decision of the Supreme Court of Virginia was not an unreasonable determination of the facts or an objectively unreasonable application of federal law.

Hedrick argues that his counsel failed to subpoena family members and friends as witnesses, failed to talk to witnesses before they testified, failed to obtain school records revealing Hedrick's low IQ, failed to obtain records concerning Hedrick's treatment for alcohol and drug addiction, and failed to present evidence regarding Hedrick's "chaotic upbringing," remorse, and co-operation with law enforcement. Hedrick also claims that counsel failed to adequately prepare and examine Dr. Hawk.

The Supreme Court of Virginia rejected Hedrick's claims, finding that Hedrick's lawyers called fifteen witnesses, including many family members, during the sentencing phase, and these witnesses testified as to Hedrick's remorse, drug abuse, intellectual limitations, and family life. Id. at 852-53. As for Hedrick's "chaotic upbringing," the Supreme Court of Virginia found, based upon the depositions of Harrison and Baber, that Hedrick directed his attorneys not to present evidence of a "bad childhood," id., so Hedrick could not challenge counsel's decision not to investigate and argue mitigating factors regarding his upbringing. This court finds that the Supreme Court's adjudication was neither an objectively unreasonable application of Strickland nor an unreasonable determination of the facts, and the court accordingly dismisses this claim.

5. Ineffective Assistance: Failure to effectively cross-examine Jones–(Claim II.E)

Hedrick claims his counsel were ineffective because they failed to effectively cross-examine Jones. On state habeas, the Supreme Court of Virginia held that the claim had no merit. This court finds that the Supreme Court of Virginia did not unreasonably apply federal law or determine the facts, and the court therefore denies relief.

Hedrick contends that counsel should have introduced Jones' felony convictions and inconsistent statements, informed the jury that Jones was a cooperating witness who expected leniency from the Commonwealth in return for his testimony, and informed the jury that Jones had threatened Hedrick before trial. Finally, according to Hedrick, after the Commonwealth's direct examination of Jones, Baber, the attorney responsible for cross-examining Jones, asked Harrison to conduct the cross-examination. Only after Harrison declined did Baber cross-examine Jones. Hedrick argues this request illustrates Baber's lack of preparation.

The Supreme Court of Virginia concluded that Hedrick failed to establish both the performance and prejudice requirements of Strickland. Id. at 855. That court found that Jones admitted during direct examination his multiple felony convictions, his lies to the police during the investigation, his hope for favorable treatment in exchange for his cooperation, and, during cross-examination, his leadership role, thereby making further cross-examination on these subjects unnecessary. Id. To these observations the court adds one more: Hedrick's own corroborated statements were extraordinarily damaging. He, not Jones, shot Crider. Consequently, counsel were left with precious few options in examining Jones. It follows that the Supreme Court of Virginia's adjudication was neither an objectively unreasonable application of Strickland nor an unreasonable determination of the facts;

therefore the court will dismiss the claim.

6. Ineffective Assistance: Mishandling Hedrick as a witness–(Claim II.F)

Hedrick claims counsel failed to prepare him properly before he spoke to police and before he testified at trial. He also faults counsel for not properly handling him as a witness. The Supreme Court of Virginia found these claims meritless and that adjudication is not an objectively unreasonable application of federal law or an unreasonable determination of the facts.

Hedrick claims counsel were ineffective because they gave conflicting advice about whether he should give a statement to the police. Although Harrison advised against it, Baber advised Hedrick that making a statement probably would not hurt him and might help him. Hedrick argues his lawyers should have given him consistent advice and suggested other options, such as giving a written statement to the police. Hedrick also complains that counsel did not obtain his previous statements and, therefore, were unable to recognize and help explain inconsistencies. Hedrick's counsel, however, testified that Hedrick wanted to make the statement and that Hedrick would not allow them to stop him. They also testified that they had reviewed Hedrick's version of events and the inconsistencies in his various statements with him. Accepting counsel's assertions, the Supreme Court of Virginia concluded that counsel properly prepared Hedrick and that Hedrick's conscious decision to make a statement to the police regardless of the advice of counsel precluded the claim.

Hedrick also claims that counsel should have either prepared him for cross-examination concerning his prior inconsistent statements or advised him not to testify. Counsel stated that they repeatedly reviewed those matters with him and ultimately concluded that it would be best for him to testify. Crediting counsel's testimony, the Supreme Court of Virginia found that trial counsel

"repeatedly reviewed petitioner's version of events with him, and they questioned him about petitioner's inconsistencies in his statements to the police officers and to trial counsel." Id. at 857. Consequently, that court concluded that the decision was a tactical decision that should not serve as the basis for an ineffective assistance of counsel claim.

Hedrick claims that counsel should have informed the jury and the court that Hedrick could not read rather than letting Hedrick become frustrated and confused when the prosecutor confronted Hedrick with the transcript of his prior statements. Hedrick further faults counsel for failing to rehabilitate his testimony on redirect. However, Baber and Harrison testified that Hedrick can read and write[4] and for tactical reasons they decided not to attempt to rehabilitate him on redirect. The Supreme Court of Virginia credited counsel's testimony and rejected the claim.

In light of the record, it would be a stretch for a federal habeas court to conclude that the Supreme Court of Virginia's adjudication resulted in a decision that was either an objectively unreasonable application of Strickland or an unreasonable application of the facts in light of the evidence presented. Furthermore, this court notes that there was very little counsel could have done to help Hedrick explain the inconsistencies in his story. Obviously, those inconsistencies occurred not because Hedrick was unable to express himself effectively, but because Hedrick deliberately changed his story.

7. Ineffective Assistance: Failure to cross-examine law enforcement officers–(Claim II.G)

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[4] Hedrick can read and write well enough to compose the letters he sends to this court and to the Supreme Court of Virginia.

