

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

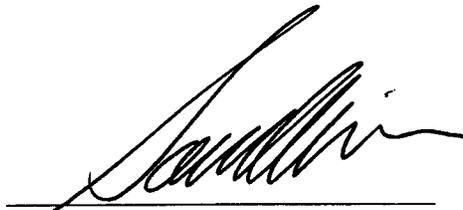
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| PERCY LEVAR WALTON, |) | |
| |) | |
| Petitioner, |) | Civil Action No. 7:99cv00940 |
| |) | |
| v. |) | <u>Final Order</u> |
| |) | |
| RONALD J. ANGELONE, DIRECTOR, |) | |
| VIRGINIA DEP'T OF CORRECTIONS, |) | By: Samuel G. Wilson |
| |) | Chief United States District Judge |
| Respondent. |) | |

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

ORDERED AND ADJUDGED

that Percy Levar Walton's petition under 28 U.S.C. § 2254 for writ of habeas corpus is
DISMISSED. This action is stricken from the active docket of the court.

ENTER: This March 27, 2002.



Chief United States District Judge

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| PERCY LEVAR WALTON, |) | |
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| Petitioner, |) | Civil Action No. 7:99cv00940 |
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| v. |) | <u>Memorandum Opinion</u> |
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| RONALD J. ANGELONE, DIRECTOR, |) | |
| VIRGINIA DEP'T OF CORRECTIONS, |) | By: Samuel G. Wilson |
| |) | Chief United States District Judge |
| Respondent. |) | |

This is a petition by Percy Levar Walton for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging capital murder and related convictions in the Circuit Court for the City of Danville, Virginia. After Walton pled guilty to all charges, the Circuit Court sentenced him to three death sentences, three life sentences, and twenty-eight years in the penitentiary. Having exhausted his state court remedies, Walton filed his current habeas petition.

Walton's petition raises a host of alleged constitutional claims. Despite the many pleadings, documents and affidavits the parties have filed, certain factual matters remain clear. Walton brutally killed three people. A psychiatrist concluded that Walton was competent to stand trial. With a mountain of evidence against him as a backdrop, Walton plead guilty. The trial judge questioned Walton and found as a matter of fact that Walton's guilty pleas were made voluntarily, intelligently and knowingly. At the sentencing hearing, the trial judge, with ample support, found Walton to be a continuing serious threat to society and sentenced him to death.

Ordinarily, there would be little left for federal habeas review. However, Walton's trial counsel signed an affidavit, offered in support of Walton's state habeas petition, that raised questions about Walton's competency and whether counsel effectively handled the matter. Three

weeks after Walton’s counsel signed that affidavit, Walton’s counsel signed another affidavit purporting to place his earlier affidavit in context. The first affidavit raises Sixth Amendment effective assistance of counsel issues. The second, if credited, puts those issues to rest. On May 16, 2001, this court held an evidentiary hearing to resolve the matter. After reviewing the record and hearing testimony at the evidentiary hearing, this court finds that Walton’s counsel was not ineffective. Since Walton’s other claims are either procedurally defaulted or have no merit, the court will dismiss Walton’s petition.

I. FACTS

The court detailed the factual history of the murders committed by Walton in its previous opinion, Walton v. Angelone, Civil Action No. 7:99cv00940 (W.D. Va. March 26, 2001), as did the Supreme Court of Virginia in Walton v. Commonwealth, 501 S.E.2d 134, 136-38 (Va. 1998). The court will not repeat those facts here. Instead, the court will set forth the facts regarding Walton’s guilty plea and sentencing proceedings, his competency to stand trial, and his counsel’s performance.

On November 28, 1996, law-enforcement officials arrested Walton for murder. The court appointed public defender, Lawrence D. Gott, to represent him.¹ In early December 1996, Gott had Walton complete a thirty-nine page questionnaire. In the questionnaire, Walton answered that no family member had ever been “diagnosed or treated for any neurological, psychological, mental or emotional problems,” and that no family member had ever been “suspected of having mental illness or disorders.” Walton also answered that he never received “any kind of counseling or therapy for psychological, emotional or nervous problems;” that he had never thought about hurting himself or ending his life; that he had never suffered from a mental illness

¹ Attorney Phyllis Mosby assisted, but Gott was lead counsel.

or disorder that had been “recognized by others;” that he had never been evaluated or treated by mental health professionals; and that no one had ever instituted commitment proceedings against him. When asked whether he had experienced certain negative feelings including rage, depression, guilt and confusion, he answered that he had not. There is no hint of irrationality in Walton’s answers to the thirty-nine page questionnaire.

In late January 1997, Gott requested the Circuit Court to appoint “forensic and mental health experts.” Less than a week later, Circuit Judge James Ingram appointed Dr. Stanton E. Samenow, a clinical psychologist the court found to be “qualified by specialized training and experience to perform forensic evaluations.”² Judge Ingram directed Samenow to submit a report to Gott concerning Walton’s “history and character” and “mental condition at the time of the offense.”

In February 1997, Gott recorded several instances of strange behavior by Walton. He forwarded these notes to Samenow. In spring of 1997, Samenow interviewed Walton. Although Samenow noted Walton’s irrational behavior and unrealistic expectations, he formed the opinion that Walton was competent to stand trial.

In July 1997, Walton indicated that he wanted to plead guilty because he wanted to get the death penalty. He expressed the belief that if he was executed he would be able to return to

² Dr. Samenow has expressed in other cases a somewhat novel theory (in that it is not largely accepted by his colleagues) regarding mental illness and criminals. In an earlier case Judge Murnaghan wrote that Samenow has: abandoned sociologic, psychologic, and mental illness explanations for criminal behavior and holds the view that “most diagnoses of mental illness [in criminals] resulted from the criminal’s fabrications.” Dr. Samenow’s published works state that circumstances have nothing to do with criminal violations and that “providing the criminal with an opportunity to present excuses deferred him and us further and further from change.”

Ramdass v. Angelone, 187 F.3d 396, 411 (4th Cir. 1999) (C.J. Murnaghan, concurring in part and dissenting in part). According to Gott, Samenow had been appointed as the defense mental health expert in every capital case in Danville since 1990. Although Gott was not pleased with Samenow’s appointment, Gott and Samenow had a good working relationship.

life immediately and resurrect other dead family members. Because of the changes in Walton's behavior, Gott requested that Samenow further evaluate Walton.

Samenow interviewed Walton again and sent a letter to Judge Ingram stating that Walton's mental state seemed to be "much different" than when he visited him earlier.

According to Samenow, Walton seemed "less rational." Samenow wrote:

this man articulated his thoughts in ways that I simply could not comprehend. Sometimes I could not understand his pressured flow of speech. At other times, I could understand the words, but the thoughts did not appear to be logical or coherent. He simply would go off on a tangent seemingly irrelevant to what we were discussing.