Hedrick argues that counsel were ineffective because they only briefly cross-examined officer Holt and did not cross-examine Officer Williamson at all. The Supreme Court of Virginia rejected the claim and its adjudication is not unreasonable.

Hedrick claims that counsel's failure to cross-examine the officers was prejudicial for several reasons. Hedrick notes that the Commonwealth's Attorney argued that, as a ploy to get Hedrick to confess, Officer Holt suggested to Hedrick that the shooting may have been accidental. Hedrick argues that if counsel had cross-examined Holt or Williamson, counsel could have shown that neither officer's notes mentioned who initially suggested that the shooting may have been accidental. Hedrick also contends that cross-examination would have revealed that, despite the Commonwealth's Attorney contrary arguments, the officers were unconcerned with getting a signed or tape recorded statement and that Hedrick never denied knowing William Dodson.

The Circuit Court found that Holt first suggested that the shooting may have been accidental. This finding is a reasonable determination of the facts, especially in light of Hedrick's own testimony at trial that he remembered one of the officers suggesting it first. Under the circumstances, Hedrick's argument that counsel were ineffective because they failed to cross-examine the officers about the matter is simply untenable.

The argument that counsel should have cross-examined the officers about their assertion that Hedrick denied knowing Dodson is, likewise, untenable. During his cross-examination, Hedrick admitted that he initially denied knowing Dodson because he did not know Dodson's name. That admission contradicts Hedrick's current assertion that he never denied knowing Dodson.

Finally, whether the officers were interested in obtaining a signed statement is at best a

peripheral issue with no reasonable probability of effecting the outcome of Hedrick's trial.

It follows that the Supreme Court of Virginia's adjudication of Hedrick's claim that his counsel were ineffective for failing to cross-examine Holt and Williamson is neither an unreasonable determination of the facts nor an objectively unreasonable application of federal law, and this court denies relief on this claim.

8. Ineffective Assistance: Eliciting damaging testimony–(Claim II.H)

Hedrick also contends that counsel provided ineffective assistance because they elicited damaging testimony. In particular, counsel asked officer Holt about "some other charges" from another jurisdiction, and thereby according to Hedrick opened the door to "inadmissible, irrelevant, and damaging" information of other crimes during the guilt phase of trial. Although the Supreme Court of Virginia did not address this issue, the Circuit Court did make findings of fact and conclusions of law as to this claim, and those findings are not an objectively unreasonable application of federal law or an unreasonable determination of the facts.

During the very brief cross-examination of officer Holt, Hedrick's counsel attempted to show that Hedrick willingly cooperated by quickly volunteering information. The Circuit Court found that "Baber questioned Holt [about some other charges from another jurisdiction] to establish that the entire time of Hedrick's four-hour interview was not spent attempting to get Hedrick to reluctantly confess to the murder of Lisa Crider. Trial counsel wanted to demonstrate to the jury that Hedrick had fully cooperated with the police by admitting that he was the triggerman and that the four hours included discussions of other matters." The Circuit Court also found that at the time of the cross-examination counsel "knew that Hedrick intended to testify and that Hedrick would be admitting his prior criminal

conduct." Of course, when Hedrick took the stand he was open to cross-examination about those convictions. See Va. Code § 19.2-269. Under the circumstances, Hedrick's complaints about these matters are groundless. Consequently, the Circuit Court's adjudication of the claim did not result in a decision that was an objectively unreasonable application of federal law or an unreasonable determination of the facts. The court accordingly denies relief on this claim.

9. Ineffective Assistance: Counsel failed to challenge venue based upon pretrial publicity–(Claim II.I)

Hedrick contends that his counsel were ineffective because they failed to move for a change of venue in the face of extensive pretrial publicity. The Supreme Court of Virginia rejected this claim, and this court finds the Supreme Court of Virginia's adjudication reasonable.

Hedrick argues that local newspapers ran several articles describing the crime. These articles named Hedrick as a suspect, stated that Hedrick admitted shooting Crider, and stated that Hedrick had received a forty-five year prison sentence for three robberies. Hedrick contends that this pretrial publicity made the trial inherently unfair, thereby violating due process and that his attorneys should have requested a change of venue.

The Supreme Court of Virginia found that "the jurors who were seated in the capital murder trial all assured the trial court that they could set aside any information that they had acquired about the case and base their decisions solely on the basis of the evidence presented. Three jurors who indicated a fixed opinion as to petitioner's guilt were excused." Id. at 858. Moreover, this court notes that the publicity Hedrick complains of essentially tracked the evidence the jury ultimately heard.

Hedrick attacks the conclusions of the Supreme Court of Virginia as unreasonable, and cites

Marshall v. Dowd, 360 U.S. 310 (1959), for the proposition that a new trial is required when a jury is exposed to prejudicial, pretrial publicity even if each juror assures the trial court that he can decide the case solely on the evidence at trial. However, the Supreme Court has explicitly stated that Marshall is not a constitutional holding and not applicable to the states. Murphy v. Florida, 421 U.S. 794 (1975). Furthermore, the Supreme Court stated in Marshall that "[t]he trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of a news article concerning the trial." Marshall, 360 U.S. at 312.

More fundamentally, as the Supreme Court noted in Patton v. Yount, 467 U.S. 1025, 1037-1038 n.12 (1984): "the constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law [citations omitted]; whether a juror can in fact do that is a determination to which habeas courts owe special deference...." Here, the trial judge unmistakably concluded that each juror was capable of deciding the case based solely on the evidence presented in open court. That finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). See Patton, 467 U.S. at 1038. Consequently, Hedrick cannot show prejudice, and the Supreme Court of Virginia's adjudication of Hedrick's ineffective assistance claim did not result in a decision that was an objectively unreasonable application of federal law or an unreasonable determination of the facts.

10. Ineffective Assistance: Inadequate voir dire–(Claim II.J)

Hedrick also complains about the adequacy of counsel's voir dire. The Supreme Court of Virginia found this claim meritless, and this court finds the Supreme Court of Virginia's adjudication was not unreasonable.

Hedrick contends that counsel inadequately questioned various jurors. When asked by the judge whether they had formed an opinion as to Hedrick's guilt or innocence, three jurors and one alternate juror stated yes, but the judge did not excuse these jurors because they stated that they could set aside their opinions and base their verdict solely on the evidence. Hedrick argues that counsel should have further questioned these jurors and moved to have them struck. Similarly, two jurors doubted that they could impose the death penalty, and Hedrick argues counsel failed to attempt to rehabilitate these jurors before they were struck for cause. Hedrick also faults counsel for not inquiring into racial bias where the trial involved an interracial violent crime, the killing of a black woman by a white man, or the juror's opinions regarding the testimony of accomplice witnesses.

The Circuit Court reviewed in detail the handling of voir dire and rejected Hedrick's characterization of counsel as doing virtually nothing. The court essentially found instead that counsel "actively participated" and followed up appropriately. The Circuit Court also examined the answers given by each juror Hedrick claims counsel failed to question appropriately and concluded that each juror stated that he or she would base his or her verdict solely on the evidence and would be willing to consider sentences other than death.

Neither the Circuit Court nor the Supreme Court of Virginia specifically addressed Hedrick's claim that counsel should have inquired into racial bias and opinions about accomplice testimony. Nevertheless, the argument is meritless. Hedrick contends that lawyers must always ask about racial prejudice when the trial involves an interracial crime. However, there is no such per se rule, see Rosales-Lopez, 451 U.S. 182, 190 (1981) ("There is no per se rule in such circumstances requiring [judicial] inquiry into racial prejudice."), and attorneys simply are not required to ask about every

possible trial issue during voir dire. Furthermore, Hedrick cannot show even a remote probability of a different outcome. Hedrick, therefore, is not entitled to habeas relief on this claim.

11. Ineffective Assistance: Failure to object to venue–(Claim II.K)

Hedrick argues that venue was improper according to Virginia law and that his counsel failed to timely object. However, the Supreme Court of Virginia held that venue was proper, Hedrick II, 570 S.E.2d at 858, and "[i]t is not the province of a federal habeas court to reexamine state-court determinations of state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Consequently, Hedrick cannot show prejudice, and the court dismisses this claim.

12. Ineffective Assistance: Failure to propose jury instructions–(Claim II.L)

Hedrick claims that he is entitled to relief because his counsel failed to submit and argue certain jury instructions. The Supreme Court of Virginia found that these arguments were without merit. This court concludes that the adjudication of the Supreme Court of Virginia is neither an objectively unreasonable application of federal law nor an unreasonable determination of the facts.

a. Voluntary Intoxication Instruction

Hedrick argues that counsel should have proposed a voluntary intoxication instruction. The Supreme Court of Virginia found "extensive reasons why the evidence did not support a voluntary intoxication jury instruction" and therefore concluded that Hedrick had failed to meet either the performance or prejudice prongs of an ineffective assistance claim. Hedrick, 570 S.E.2d at 851. This court finds that adjudication reasonable and rejects Hedrick's claim.

The Court of Appeals for the Fourth Circuit recently summarized the defense of voluntary intoxication in Virginia:

> Under Virginia law, voluntary intoxication does not excuse any crime. See Wright v. Commonwealth, 363 S.E.2d 711, 712, (Va. 1988). "However, when a person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit a class of murder that requires proof of a deliberate and premeditated killing." Id. In determining whether the evidence supports a voluntary intoxication defense, Virginia courts look to the defendant's behavior before and after the offense. See, e.g., Giarratano v. Commonwealth, 266 S.E.2d 94, 99 (Va.1980). Relevant behaviors include attempts to conceal the crime, see id. at 100 (noting that defendant killed second person in order to conceal first murder); a lapse of time between ingestion of intoxicants and the crime, see Hedrick v. Warden, 570 S.E.2d 840, 851 (Va. 2002); whether the conduct of the defendant was "planned and purposeful," id; and whether the defendant was able to engage in complex behaviors such as operating an automobile, see Lilly v. Commonwealth, 499 S.E.2d 522, 536 (Va. 1998), *rev'd on other grounds*, 527 U.S. 116 (1999).

Reid v. True, 349 F.3d 788, 800 (2003).

The Supreme Court of Virginia summarized the evidence it relied on in concluding that Hedrick was not entitled to a voluntary intoxication instruction:

> The circuit court found that "a minimum of five hours had transpired from the time [petitioner] last ingested any substance" and the time the murder occurred. As many as seven hours may have passed between the time petitioner last ingested alcohol or drugs and the time of the murder. The evidence at trial did not depict petitioner as someone who was intoxicated or impaired by drugs. The conduct of Jones and petitioner during the early morning hours preceding Crider's murder was planned and purposeful. Jones stopped the truck and he and petitioner discussed the necessity of killing Crider. They spent several hours looking for a suitable secluded location. They removed the handcuffs to avoid leaving evidence, and petitioner wore gloves to avoid leaving any fingerprints. They placed duct tape around the victim's hands, mouth, and eyes before they took her to the river bank. Before fleeing to Nebraska, they disposed of much of the incriminating evidence.

Hedrick, 570 S.E. 2d at 851.