Samenow considered Walton "imminently dangerous to himself and others" and he recommended that Walton "be placed in the secure psychiatric hospital where he can be observed for a further determination of his mental state and until he is no longer a danger to himself and others."

Gott immediately petitioned the court to hospitalize Walton in a state "forensic mental health facility" under Virginia Code § 19.2-169.6. Under this statute, an incarcerated defendant can receive emergency pre-trial hospitalization if the court finds by "clear and convincing evidence" that the defendant "is mentally ill and immediately dangerous to himself or others in the opinion of a qualified mental health professional," and "requires treatment in a hospital rather than a jail." Va. Code § 19.2-169.6(1). Although Gott requested that Samenow characterize Walton as mentally ill, Samenow refused. At the evidentiary hearing held by this court on May 16, 2001, Samenow testified that at the time he could not diagnose Walton as mentally ill, but believed that hospitalization was the best option. Without a supporting diagnosis of mental illness, Judge Ingram declined to commit Walton to the hospital.

Approximately three weeks later Gott moved for a competency evaluation, stating that there was “probable cause” to believe that Walton lacked “substantial capacity to understand the proceeding against him or to assist counsel in the preparation of his defense.” Gott requested that Judge Ingram “direct the evaluation be done in-patient.” Gott attached a copy of the letter Samenow had sent Judge Ingram in July.

On August 22, 1997, Samenow prepared a report detailing Samenow’s findings and conclusions. The report, drafted like a running commentary contemporaneous to the various evaluations, described some of Walton’s strange behavior. Following a narration of the spring interviews, Samenow stated in the report that Walton was “*competent to stand trial.*” (emphasis added). According to Samenow:

[Walton] understood that a capital murder charge can result in the death penalty “by electric chair or needle.” He could identify his lawyers by name, knew their role, and he understood precisely what he was being charged with. He also knew that evidence is required to convict him. And he differentiated between what he thought he would be charged with and what he would not be charged with.

Moreover, Walton asserted that he had a strong case, a good lawyer and believed he would be found not guilty.

However, on the final page of his report, Samenow stated that the “Percy Lavar Walton whom [he] interviewed in July, 1997 was quite different in demeanor and mode of expression from [] earlier interviews.” Samenow was uncertain “what the dramatic change was attributable to.” Samenow stated rhetorically that “if Mr. Walton were to predicate his responses to his attorney upon a premise that death would bring him back to earth in a new and better form, would this not interfere with his being able to logically assist counsel in his own defense.” Nevertheless, Samenow did not conclude that Walton was incompetent. At the evidentiary hearing before this court, Samenow explained that had he only interviewed Walton in July, he

would have concluded that Walton was not competent. However, he had also interviewed Walton in the spring and concluded then that Walton was competent. Samenow explained that because he had these two “snapshots” of Walton, he only could call Walton’s competency into question.

In arriving at his conclusions Dr. Samenow interviewed Walton on at least six separate occasions; administered the Wechsler Adult Intelligence Test, the Bender-Gestalt Test, and the Thematic Appreciation Test; interviewed Walton’s mother, grandmother, maternal aunt, little league coach, principal, friend, paternal grandfather, paternal aunt, paternal stepmother, and a rehabilitation counselor who had counseled Walton; made three separate home visits; reviewed a host of documents including Walton’s school records, records from the court file, discovery provided by the Commonwealth, Walton’s detention center records from an earlier detention, and the questionnaire Walton completed for Gott.

After receiving a copy of Samenow’s August 22 report, Judge Ingram ordered another evaluation by another mental health expert to determine Walton’s “capacity to understand the proceedings against him and assist his attorney in his own defense” and to determine whether Walton “was affected by mental disease or defect” when he allegedly committed the murders.

Dr. Miller Ryans, a psychiatrist at Central State Hospital, conducted a forensic evaluation of Walton and reported his conclusions to Judge Ingram on September 11, 1997. Ryans reviewed Samenow’s August 22 report, transcripts of statements and witness interviews, police investigative reports and various other materials, and conducted a psychiatric interview. Ryans found “no evidence of psychosis” although he noted that “throughout the interview, [Walton] would display an inappropriate laugh, which was not consistent with the material being discussed. He concluded: “*Mr. Walton has a satisfactory understanding of the proceedings*

against him and has a workable level of ability to assist in his own defense. That is, in my opinion, he is competent to stand trial.” (emphasis added). Ryans sent a separate letter to Gott in which he noted that he found Walton “competent to plead and assist [Gott].”

When Gott met with Walton on September 30, 1997, Walton was “loud” and refused to cooperate. Walton said that he wanted the “chair” but did not state specifically whether he wanted to plead guilty or not guilty. When Gott spoke with Walton the next morning, however, Walton was “calm and collected.” After Gott explained the “time delays built into the system and the number of years it would take before execution [Walton] still wanted to [plead guilty] and get ‘the chair’ and go out like a man.” Walton signed a typed statement in which he professed to understand the charges against him as well as “all possible defenses” to those charges. In the statement, Walton made his wishes plain:

My attorney has told me that he wants to try to negotiate (work out) a Life Sentence instead of a Death Sentence. I have told my attorney that I want to plead guilty and get a Death Sentence.

Walton signed a jury trial waiver form and a guilty plea questionnaire. Gott read the questions on the guilty plea questionnaire to Walton, recorded Walton’s answers, and Walton signed the questionnaire.

On October 7, 1997, Walton pled guilty to all charges against him. Judge Ingram questioned Walton at length. Walton affirmed that he understood the charges against him; that his attorneys had explained what the Commonwealth must prove in order to convict him of those charges; that he had discussed any possible defenses that he might have; that he decided to plead guilty; that he was pleading guilty freely and voluntarily; that he was pleading guilty because he was, in fact, guilty; that he was waiving his right to trial by jury, waiving his right not to

incriminate himself, waiving his right to confront and cross-examine his accusers and waiving his right to defend himself; that no one had forced him to plead guilty or threatened him in any way; that no one had made any promises of any kind; that he understood that the court could impose multiple death sentences; that he was satisfied with the services of his attorneys; that his attorneys had “gone over” the guilty plea questionnaire with him in advance; that he understood all of the questions; that he understood the judge’s questions; and, that he still wished to plead guilty.

Following the plea colloquy the court found as follows:

Let the record show, the Court has inquired of the defendant, Percy Levar Walton, as to his understanding of the nature of the charges against him . . . the freeness and voluntariness of his pleas of guilty to the charges . . . to his understanding of his waiver of his right to be tried by a jury . . . his waiver of his right to appeal decisions the court . . . as to his understanding of the limits of punishment, which might be imposed upon the conviction of these offenses. *The Court hereby finds, as a matter of fact, that the defendant has tendered a plea of guilty to each of the charges... has done so freely, voluntarily, intelligently, and with a full knowledge and understanding of the consequences.* (emphasis added).