Clearly, the Supreme Court of Virginia's adjudication of Hedrick's ineffective assistance claim, grounded as it is in the requirements of Virginia's own law on the question of when an accused is entitled to a voluntary intoxication instruction, is unassailable, and the court denies relief on this claim.

b. Cautionary Instruction Regarding Accomplice Testimony

Hedrick also contends that counsel should have proposed a cautionary instruction on the inherently suspect nature of accomplice testimony. The Supreme Court of Virginia reasoned that "[c]autionary accomplice instructions . . . deal with a lack of evidence, evidence of a corroborative nature. The test, therefore, in determining whether a cautionary instruction should be granted becomes this: is corroborative evidence lacking? If it is, the instruction should be granted; if it is not lacking, the instruction should be refused...." Hedrick II, 570 S.E. 2d at 860 (quoting Smith v. Commonwealth, 237 S.E. 2d 776, 777 (1977)). The Supreme Court of Virginia found that Jones' testimony was corroborated, for example, by the discovery of seminal fluid consistent with Hedrick's DNA despite Hedrick's assertion that he wore a condom. Id. at 860-61. Consequently, had Hedrick requested the instruction, under Virginia law the Circuit Court would have properly refused it, and the Supreme Court of Virginia concluded that Hedrick met neither the performance nor prejudice requirement of an ineffective assistance claim. Moreover, this court notes that the Constitution did not require the Circuit Court to give such an instruction. Foster v. Ward, 182 F.3d 1177, 1193-94 (10th Cir. 1999). Thus, the Supreme Court of Virginia's determination that the instruction would have been inappropriate settles the matter. It follows that Hedrick cannot show prejudice, and adjudication of the Supreme Court of Virginia is not an objectively unreasonable application of Strickland or an unreasonable determination of the facts, and the court dismisses this claim.

c. Unanimity Instructions

Hedrick faults counsel for not requesting certain unanimity instructions. First, Hedrick claims counsel should have requested the judge to instruct the jury that it was required to find unanimously

which specific acts–oral sodomy, anal sodomy, or both–Hedrick forced Ms. Crider to perform before it could find him guilty of capital murder in the commission of forcible sodomy. Second, Hedrick similarly claims that counsel should have requested an instruction informing the jury that it was required to find unanimously the vileness aggravating circumstances–depravity of mind, aggravated battery, or torture. The Supreme Court of Virginia rejected the first claim without reaching the question of whether counsel should have requested a unanimity instruction because Hedrick could not show prejudice due to his convictions for murder in the commission of robbery and murder in the commission of rape. Id. at 862. Likewise, that court did not reach the adequacy of counsel's performance in not requesting a unanimity as to the vileness aggravating circumstances because Hedrick could not show prejudice because the jury unanimously agreed that Hedrick posed a continuing threat to society, a finding sufficient to support a judgment imposing the death penalty. Id. Within the confines of habeas review, the Supreme Court of Virginia's adjudication of these issues is unassailable.

Because the jury convicted Hedrick of capital murder in the commission of robbery and in the commission of rape and found that Hedrick posed a continuing threat to society, this court concludes that the Supreme Court of Virginia reasonably decided that the failure to request the unanimity instructions did not prejudice Hedrick. Consequently, the adjudication of the Supreme Court of Virginia was not an objectively unreasonable application of Strickland or an unreasonable determination of the facts.

13. Ineffective Assistance: Failure to object to improper evidence–(Claim II.M)

Hedrick further alleges that counsel failed to object to the improper testimony of Edna Alexander, the victim's grandmother. The Supreme Court of Virginia rejected this claim, and this court

finds that the Supreme Court of Virginia's adjudication was not an objectively unreasonable application of Strickland.

Hedrick contends that the prosecution elicited testimony from Ms. Alexander regarding the victim's six-year-old son and presented to the jurors photographs of the victims family, all during the guilt phase of his trial. Hedrick argues that counsel should have objected to the victim impact evidence. Harrison testified in the habeas proceeding that he considered objecting, but decided against doing so because the jury might not have looked favorably upon such an objection and because Alexander's testimony opened the door for evidence regarding Crider. The Supreme Court of Virginia found that "trial counsel made a tactical decision that they would not object to this testimony because they believed that the information was unlikely to cause any prejudice to the petitioner, and the Commonwealth's evidence 'opened the door' permitting trial counsel to cross-examine Alexander about the victim's past criminal history." Id. at 858.

Hedrick argues that counsel's tactical decision was unreasonable on numerous grounds. At base, his argument mis-perceives the role of a federal habeas court when reviewing a claim that the state court has adjudicated on the merits. The claim is not before the court de novo. The question is not whether counsel's tactical decision was unreasonable and prejudicial but whether the Supreme Court of Virginia could have reasonably determined that it was not. When viewed through this prism, this court has not hesitancy in dismissing the claim.

14. Ineffective Assistance: Failure to object to improper closing argument–(Claim II.N)

Hedrick contends that counsel were ineffective because they failed to object to the

Commonwealth's closing argument that if the jury failed to convict Hedrick of capital murder, Hedrick would be freed. Hedrick contends this statement was false and inflammatory, thereby resulting in a violation of due process. The Circuit Court disagreed, finding that "[t]he jury already knew that Hedrick had been convicted in other jurisdictions and had received a lengthy prison sentence. They could not have been misled by this statement." The Supreme Court of Virginia adopted this finding, and its conclusion is not an objectively unreasonable application of federal law and is not an unreasonable determination of the facts. Accordingly, this court denies relief on this claim.