The court then accepted Walton’s guilty pleas.

The court conducted the penalty phase of the case on October 29-31, 1997. During those proceedings, Walton laughed, smiled and waved to family members. Gott advised Walton to keep his head down or focus on a spot. During a victim impact statement made by one of the Kendrick grandchildren, the victim noted that she hoped the judge had noticed Walton’s smiles and laughter over the course of the proceedings. Samenow recalls Judge Ingram “glaring” at Walton on one occasion because of his behavior.

After a recess Walton refused to return to the courtroom. According to Samenow, Walton was extremely agitated, and his behavior reminiscent of the behavior Samenow

witnessed during the July 1997 interviews. Samenow, Walton's family members, Gott, and a deputy attempted to persuade Walton to return to the courtroom. When all attempts failed, deputies maced Walton and returned him to the courtroom in shackles. Judge Ingram asked Samenow what Walton's behavior meant, and Samenow opined that it was likely caused by fear. Judge Ingram found that Walton presented a continuing threat to society and sentenced him to three death sentences, three life sentences, and twenty-eight years in the penitentiary.

On November 25, 1997, Walton appealed the convictions. The Supreme Court of Virginia consolidated the automatic review of Walton's death sentences with his appeal of right of the capital murder convictions and his direct appeal of the non-capital convictions, and ruled on all issues in a published decision, denying relief on all grounds. See Walton v. Commonwealth, 501 S.E.2d 134 (Va. 1998). Walton petitioned the Supreme Court of United States for certiorari, and the Supreme Court denied his petition.

On February 5, 1999, Walton filed a petition for writ of habeas corpus in the Supreme Court of Virginia. Walton's petition raised claims regarding substantive and procedural competence; the voluntariness of his plea; the expert assistance he received; his rights under Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419 (1995), Massiah v. United States, 377 U.S. 201 (1964), and Napue v. Illinois, 360 U.S. 264 (1959); the effective assistance of his counsel at trial, sentencing, and the appeal proceedings; and, the constitutionality of the death penalty.

The Commonwealth moved to dismiss the petition, and the court granted the Commonwealth's motion to dismiss. In denying relief, the court found that: (1) the rule in

Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974), applied to seven of Walton's claims;³ (2) the rule that an accused who enters a guilty plea is bound by his representations at trial, Anderson v. Warden, 281 S.E.2d 885 (Va. 1981), applied to Walton's claim regarding his guilty plea and to thirteen of his ineffective assistance of counsel claims;⁴ and (3) Walton's final two ineffective assistance of counsel claims had no merit.⁵ The court also denied all other pending motions, including Walton's claim that, under Ford v. Wainwright, 477 U.S. 399 (1986), the Commonwealth could not execute him because he was incompetent.⁶ Walton petitioned the court for rehearing, and the court denied his motion.

Walton moved for the appointment of habeas counsel and a stay of execution in the United States District Court for the Eastern District of Virginia, and that court transferred the matter to this district. Walton filed this habeas petition, respondent moved to dismiss, and the court heard arguments and denied the motion.

Walton's petition raises the following claims:

- I. Walton was not competent to stand trial or plead guilty;
- II. the trial court failed to ensure that adequate procedures were employed to determine Walton's competence;
- III. Walton's guilty plea was not knowing, voluntary, or intelligent;
- IV. Walton was not afforded appropriate expert assistance;

³ Corresponds to claims I, II, IV, V, VI, VII, and X in Walton's federal habeas petition.

⁴ Corresponds to claims III, VIII.A.1 to VIII.A.9, and VIII.B.1 to VIII.B.4 in Walton's federal habeas petition.

⁵ Corresponds to claims VIII.A.10 and VIII.C in Walton's federal habeas petition.

⁶ Corresponds to claim IX in Walton's federal habeas petition.

- V. Walton's due process rights were violated when the attorneys stipulated into evidence certain facts that Walton was not given the chance to deny or explain and when the Commonwealth failed to turn over exculpatory evidence;
- VI. Walton's due process rights under Napue v. Illinois, 360 U.S. 264 (1959), were violated when the Commonwealth knowingly allowed Lacy Johnson to testify falsely against Walton and failed to correct it;
- VII. Walton's Sixth Amendment rights under Massiah v. United States, 377 U.S. 201 (1964), were violated when Lacy Johnson, a government agent, elicited incriminating statements from Walton outside the presence of counsel;
- VIII. counsel rendered ineffective assistance,
 - A. regarding Walton's mental health,
 - 1. counsel unreasonably failed to ensure that Walton was competent to plead guilty,
 - 2. counsel failed to adequately investigate and present all necessary information relevant to Walton's competency,
 - 3. counsel failed to adequately investigate and present all necessary and relevant information regarding the knowing, voluntary, and intelligent nature of Walton's guilty plea and to ensure that the court conducted a proper colloquy,
 - 4. counsel failed to ensure that a competency hearing was held,
 - 5. counsel failed to ensure that a competency finding was made by the court,
 - 6. counsel failed to adequately investigate and present all necessary and relevant information regarding Walton's mental state at the time of the crime,
 - 7. counsel failed to adequately investigate and present all necessary and relevant information regarding Walton's mental state during the sentencing phase,
 - 8. counsel failed to ensure that Walton's rights to access to a psychiatrist under Ake v. Oklahoma, 470 U.S. 68 (1985), were appropriately asserted and afforded,

9. counsel failed to adequately advise Walton regarding his guilty plea,

10. counsel failed to move to withdraw Walton's guilty plea;

B. as to other unreasonable acts and omissions,

1. counsel failed to effectively cross-examine Lacy Johnson,

2. counsel unreasonably failed to protect Walton's Sixth Amendment rights under Massiah,

3. counsel unreasonably stipulated to evidence in the Commonwealth's proffer,

4. counsel failed to object to the prosecutor's inappropriate re-direct examination of Lacy Johnson, and

C. on appeal;

IX. Walton is incompetent to be executed;

X. the death penalty is unconstitutional; and

XI. Walton is entitled to an evidentiary hearing.

In support of his claims, Walton submitted historical evidence regarding his mental health, anecdotal evidence from his family and acquaintances detailing his strange behavior, and opinions from various experts who have evaluated Walton since his guilty plea and sentencing proceedings. The court will briefly summarize that evidence.

Walton first attended counseling in the fourth grade because he had anger "issues." At sixteen he was referred to family counseling, but refused to go. In 1996, Walton was evaluated at the Reception and Diagnostic Center for Children, where he was diagnosed as being "vulnerable to negative influences due to low self-esteem," "very needy of acceptance," and "angry." However, there was no evidence of a thought disorder.