15. Ineffective Assistance: Failure to object to preserve issues for appeal–(Claim II.O)

Finally, Hedrick argues that counsel failed to preserve meritorious issues on appeal. The issues that Hedrick cites include objections to inflammatory evidence and argument, venue, venire members exposure to media, juror bias against Hedrick, and the constitutionality of Virginia's death penalty statutes. The Supreme Court of Virginia held that Hedrick failed to satisfy the performance or prejudice prongs of Strickland v. Washington. Id. at 862. With the lone exception of the constitutionality of Virginia's death penalty statutes, this court has already addressed and implicitly rejected the underpinnings of every issue cited by Hedrick as a meritorious issue that counsel failed to preserve; consequently, the Supreme Court of Virginia reasonably concluded that failure to appeal these issues did not prejudice Hedrick. As for the constitutionality of Virginia's death penalty statute, a number of cases have upheld these statutes against constitutional challenges. See Clozza v. Murray, 913 F.2d 1092, 1105 (4th Cir. 1990); Powell v. Commonwealth, 590 S.E.2d 537 (Va. 2004); Beck v. Commonwealth, 484 S.E. 2d 898 (Va. 1997). Therefore, failure to appeal this issue was neither

deficient performance nor prejudicial. Consequently, the adjudication of the Supreme Court of Virginia is not an objectively unreasonable application of Strickland or an unreasonable determination of the facts, and this claim is dismissed.

IV. DEFAULTED CLAIMS (CLAIMS III, V, VI, VII, VIII, AND IX)

A. Standard of Review

In addition to Hedrick's ineffective assistance of counsel claims, which the state court decided on the merits, Hedrick presents numerous procedurally defaulted claims. In an attempt to obtain review of these defaulted claims, Hedrick claims he is actually innocent of rape, forcible sodomy, and capital murder in the commission of rape and forcible sodomy, and he asserts cause and prejudice. This court, however, finds that Hedrick has failed to demonstrate actual innocence or show cause and prejudice and dismisses the claims.

A claim is defaulted if a state court expressly relied on an adequate and independent state procedural rule to deny relief on that claim, see Fisher v. Angelone, 163 F.3d 835, 844 (4th Cir. 1998), or the petitioner failed to present a claim to the state court and that claim may not be presented to that court now. See Gray v. Netherland, 518 U.S. 152, 161-62; Bassette v. Thompson, 915 F.2d 932, 936 (4th Cir. 1990). A federal court will not review a claim that is procedurally defaulted absent cause and prejudice or actual innocence. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); Harris v. Reed, 489 U.S. 255, 262 (1989); Murray v. Carrier, 477 U.S. 478, 488 (1986).

To show cause, a petitioner must demonstrate that "objective factors," external to his defense, impeded him from raising his claim at an earlier stage. Murray, 477 U.S. at 488. To demonstrate prejudice, a petitioner must show that the alleged constitutional violation worked to his actual and

substantial disadvantage, infecting his entire trial with error of constitutional magnitude. Id. at 492. A valid non-defaulted ineffective assistance of counsel claim may constitute cause and prejudice and, thereby, excuse a procedural default. Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000).

To show actual innocence, a petitioner must base his claim "on reliable evidence not presented at trial," Calderon v. Thompson, 523 U.S. 538, 559 (1998), and that evidence must demonstrate "that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. Schlup v. Delo, 513 U.S. 298, 327 (1995). "To the extent the capital petitioner contests the special circumstances rendering him eligible for the death penalty, [a] 'clear and convincing' standard applies, irrespective of whether the special circumstances are elements of the offense of capital murder or ... mere sentencing enhancers." Id.

B. Hedrick's Individual Claims

1. Claims Hedrick failed to present in the state habeas proceeding–(Claims III, VI, and VIII)

Hedrick presents several defaulted claims that he failed to raise in his state habeas petition. He alleges cumulative ineffective assistance of counsel [claim III], that the Commonwealth and the jury acted improperly [claim VI], and that he is mentally retarded and his execution is barred by Atkins v. Virginia, 536 U.S. 304 (2002) [claim VIII]. Hedrick, however, failed to raise claim III in his state habeas petition, and that claim is procedurally defaulted because he could not present it to the state court now. Further, the Supreme Court of Virginia relied on an adequate and independent state rule to procedurally default claim VI, and Hedrick failed to raise his mental retardation claim, claim VIII, in his state habeas proceeding despite an opportunity to do so. Therefore, Hedrick procedurally defaulted

his claims.

a. Cumulative ineffective assistance of counsel claim–(Claim III)

Hedrick's cumulative ineffective assistance of counsel claim is procedurally defaulted because he failed to raise it in his state habeas petition. Under Virginia law, no writ for habeas corpus "shall be granted on the basis of any allegation the facts of which petitioner had knowledge of at the time of filing any previous petition." Va. Code § 8.01-654(B)(2). The Court of Appeals for this circuit has held that § 8.01-654(B)(2) "bar[s] claims which could have been raised in an earlier habeas proceeding," where the unraised claims rely on facts known to the petitioner at the time of his earlier state habeas petition. Bassette, 915 F.2d at 936-37.

Hedrick does not even allege that his claims are based on facts not known at the earlier state proceeding, and he cannot make such an allegation. The record clearly indicates that Hedrick had knowledge of the facts upon which his claims are based when he filed his state habeas petition and during its pendency. Rather, he asserts that the Virginia Supreme Court simply failed to address the cumulative impact of counsel's deficient performance. Although Hedrick presented a cumulative impact claim in his opening brief to the Virginia Supreme Court, he never raised the claim as an individual claim in his habeas petition. Thus, the Supreme Court did not examine the claim and that claim could not be presented to the state court now. Therefore, it is procedurally barred.

b. Claims that the Commonwealth and the jury acted improperly–(Claim VI)

Hedrick alleges that the prosecution failed to disclose evidence impeaching Jones [claim VI.A] and that the jury improperly conducted deliberations [claim VI.B]. Although Hedrick included the two claims in his state habeas petition, the Supreme Court of Virginia refused to hear them on the merits,

holding that Hedrick had procedurally defaulted them because he failed to discuss the claims in his opening brief to the court.[5]

Although neither party cites any case in which the Virginia Supreme Court has barred a habeas claim because the petitioner failed to brief the issue after the petitioner included the claim in his habeas petition, the court has consistently barred claims in other contexts on those grounds. See Wolfe v. Commonwealth, 576 S.E.2d. 471, 479 (Va. 2003) (noting that it is "well-established precedent" that assignments of error not argued in one's initial brief to the court are waived); Lenz v. Commonwealth, 544 S.E.2d 299, 303 (Va. 2001) (holding that where defendant failed to brief three assignments of error, the claims were waived and could not be considered on appeal); Williams v. Commonwealth, 450 S.E.2d 365, 372 (Va. 1994) (holding that two of defendant's assignments of error are waived because they were not briefed). Therefore, the Virginia Supreme Court consistently applies a well-established, adequate and independent state procedural rule to bar claims that are not properly briefed.