Shortly before the murders, witnesses observed Walton loitering at the entrance to Cabin Lake Apartment Buildings, where one of the murder victims lived, and talking to himself. After the murders, Gott observed Walton behave strangely: Walton purportedly did not understand the seriousness of his position; he expected to get out of jail; he insisted on personally talking to a judge regarding bond; he claimed not to have a lawyer; he claimed his father had a lot of money and would be willing to post bond; he identified himself as Percy Gunn, his father; he identified himself as the King of Hearts; he said he wanted to die so he could come back to life and live with his “honeys;” he changed his position on his guilt; and he rambled and laughed inappropriately.

Walton’s family purportedly observed the following behavior: Walton thought his mother was his sister and was confused about his relation to other family members; he told his family he was a millionaire; he thought he was being released from jail; he referred to himself as the queen bee; he believed he was Jesus and the bible was about him; he referred to himself as Superman; he thought his father was working for the police against him; he told his mother he wanted the electric chair and then would show her how he would shake in the chair; and he thought that if he died he could bring his grandfather back to life.⁷

Inmates in jail also purportedly observed Walton’s strange behavior. Roger Dale Williams said Walton referred to his mother as his sister. Pedro Crespo stated that Walton was “a nutcase” because he talked about his crimes. Marvin Wesley Brandon thought Walton was “crazy, cracked up.” Brandon stated that Walton would drop his pants and parade around naked in front of the other inmates. Also, Walton told a guard that he wished he had killed his mother

⁷ Dr. Samenow and Dr. Ryans observed similar behavior during their interviews with Walton.

and cut her throat and head off, just like the other three. However, three other inmates, Lacy Johnson, David Allen Burke, and Corey Reginald Walker, stated that Walton was malingering, “playing crazy,” to better his situation.

Dr. Ruben C. Gur evaluated Walton during his state habeas proceeding and diagnosed Walton with schizophrenia, surmising that there was a substantial probability that Walton was incompetent to stand trial and that it was likely that he was insane at the time of the murders. Dr. Kreutzer also assessed Walton’s mental state during the state habeas proceeding and concluded that Walton was not capable of making rational decisions in his best interests and that his impairments appear to be a function of a psychotic disorder and dementia. Walton also submitted a letter from Dr. Pandurangi, a professor in psychiatry, stating that Walton likely suffers from schizophrenia.

Gott, Samenow and Ryans have also filed multiple affidavits, some of which conflict with others. It was this morass of affidavits that, in part, motivated the court to hold an evidentiary hearing. This court conducted a hearing on issues relevant to Walton’s claims that he was incompetent to stand trial [claim I] and that his counsel rendered ineffective assistance of counsel regarding Walton’s competence to stand trial [claims VIII.A.1, VIII.A.2, VIII.A.4, and VIII.A.5].

At the evidentiary hearing the following was made clear. Although Gott documented incidents of Walton’s strange behavior for Samenow’s review and believed Walton was a difficult client, he did not believe Walton was incompetent to stand trial or insane at the time of the offenses. Samenow, who initially believed Walton was competent, developed doubts about Walton’s mental state after Walton’s behavior in July 1997. To this day, Samenow cannot say

whether Walton was incompetent to stand trial. At the time of his evaluation, Ryans determined that Walton was competent to stand trial and stands by that determination.

II. APPLICABLE LAW UNDER THE AEDPA

Walton filed his petition for a federal writ of habeas corpus after the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted on April 24, 1996. Therefore, the amendments to 28 U.S.C. § 2254 effected by section 104 of the AEDPA apply. See Mueller v. Angelone, 181 F.3d 557, 565-69 (4th Cir.), cert. denied, 527 U.S. 1065 (1999); Lindh v. Murphy, 521 U.S. 320, 336 (1997). Under the AEDPA, a federal court only may grant habeas relief with respect to a claim adjudicated on the merits in state court 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 an 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.

Under § 2254(e)(1), a state court's factual findings are presumed correct, but a petitioner may rebut that presumption with clear and convincing evidence. A summary state court decision is an adjudication on the merits. Bell v. Jarvis, 236 F.3d 149, 163 (4th Cir. 2000). "When the state court fails to articulate the rationale behind its ruling," the court must "independently review the record and the applicable law." Id. "However, this independent review of the record and applicable law must be distinguished from a de novo review of the petitioner's claims and from a requirement that [the court] make an independent determination on the merits of those claims." Id. Instead, the federal habeas court must uphold the state court's decision unless it is clear that the result reached by the state court represents an unreasonable application of clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented. Id.

When a state court has expressly relied on an adequate and independent state procedural rule to deny relief on a claim, that adequate and independent state procedural rule also bars federal review unless the petitioner shows either 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 there were "objective factors," external to his defense, which impeded him from raising his claim at an earlier stage. Carrier, 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 can constitute cause and prejudice and, thereby, excuse a

procedural default. Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000). In a capital case, a petitioner may show actual innocence and also excuse a procedural default: (1) if he demonstrates, through new evidence, that an error of constitutional magnitude probably resulted in the conviction of an innocent person, or (2) if he presents clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. Schlup v. Delo, 513 U.S. 298, 323-27 (1995).

III. ANALYSIS

A. Defaulted Claims [Claims I, II, IV, V, VI, VII and X]

Walton claims that he was not competent to stand trial or plead guilty [claim I]; that the trial court failed to ensure that adequate procedures were employed to determine his competence [claim II]; that the court failed to afford him appropriate expert assistance [claim IV]; that his attorneys violated his due process rights when they stipulated certain evidence he was not given the chance to deny or explain and that the Commonwealth violated his due process rights when it failed to disclose exculpatory evidence [claim V];⁸ that the Commonwealth violated his due process rights because it knowingly allowed a witness, Lacy Johnson, to testify falsely [claim VI]; that the Commonwealth violated the Sixth Amendment when Johnson, a government agent, elicited incriminating statements from Walton outside the presence of counsel [claim VII]; and that the death penalty is unconstitutional [claim X]. In Walton's state habeas proceedings, the Supreme Court of Virginia found that Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974), barred

⁸ Walton claims that the Commonwealth failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). The Supreme Court of Virginia found that Walton defaulted the claim under Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974). Walton contends that the Commonwealth concealed the basis of the claim, thereby excusing his default. He circuitously reasons: "[t]he factual basis of the Brady claim was (and continues to be) concealed by the Commonwealth." (petition at 81). It would seem a truism that he only can prevail on a Brady claim if he can prove its factual basis.

these claims because Walton could have raised them at trial or on direct appeal, but did not. The rule in Slayton is an independent and adequate state law ground for decision. Wright v Angelone, 151 F.3d 151, 159-60 (4th Cir. 1998). Thus, Walton has procedurally defaulted these claims unless cause and prejudice or actual innocence excuses that default.⁹ The court concludes for the reasons that follow that Walton has shown neither cause and prejudice nor actual innocence, and accordingly, dismisses the claims.

1. Cause and Prejudice

Walton argues that the ineffective assistance of his counsel serves as the cause and prejudice excusing his procedural default. In claims VIII.A.1 through VIII.A.10, claims VIII.B.1 through VIII.B.4 and claim VIII.C Walton contends that his counsel rendered ineffective assistance. In Walton's state habeas proceeding, the Supreme Court of Virginia applied Anderson v. Warden, 281 S.E.2d 885 (Va. 1981), to deny claims VIII.A.1 through VIII.A.9 and VIII.B.1 through VIII.B.4. In Anderson, the Supreme Court of Virginia held that a petitioner on state habeas cannot challenge the truth and accuracy of the representations he made regarding the adequacy of his court-appointed counsel and the voluntariness of his guilty plea, unless he offers a valid reason to explain why he should be allowed to controvert his statements. Id. at 888.

⁹With respect to claims I and II, Walton also argues that default is improper because he cannot procedurally default a claim of incompetence. He bases this argument on Pate v. Robinson, in which the Court found that a defendant cannot knowingly or intelligently waive his right to have the court determine his capacity to stand trial. 383 U.S. 375, 384 (1966). In Pate, the Court determined that sufficient evidence of the defendant's mental condition had been introduced at trial, such that the failure of the trial court to further inquire into the issue of competency constituted a violation of the right to a fair trial. Id. at 385. However, the Fourth Circuit held that the reasoning in Pate regarding waiver of rights is not applicable to the procedural default of a competency claim. Smith v. Moore, 137 F.3d 808, 819 (4th Cir. 1998). In Smith, the court stated, "[u]nlike waiver, which focuses on whether conduct is voluntary and knowing, the procedural default doctrine focuses on comity, federalism, and judicial economy." Id. at 818-19. As such, a defendant can procedurally default his claim of incompetency to stand trial. Id. at 819; see Burket v. Angelone, 208 F.3d 172, 191 (4th Cir. 2000) (finding competency claim procedurally defaulted under Slayton). Accordingly, the court rejects Walton's argument that he cannot procedurally default claims I and II.

Recently, the Fourth Circuit has declined to apply this interpretation of Anderson as a procedural bar because the scope of the rule is unclear. See Royal v. Taylor, 188 F.3d 239, 246-48 (4th Cir. 1999), cert. denied, 528 U.S. 1000, (1999); see also Burket v. Angelone, 208 F.3d 172, 184 (4th Cir. 2000), cert. denied, 530 U.S. 1283 (2000). In accordance with Royal and Burket, this court will not apply Anderson as a procedural bar and will address the merits of Walton's ineffective assistance claims that the Supreme Court of Virginia denied under Anderson.

Under the Sixth Amendment, an accused 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, Walton must show both a deficient performance and a resulting prejudice. Id. at 687. To establish deficient performance, Walton must show that "counsel's representation fell below an objective standard of reasonableness," considering circumstances as they existed at the time of the representation. Id. at 687-88. Walton must overcome the strong presumption that counsel's performance was within the range of competence demanded of attorneys defending criminal cases, id. at 689, and the court must defer to counsel's strategic decisions, avoiding the distorted effect of hindsight. Id. at 688-89.

Even if he shows that counsel's performance was deficient, Walton is not entitled to habeas relief unless he satisfies the second Strickland prong by showing that counsel's errors "actually had an adverse effect on [his] defense." Id. at 693. At a minimum, Walton must demonstrate "a reasonable probability" that but for counsel's unprofessional errors, the result of the proceeding would have been different.¹⁰ Id. at 694-95. If it is clear that no prejudice resulted

¹⁰ The prejudice prong of the Strickland test is dependent upon the context of the ineffective assistance claims. "In the context of a guilty plea, the petitioner must demonstrate . . . 'that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial.'" Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)). In contrast, "in assessing prejudice in the context of a determination regarding a defendant's competency, the question is whether there was a

from an alleged error, the court need not inquire whether the error amounts to deficient representation. Id. at 697.

For the reasons that follow, the court finds that Walton has not demonstrated constitutionally ineffective assistance of counsel in any of his claims.

a. Ineffective Assistance: Walton's Competency for Trial
[Claims VIII.A.1, VIII.A.2, VIII.A.4 and VIII.A.5]

The core of Walton's ineffective assistance of counsel claims involve counsel's actions regarding Walton's competency. Walton asserts that his counsel rendered ineffective assistance because he failed to ensure that Walton was competent to plead guilty [claim VIII.A.1], failed to adequately investigate and present all information relevant to Walton's competency [claim VIII.A.2], failed to ensure that the court hold a competency hearing [claim VIII.A.4], and failed to ensure that the court made a competency finding [claim VIII.A.5].¹¹ The court concludes that Walton has not shown that Gott acted unreasonably, or that had Gott performed as Walton says he should have, there is a reasonable probability that the trial court would have found that Walton was not competent to plead guilty.

The Due Process Clause of the Fourteenth Amendment prohibits the trial and conviction of a defendant who is mentally incompetent. Pate, 383 U.S. at 384-86 (1966). "The test for determining competence is whether '[the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and whether he has a rational as well as a factual understanding of the proceedings against him.'" Burket, 208 F.3d at 191 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). This test applies through all

reasonable probability that he would have been found incompetent to stand trial." Jermyn v. Horn, 266 F.3d 257, 283 (3rd Cir. 2001).

¹¹ The Supreme Court of Virginia found that the rule in Anderson barred these claims.

proceedings. “Even if a petitioner is mentally competent at the beginning of trial, the trial court must continually be alert for changes which would suggest that he is no longer competent.” Beck v. Angelone, 261 F.3d 377, 387 (4th Cir. 2001) (internal citations omitted). However, “[N]either low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.” Id. (citing Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir. 1995)). Therefore, “[n]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.” Id. (quoting United States ex rel. Foster v. DeRobertis, 741 F.2d 1007, 1012 (7th Cir. 1984)).

After reviewing the record and holding an evidentiary hearing on these claims, the following facts are now clear. Gott had Walton answer a thirty-nine page questionnaire regarding his mental health. When Gott observed Walton’s strange behavior, he documented it and forwarded the information to Samenow. Samenow interviewed Walton several times; conducted various psychological tests; interviewed Walton’s family members, friends, former little league coach, principal and counselor; and reviewed a host of historical documents and records regarding Walton’s mental health. When Walton changed his position on guilt, Gott asked Samenow to perform another evaluation. When Samenow equivocated in his diagnosis but recommended that the court commit Walton to a mental hospital for further observation, Gott filed a motion seeking to hospitalize Walton. Gott then filed a motion for a competency evaluation, and the court directed another mental health expert, Dr. Ryans, to evaluate Walton. Considering these facts, the court finds that Gott’s representation was not objectively unreasonable.