Further, the Virginia Supreme Court provided Hedrick with specific notice of its briefing requirement, undermining his argument that he lacked notice of the procedural rule. As conceded in

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[5] In the state proceedings, Hedrick presented three claims in his habeas corpus petition to the Supreme Court of Virginia. The court remanded one claim, the ineffective assistance of counsel allegations, to the Circuit Court, which conducted an evidentiary hearing on that claim. After the evidentiary hearing, Hedrick filed an opening brief with the Supreme Court of Virginia, which fully addressed the ineffective assistance allegations, but did not mention his remaining two claims. The Virginia Supreme Court found the two remaining claims procedurally barred from consideration when it adjudicated his habeas petition. Hedrick objects and claims that "[i]n finding [the] claim[s] procedurally defaulted, the state court announced a new rule of procedure for state habeas cases remanded for evidentiary hearings. Hedrick had no notice that this rule would be applied." This court disagrees and finds that the Virginia Supreme Court relied on an adequate and independent state procedural rule to bar Hedrick's claims.

Hedrick's current petition, the court ordered Hedrick to file its brief "in accordance with [Virginia Supreme Court] Rules 5:26 through 5:32," which require an opening brief to "conform in all respects to the requirements of the petition for appeal set forth in Rule 5:17(c)..." VA. Sup.Ct. R. 5:27. Rule 5:17(c) required Hedrick to "list the specific errors in the rulings below upon which [he] intends to rely."[6] VA. Sup.Ct. R. 5:17(c). Therefore, not only does the Virginia Supreme Court use an adequate and independent state procedural rule to bar claims that are not briefed, Hedrick had actual notice that he should brief every issue. Consequently, Hedrick's claim is procedurally barred, and he must show either cause and prejudice or actual innocence.

c. Mental retardation claim–(Claim VIII)

Hedrick unpersuasively argues that his Atkins claim is not procedurally barred. Hedrick asserts that the United States Supreme Court decided Atkins on June 30, 2002, after Hedrick exhausted his direct appeals and while his state habeas corpus petition was pending in the Virginia Supreme Court, which denied Hedrick's petition on November 1, 2002, and denied his motion for a rehearing on January 10, 2003. Although Hedrick's state habeas petition was pending when the United States Supreme Court decided Atkins, Hedrick failed to assert his mental retardation claim in an amended petition. See Va. Sup. Ct. R. 1:8 ("Leave (of the court) to amend shall be liberally granted in

[6] Hedrick unpersuasively argues that the rule did not provide notice that he should brief all issues, but limited his brief to only those claims addressed in the evidentiary hearing. In support of this, Hedrick argues that the rule required him to brief the assignments of error from only the "ruling below," which Hedrick contends only includes the Circuit Court's evidentiary hearing. However, a plain reading of the rule requires one to brief the "specific errors in the *rulings* below." VA. Sup.Ct. R. 5:17(c) (emphasis added). Nothing in the rule limits the opening brief to issues addressed in the Circuit Court's evidentiary hearing.

furtherance of the ends of justice."). A federal court is not at liberty to grant habeas relief if the petitioner had an opportunity to present his claim in state court. "It is enough that the state provided the mechanism and an opportunity for such full and fair litigation." DiPaola v. Riddle, 581 F.2d 1111, 1113 (4th Cir. 1978). Whether the Virginia Supreme Court would have granted Hedrick leave to amend his state habeas petition is not before the court. It is enough that Hedrick could have raised it and the Supreme Court of Virginia could have heard it. Further, Hedrick cannot present his claim to the state court now. See Va. Code § 8.01-645.2 ("If the person has completed both a direct appeal and a [state] habeas corpus proceeding..., he shall not be entitled to file any further habeas petitions in the Supreme Court [of Virginia] and his sole remedy shall lie in federal court."). Since Hedrick had a viable opportunity to present his claim to the state court and he failed to do so, his claim is procedurally barred from federal review. Cf. Walton v. Johnson, 269 F. Supp. 692, 696 (W.D. Va. 2003) (holding that court could hear defendant's Atkins claim because the defendant had exhausted his state habeas proceeding prior to the Atkins opinion).

More importantly, Hedrick has failed to present even a colorable claim of mental retardation. Following Atkins, which left to the states the task of developing standards for determining mental retardation in capital cases, 536 U.S. at 317, Virginia adopted a statute defining mental retardation and providing procedures for raising such claims in capital cases. Va.Code § 19.2-264.3:1.1. The statute defines mentally retarded as:

> [A] disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and

practical adaptive skills.

Id. Hedrick, however, fails to raise facts suggesting that he is mentally retarded, a claim that he raises for the first time in this federal habeas petition.[7] Hedrick provides no standardized measure of his intellect before his eighteenth birthday. The only measure Hedrick does provide is a test administered by Dr. Hawk, Hedrick's expert clinical psychologist, after Hedrick turned eighteen. After studying the results of that test, which Dr. Hawk considered "the most well standardized intellectual assessment test that we have," he testified that Hedrick had an IQ of 76, which was below average (Tr. at 784), and he stated that ninety-five percent of test-takers score better than Hedrick, but that his score was "not so low as to suggest mental retardation." (Tr. at 784). Dr. Hawk also noted Hedrick's poor grades in school–mostly D's and F's–and indicated that people with Hedrick's IQ tend to have great difficulty in school. However, he opined that Hedrick's poor grades were "perplexing" and indicated a possible learning disability or other problem at school, rather than mental retardation. (Tr. at 787). In short, Hedrick points to no evidence that suggests he is mentally retarded, and the court denies his claim.

2. Claims Hedrick failed to present on direct appeal–(Claim V, VII, and IX)

Hedrick also presents several claims that are procedurally defaulted because Hedrick could but failed to present them at trial or on direct appeal. Hedrick alleges that the Virginia capital sentencing

[7] Hedrick also argues that Ring v. Arizona, 536 U.S. 584 (2002), requires a jury to resolve questions of mental retardation. This argument, however, fails for two reasons: (1) mental retardation is not equivalent to an element of the offense for Apprendi purposes because it does not increase the penalty above the statutory maximum; and (2) the Virginia statute governing mental retardation claims in death penalty cases does not treat the lack mental retardation as an element of the offense. See Walton v. Johnson, 269 F. Supp 2d. 692, n.3 (W.D. Va. 2003).

statutes are unconstitutional [claim V], that the trial court committed constitutional error [claim VII],[8] and that the jury verdict forms were unconstitutional [claim IX]. The state court relied on an adequate and independent rule to bar the allegations in claim V, and that claim is thus defaulted. Hedrick also raises claims VII and IX for the first time in his federal habeas petition, and he has procedurally defaulted these claims because he is unable to present the claims now in a state proceeding. Because Hedrick fails to show either cause and prejudice or actual innocence to excuse his defaulted claims, see infra Part IV.C, the court dismisses claims V, VII, and IX.

a. Claim challenging the constitutionality of the Virginia capital sentencing statutes–(Claim V)

Hedrick challenges the constitutionality of Virginia's capital sentencing statutes, but on direct appeal, Hedrick failed to adequately raise his claims.[9] "In support of his contention," the Virginia Supreme Court stated, "[Hedrick] merely refers this Court to a memorandum of law that he filed in the trial court." Hedrick, 513 S.E.2d at 638. Relying on a state rule that requires appellants to clearly state the grounds for any appealable issue and not rely on cross-references to arguments made in the trial court, the Supreme Court of Virginia found Hedrick procedurally defaulted the claim.

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[8] Hedrick asserts that the trial court violated his constitutional rights by admitting inflammatory photographs of the victim [claim VII.A], denying his request for a bill of particulars [claim VII.B], and denying a defense-proffered jury questionnaire [claim VII.C]. Although Hedrick now presents the claims as constitutional errors, on direct appeal, he presented similar claims as an abuse of the trial court's discretion, and the Virginia Supreme Court adjudicated the claims on that ground. Since Hedrick failed to present his current claims in state court, the claims are procedurally barred.

[9] Hedrick presented on direct appeal a claim challenging the sufficiency of the evidence for aggravated battery. Hedrick, however, did not present a claim challenging the constitutionality of the aggravated battery or capital sentencing statutes. Since he did not challenge the constitutionality of the statutes in state court, and could not do so now, he has procedurally defaulted the claim.

This court finds the state rule to be adequate and independent, a finding not challenged by Hedrick. A state rule is adequate if it is "firmly established and regularly and consistently applied by the state court . . . ." Weeks v. Angelone, 176 F.3d 249, 270 (4th Cir. 1999). A state rule is independent "if it does not depend on a federal constitutional ruling." Id. Here, the Virginia Supreme Court followed a firmly established, consistently applied procedural rule completely independent of any federal interest. See Swisher v. Commonwealth, 506 S.E.2d 763, 767 (Va. 1998); Jenkins v. Commonwealth, 423 S.E.2d 360, 370 (Va. 1992); Spencer v. Commonwealth, 393 S.E.2d 609, 622 (Va. 1990). Therefore, unless Hedrick can show cause and prejudice or actual innocence, the claim is barred.

b. Hedrick's remaining procedurally defaulted claims–(Claims VII and IX)

Hedrick raises for the first time the allegations in claim VII, that the trial court committed constitutional error, and in claim IX, that the jury verdict forms were constitutionally deficient. However, where an applicant has not presented a particular claim to all appropriate state courts, and no state remedy is presently available, the claim is considered exhausted, but procedurally defaulted. See Teague v. Lane, 489 U.S. 288, 297-99 (1989); Burket v. Angelone, 208 F.3d 172, 201 n.21 (4th Cir. 2000). Since Hedrick failed to raise claims VII and IX in state court and could not do so now, see Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974) (holding a claim procedurally barred if it could have raised and fully litigated at trial or on direct appeal), his claims are procedurally defaulted, and Hedrick must show either cause and prejudice or actual innocence for this court to review the claims.

C. Cause and Prejudice or Actual Innocence

1. Cause and Prejudice

This court cannot review Hedrick's procedurally defaulted claims unless he demonstrates either

cause and prejudice or actual innocence. Only as to claim V, in which Hedrick challenges the constitutionality of Virginia's capital sentencing statutes, does Hedrick even assert cause and prejudice. In any event, the ineffective assistance of counsel claims Hedrick relies on to excuse his procedural defaults are premised on the ineffective assistance claims this court has already rejected.[10] Therefore, Hedrick has not made a showing of cause and prejudice sufficient to allow this court to address his procedurally defaulted claims.

2. Actual Innocence–(Claim I)[11]

Hedrick challenges his conviction for rape, forcible sodomy, and capital murder in the commission of rape and forcible sodomy. Although Hedrick has admitted his involvement in Crider's death, he claims that he never raped or forcibly sodomized her. Absent these convictions, Hedrick asserts, the jury may have recommended life in prison, rather than the death penalty. For the reasons stated below, however, this court finds that Hedrick is unable to establish actual innocence, and his claim of actual innocence does not excuse his procedural defaults.