Even if Gott's representation was unreasonable and deficient, however, Walton has not demonstrated prejudice. See Burket, 208 F.3d at 192. Although Walton's behavior was sometimes bizarre, Samenow did not conclude that Walton was incompetent, Ryans concluded that Walton was competent, and three inmates stated that Walton was malingering. Walton has failed to demonstrate that there is a reasonable probability that, had Gott requested a competency hearing, Judge Ingram would have found Walton incompetent. Indeed, Judge Ingram had Samenow's report detailing Walton's bizarre behavior, had Ryans' report, conducted the plea colloquy, and found that Walton was pleading guilty "freely, voluntarily, intelligently, and with a full knowledge and understanding of the consequences." Under the circumstances, Judge Ingram's finding is, in effect, an implicit finding of competency. Walton has not shown that there is a reasonable probability Judge Ingram would have reached a different decision if he had conducted a formal competency hearing.

The court also finds that Gott's failure to request a competency determination at sentencing was not objectively unreasonable. At one point during sentencing Walton refused to enter the courtroom, the deputies maced him, and took him into the courtroom in shackles. Judge Ingram inquired as to the meaning of the behavior, and Samenow stated that Walton was likely experiencing tremendous fear. Since the mental health professional assigned to assist the defense gave neither Gott nor Judge Ingram reason at that juncture to question further Walton's competence, the court does not find that Gott acted unreasonably in failing to request a competency determination. Moreover, Walton has not demonstrated a reasonable probability that Judge Ingram would have found that Walton had become incompetent.

In summary, Walton has not demonstrated that Gott rendered ineffective assistance in handling questions concerning Walton's competency. Accordingly, the court will dismiss claims VIII.A.1, VIII.A.2, VIII.A.4 and VIII.A.5.

b. Ineffective Assistance: Expert Assistance
[Claim VIII.A.8]

Walton claims Gott was ineffective in failing to ensure that the court provide Walton appropriate expert assistance to evaluate his competency, to evaluate his mental state at the time of the offenses, and to develop and present an opinion in mitigation at the sentencing hearing.¹² Specifically, Walton claims that Gott was ineffective because: (1) Gott did not object to Samenow's appointment even though he was aware of Samenow's stringent views regarding mental illness and crime; (2) Gott did not ask for a new expert when Samenow was unable to give a definite opinion; and (3) Gott failed to provide Samenow with all information relevant to Walton's mental health. The court finds that these claims lack merit.

Under Ake v. Oklahoma, 470 U.S. 68 (1985), if a defendant is indigent and "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial," the Due Process Clause of the Fourteenth Amendment requires that the state provide the defendant with access to a psychiatrist. Ake, 470 U.S. at 83. Although the Constitution requires access, it does not afford a defendant the right to choose the mental health professional of his liking. Id. Rather, the state may decide how best to effectuate access. Id. The same due process right of access to a psychiatrist applies when, at sentencing, the state presents psychiatric evidence to support a finding of future dangerousness. Id. Although Ake speaks in terms of a psychiatrist, the appointment of a qualified mental health professional, such as a

¹² The Supreme Court of Virginia found that the rule in Anderson barred this claim.

clinical psychologist, suffices. Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998). Finally, since due process requires only access to the assistance of a mental health expert, a defendant has no substantive claim for the ineffective assistance of his court-appointed mental health expert. Id.

With respect to Walton's first two claims, the court finds that Gott's decision not to request a different expert was not objectively unreasonable. The Constitution does not give a defendant the right to choose the mental health professional of his liking. Ake, 470 U.S. at 83. More fundamentally, Walton has failed to show prejudice. Even if Gott had requested a different expert, Walton has not shown a reasonable probability that the court would have appointed a different expert, that a different expert would have concluded that Walton was incompetent and that Judge Ingram would have followed this expert's opinion and found Walton incompetent.

Next, the court finds that Walton's third claim that Gott failed to provide Samenow with all relevant information is without merit. As described earlier, Gott had Walton complete a thirty-nine page questionnaire and forwarded it to Samenow along with documentation of Walton's strange behavior; Samenow conducted several interviews with Walton as well as his family members, and acquaintances; and, when Walton's condition deteriorated, Gott requested that Samenow re-evaluate Walton. Walton has not shown that Gott's performance was objectively unreasonable. Samenow already had conducted numerous interviews and evaluations and had witnessed a full range of Walton's bizarre behavior. Furthermore, even if Gott had provided Samenow with more information, Walton has not shown a reasonable probability that Samenow would have concluded that Walton was incompetent, and that Judge Ingram would have found Walton incompetent. Accordingly, the court will dismiss claim VIII.A.8.

c. Ineffective Assistance: Walton's Guilty Plea
[claims VIII.A.3, VIII.A.6, VIII.A.9, and VIII.A.10]

Walton claims that Gott was ineffective for failing to adequately investigate and present the information necessary for the court to conduct a proper plea colloquy, ensuring that the plea was knowing, intelligent, and voluntary [claim VIII.A.3].¹³ Walton premises this claim on his contention that he was incompetent to plead guilty. However, as the court has already concluded, Walton has not demonstrated that Gott's performance regarding Walton's competency was objectively unreasonable. Moreover, Walton has not demonstrated a reasonable probability that even if Judge Ingram had scrutinized the matter more closely, Judge Ingram would have found Walton incapable of entering a knowing, intelligent and voluntary plea or that Walton would not have plead guilty.

Walton asserts that Gott failed to adequately investigate and pursue an insanity defense [claim VIII.A.6] and failed to adequately advise Walton on whether he should pursue an insanity defense or plead guilty [claim VIII.A.9].¹⁴ The argument is as follows. Had Gott conducted an adequate investigation into Walton's sanity, he would have discovered that Walton was insane at the time of the offenses. Armed with that discovery, Gott would have advised Walton of his insanity defense and its likely success. Thus, Walton argues, it is reasonably likely that Walton would not have pled guilty had he known of the insanity defense. The court, however, finds that Gott's investigation and his decision not to pursue an insanity defense were not objectively unreasonable.

In June of 1996, before the murders, an evaluation of Walton suggested no mental disorder. In March of 1997, Walton was tried for a felony, and there was no evidence that he was insane or had a serious mental disorder. Samenow and Ryan's later mental evaluations of

¹³ The Supreme Court of Virginia found that the rule in Anderson barred this claim.

¹⁴ The Supreme Court of Virginia found that the rule in Anderson barred these claims.

Walton did not support an insanity defense. Moreover, the circumstances surrounding the murders, Walton's efforts to cover them up and his efforts to destroy evidence point unerringly to his consciousness of guilt and his ability to discern right from wrong and undercut any reasonable prospect for a successful insanity defense.¹⁵ For these reasons, the court finds that Gott's investigation and decision not to pursue an insanity defense were reasonable under the circumstances, and that Walton has not demonstrated prejudice. Walton has not shown "that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000). Accordingly, the court will dismiss claim VIII.A.6.

Walton also asserts that Gott was ineffective in failing to move to withdraw Walton's guilty plea [claim VIII.A.10]. The Supreme Court of Virginia found that this claim had no merit. Therefore, this court only is permitted to review the court's finding to determine if that court has applied Strickland unreasonably. Since there is no evidence Walton wanted to withdraw his plea, and since that decision was his to make, it follows that the Supreme Court of Virginia's decision was neither contrary to nor an unreasonable application of Strickland.

For the foregoing reasons, the court will dismiss claims VIII.A.3, VIII.A.6, VIII.A.9 and VIII.A.10.

d. Ineffective Assistance: Evidence At Sentencing of Mental Illness
[Claim VIII.A.7]

Walton asserts that Gott did not adequately investigate or present evidence of Walton's mental illness in mitigation at sentencing.¹⁶ According to Walton, Gott's failure to ensure access

¹⁵ See court's discussion of Walton's actual innocence arguments.

¹⁶ The Supreme Court of Virginia found that the rule in Anderson barred this claim.

to a mental health expert, coupled with the lack of an adequate investigation, prevented Gott from presenting any evidence tending to show Walton's illness would respond favorably to medication. Walton maintains that if he had been able to show that his illness was treatable, he could have rebutted the Commonwealth's allegation of future dangerousness. He also contends that the lack of an adequate investigation precluded him from showing he was schizophrenic at the time of the offenses, which would have allowed him to argue extreme mental or emotional disturbance at the time of the offenses, a statutory mitigating factor. Walton further contends that, had Gott presented evidence of mental illness, it would have helped explain Walton's inappropriate behavior at sentencing, which the Commonwealth used to argue that Walton was not remorseful.

Gott's strategy at sentencing was to portray Walton as a very young, remorseful man with no substantial history of violence who committed murder as an aberration, but who wanted to take full responsibility for his actions. Gott believed this to be Walton's best chance of avoiding the death penalty. Gott presented several witnesses, including family and community members, who portrayed Walton in just that light. Gott did not present mental health evidence because he felt the evidence was lean and would undermine Walton's attempt to accept responsibility. He also believed that Samenow's testimony would not have been helpful, and that on cross-examination, the Commonwealth would have elicited adverse information from Samenow. Indeed, Samenow testified at the evidentiary hearing in this court that he did not believe there was any mental health mitigating evidence.

This court has already determined that Samenow's appointment fulfilled Walton's right of access to a mental health professional. Under the circumstances, Gott was not required to "shop" for a more favorable opinion. Gott's reliance on Samenow was within the range of

competence that the Sixth Amendment requires. With that in mind, Gott’s strategic decision not to present evidence at sentencing of Walton’s mental illness is simply that—a strategic decision that is presumptively within the wide range of competency that the Sixth Amendment requires.

The court must “appreciate the practical limitations and tactical decisions that trial counsel faced.” Bunch v. Thompson, 949 F.2d 1354, 1363 (4th Cir. 1991). In Bunch, the petitioner charged counsel with ineffective assistance for failing to present favorable psychiatric testimony at sentencing. Id. at 1363-64. However, counsel was aware that on cross-examination unfavorable testimony would be given which reinforced the petitioner’s self-destructive behavior. Id. at 1364. Counsel, therefore, did not present psychiatric testimony because he felt that the ultimate effect of the testimony would have been negative. Id. The Fourth Circuit noted that to find such a strategic decision ineffective, would institute a rule that whenever psychiatric testimony is available, it should be used, regardless of the effect. Id.

Similarly, in Truesdale v. Moore, 142 F.3d 749, 754-55 (4th Cir. 1998), the court deferred to counsel’s strategic decision not to offer evidence of organic brain dysfunction because the evidence would not have supported the image of a normal person, capable of rehabilitation. The court stated that mental health evidence can be a “double-edged sword,” and “the decision not to pursue this line of inquiry exemplifies the type of reasonable ‘strategic judgment’ that we respect.” Id. at 755.

It is, no doubt, easier to discern the wisdom or folly of a strategic choice after the results are known. Trial lawyers, however, must choose without knowing the results, and frequently they *must* choose from bad alternatives. The circumstances of these brutal slayings were problematic, and the mental health evidence was problematic. Only a clinical, hypothetical, after-the-fact analysis produces a clear path. Since Gott’s decision, however, represents a

plausible, strategic judgment, this court is not at liberty to second-guess it. Accordingly, the court will dismiss claim VIII.A.7.

e. Ineffective Assistance: Stipulations
[Claim VIII.B.3]

Walton asserts that Gott was ineffective for permitting certain matters to occur off the record and out of Walton's presence.¹⁷ Walton claims that during the guilty plea, the attorneys relied on written stipulations which the court referred to as being made "in chambers" and "off the record." Because these stipulations were unavailable for Walton to deny or explain, Walton claims that his due process rights were violated. See Gardner v. Florida, 430 U.S. 349 (1977). The Commonwealth contends that all stipulations and other matters of import were on the record.

The court has reviewed the transcript and finds it unclear whether there are unpreserved stipulations. In any event, however, given the stipulations on the record, the numerous forensic reports submitted, the overwhelming circumstantial evidence, the testimony of Walton's fellow inmates and Walton's guilty plea, Walton has not shown a reasonable probability that the allegedly missing, off-the-record stipulations were remotely capable of changing or changed the outcome of the proceedings. Thus, Walton has not shown prejudice.

Additionally, Walton claims that Gott unreasonably stipulated evidence in the Commonwealth's proffer. According to Walton, Gott failed to perform an adequate investigation into his innocence precluding Gott from challenging false testimony. The court notes, however, that there was considerable evidence against Walton, and Walton is able to point to little helpful evidence about the circumstances of the murders that Gott could have discovered had he

¹⁷ The Supreme Court of Virginia found that the rule in Anderson barred this claim.

investigated the Commonwealth's case further. In short, Walton has not shown that Gott's investigation was unreasonable, and Walton has not shown prejudice.