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[10] In claim V, Hedrick asserts a non-defaulted ineffective assistance of counsel claim as cause and prejudice–that counsel failed to preserve and argue meritorious issues on appeal–but this court denied Hedrick's ineffective assistance claim because the state court's adjudication was not contrary to, or an unreasonable application of, clearly established federal law, and the court did not unreasonably determine the facts. See supra Part III.B.15. Further, to the extent Hedrick implicitly relies on other ineffective assistance of counsel claims as cause and prejudice, this reliance is misplaced because his claims are without merit. See generally supra Part III.

[11] To the extent Hedrick claims his actual innocence in and of itself is a basis for habeas relief, this court denies that claim. "[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999) (citing Herrera v. Collins, 506 U.S. 390, 400 (1993)). Rather, one must use an actual innocence claim as a procedural gateway to assert a defaulted claim. Id. at 243-44. Therefore, to the extent Hedrick asserts actual innocence alone as a basis for a writ of habeas corpus, claim I is denied.

Hedrick fails to provide any new evidence supporting his claim of actual innocence. Hedrick essentially claims that evidence not adduced at trial could have been used to impeach Jones, who, according to Hedrick, supplied the majority of evidence used to convict Hedrick of rape and forcible sodomy. In support of this allegation, he argues that the Commonwealth withheld impeachment material regarding Jones' motive for testifying. Specifically, Hedrick seizes on a statement in Jones' affidavit in which Jones states that the prosecutor "assured me that if I testified, he would recommend that I receive twenty-five (25) years for my involvement in the offense." However, when the state court addressed the validity of Jones' assertions during the evidentiary hearing, the court stated in its Findings of Fact and Conclusions of Law that the facts simply do not support Jones's claim that the prosecutor promised to recommend a twenty-five year sentence.

> The trial prosecutor, Thomas W. Lawson, testified at the evidentiary hearing that no such promise existed. Additionally, at the time Jones entered his pleas of guilty he represented to the court that no promises had been made to him. Most importantly, the Commonwealth's Attorney did not recommend a sentence of twenty-five years. Jones received two-terms of life imprisonment plus thirty-five years for his involvement in the crimes.

Hedrick v. Taylor, No. 992913, at 17 (Va. Cir. Ct. of Appomattox County Aug. 20, 2001). Hedrick therefore has no new evidence supporting his claim of actual innocence.

More fundamentally, any new evidence adduced by Hedrick must demonstrate "that it is more likely than not that no reasonable juror would have convicted him." Schlup, 513 U.S. at 327. It is not possible under the facts of this case for Hedrick to demonstrate that it is more likely than not that no reasonable juror would have convicted him. Moreover, since the evidence clearly proves that Hedrick killed Crider, to demonstrate that he is "actually innocent of the death penalty" Hedrick must establish

by clear and convincing evidence that no reasonable judge or juror would have found him eligible for the death penalty. He has presented nothing that remotely discharges that burden. Although Hedrick challenges his conviction for rape and forcible sodomy, the jury also convicted Hedrick of capital murder during the commission of a robbery, which is sufficient by itself to support his death sentence. See Va. Code § 18.2-31(4). Further, both the jury and the Circuit Court found the nature of Hedrick's crime satisfied disjunctive requisites for the death penalty: "future dangerousness" and "vileness." See Va. Code Ann. § 19.2 - 264.2. Their findings are fully supported. Therefore, Hedrick is unable to show by clear and convincing evidence that, but for the alleged withholding of impeachment material, no reasonable juror would have sentenced him to death.

In summary, Hedrick has failed to show cause and prejudice or actual innocence, and, therefore, has defaulted claims III, V, VI, VII, VIII, and IX. Accordingly, the court dismisses these claims.

IV. CHALLENGES TO THE STATE HABEAS PROCEDURE (CLAIM IV)

Hedrick alleges that the state evidentiary hearing process violated his federal rights. Specifically, Hedrick claims in IV(A) that the state courts improperly restricted access to the prosecutor's files and in IV(B) that the Circuit Courts improperly resolved factual disputes. Essentially, however, Hedrick challenges the state habeas proceedings and this provides no basis for federal habeas review. Wright v. Angelone, 151 F.3d 151, 159 (4th Cir. 1998). A federal court can entertain a habeas petition only on the ground that the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "This does not provide a basis for a challenge to a ruling in a state post-conviction proceeding, because the petitioner is not 'detained as a

result of a decision of the Virginia Supreme Court in the state habeas action,' but rather is in custody pursuant to the ruling of the original trial court." Orbs v. True, 233 F. Supp. 2d 749, 787 (E.D. Va. 2002) (citing Wright, 151 F.3d at 159). Since this court may not review a claim challenging state habeas proceedings, Hedrick's claim is dismissed.

V.

This court has thoroughly reviewed Hedrick's petition and finds no viable, colorable claim that his conviction and death sentence violate federal law. Accordingly, the court dismisses his petition.

ENTER: This March 23, 2004.

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CHIEF UNITED STATES DISTRICT JUDGE

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

BRANDON WAYNE HEDRICK,	)	
	)	
Petitioner,	)	**Civ. Action No. 7:03CV0219**
	)	
v.	)	**FINAL ORDER**
	)	
WILLIAM PAGE TRUE, Warden	)	**By: Samuel G. Wilson,**
Sussex I State Prison,	)	**Chief United States District Judge**
	)	
Respondent.	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby

ORDERED AND ADJUDGED that Brandon Wayne Hedrick's petition pursuant to 28 U.S.C. § 2254 for writ of habeas corpus is hereby **DISMISSED**. This action is stricken from the active docket of the court.

ENTER: This March 23, 2004.

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CHIEF UNITED STATES DISTRICT JUDGE