Accordingly, the court will dismiss claim VIII.B.3.

f. Ineffective assistance: Constitutionality of the Death Penalty
[Claim VIII.C in part]

Walton asserts that Gott was ineffective on appeal for failing to raise the unconstitutionality of the death penalty. The Supreme Court of Virginia, on state habeas review, determined that this claim had no merit. Given the lack of success other petitioners have had with this identical claim,¹⁸ Walton cannot show that that the Supreme Court of Virginia's conclusion is contrary to or an unreasonable application of Strickland. Accordingly, the court will dismiss the claim.

g. Ineffective Assistance: Lacy Johnson's Testimony
[Claims VIII.B.1, VIII.B.2 VIII.B.4 and VIII.C in part]

Several of Walton's ineffective assistance claims involve evidence from Lacy Johnson, one of Walton's fellow inmates at the Danville City Jail. Johnson testified that Walton confided in him, in detail, about committing the murders and that Walton told him that he was going to

¹⁸ Walton argues that the death penalty is unconstitutional because it is cruel and unusual punishment, because it is applied inconsistently and disproportionately on the poor and on minorities, and because in Virginia it is imposed disproportionately on indigent males. Virginia executes persons sentenced to death pursuant to a statutory scheme that allows for the balancing of mitigating and aggravating factors. Inasmuch as the Supreme Court of Virginia, through its review of every death sentence imposed in Virginia since 1977, has implicitly determined that the imposition of the death penalty in Virginia, when taken as a whole, is not arbitrary or discriminatory, there is very little likelihood, if any, that Walton would have prevailed on such a claim on direct appeal. Moreover, the Fourth Circuit has rejected an argument that Virginia imposes the death penalty in an arbitrary fashion. Turner v. Williams, 35 F.3d 872, 892-93 (4th Cir. 1994), cert. denied, 115 S.Ct. 1359 (1995), rev'd on other grounds, O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996) (finding that the results of Virginia's capital system are neither inconsistent nor arbitrary). In order to show that the death penalty is imposed in a discriminatory fashion, it is not enough to demonstrate disproportionality. Walton must demonstrate that, in his case, the decision maker acted with discriminatory intent. McCleskey v. Kemp, 481 U.S. 279 (1987). Walton has not done so.

“play crazy.” The Commonwealth introduced Johnson’s statements at the guilty plea, and Johnson testified at the sentencing proceedings.

This was not the first time Johnson testified for the Commonwealth in a capital murder trial. Johnson also testified in the capital murder trial of William Saunders. A jury found Saunders guilty of capital murder and sentenced him to death. William Fuller, the same Commonwealth Attorney who prosecuted Walton, prosecuted Saunders, and Judge Ingram presided over Saunder’s trial and sentenced him to death. Fuller and Ingram later successfully petitioned the Governor of Virginia to commute Saunders’ sentence because a polygraph test indicated that Johnson’s testimony was untruthful and facts revealed later significantly undermined Johnson’s testimony.

Despite these disturbing facts, Fuller called Johnson, who was housed in close proximity to Walton at the Danville city jail and who was serving a three-year sentence and awaiting sentencing on thirty felonies, as a witness against Walton. This time, however, Fuller required Johnson to submit to a polygraph examination which Johnson purportedly “passed.” In exchange for Johnson’s testimony Fuller agreed to recommend that the Circuit Court sentence Johnson to only one additional year. Johnson testified at Walton’s sentencing proceedings that Walton confessed, in detail, to the murders.¹⁹ Johnson also testified about Walton’s alleged plans to “play crazy” during his psychological examinations.

¹⁹According to Leslie Robertson, another inmate, the inmates were watching the television program “New York Undercover” when Walton became agitated and started talking about the murders. According to Robertson, Johnson then intensely questioned Walton about the crimes, and referred to Walton as “his free ride home.” Another inmate, Hubbard, noted that Johnson followed Walton around, asking him questions.

An affidavit from fellow inmate Gary Swanson states that other inmates told Swanson that officials were moving Johnson around the jail, keeping Johnson close to Walton, so that Johnson could obtain information from Walton.²⁰

Walton raises various ineffective assistance claims about Gott's handling of issues involving Johnson. The court addresses those issues, in turn.

(i.) Failure to Protect Sixth Amendment Rights
[Claim VIII.B.2]

Walton claims Gott was ineffective for failing to protect his rights under Massiah v. United States, 377 U.S. 201 (1964).²¹ According to Massiah, the Sixth Amendment prohibits a government agent from eliciting incriminating statements from a defendant outside the presence of counsel and introducing those statements at trial. Id. at 206. The Supreme Court has interpreted Massiah to apply where the state places an undercover, government informant in close proximity to the defendant and instructs the informant to gather and report any incriminating statements that the defendant makes. United States v. Henry, 447 U.S. 264 (1980).

According to Walton, Johnson was an agent of the Commonwealth and was housed near him for the express purpose of interrogating him and reporting back to the Commonwealth. Walton asserts that had Gott investigated properly, he would have discovered evidence to substantiate a Massiah claim. However, other than an affidavit from a fellow inmate lacking in foundation and based on hearsay, Walton has offered little evidence to support his hypothesis. In contrast, Fuller and Danville Detective Hugh C. Wyatt who investigated the murders gave affidavits that they did not instruct Johnson to question Walton about Walton's crimes, and that

²⁰ Gary Swanson assaulted Johnson because of Johnson's testimony for the Commonwealth in another murder case.

²¹ The Supreme Court of Virginia found that the rule in Anderson barred this claim.

before Johnson volunteered the information, Fuller had no reason to believe Johnson and Walton were in contact. After Johnson volunteered the information, Fuller claims he did not instruct Johnson to obtain further information from Walton. Wyatt indicated that at no time before or after Johnson's statements did the Danville Police Department control Johnson's housing at the jail or suggest that Johnson gather information from Walton.

In short, Walton has not established that Johnson was anything more than an inmate looking after his own interests and that had Gott investigated the matter further, there is a reasonable probability that he would have discovered the underpinnings of a successful Massiah claim. Accordingly, the court will dismiss claim VIII.B.2.

(ii.) Failure to Effectively Cross-Examine Johnson
[Claim VIII.B.1]

Walton claims that Gott failed to effectively cross-examine Lacy Johnson.²² On direct examination, Johnson testified to his extensive criminal record of over forty offenses, including an escape, multiple burglaries and larcenies, and two false information offenses. On cross-examination, Gott reviewed some of Johnson's convictions, his past addiction to crack cocaine and the fact that Walton's case would be the third murder trial in which Johnson testified for the Commonwealth. Gott explored Johnson's interests in testifying, particularly Fuller's intent to recommend only a one-year sentence for the twenty-nine or thirty felonies Johnson faced.

First, Walton claims that Gott was ineffective in failing to interview and present the testimony of Leslie Robertson, another inmate present at the time Walton allegedly confessed to Johnson, but who did not hear Walton confess. Although Robertson's testimony may have contradicted Johnson's testimony, other inmates claim that they also heard Walton speak of

²² The Supreme Court of Virginia found that the rule in Anderson barred this claim.

committing the crimes.²³ Therefore, since Judge Ingram had a first-hand experience with Johnson's lack of candor resulting in the Governor commuting a death sentence Judge Ingram had imposed, and since Robertson's testimony would have had its own risks, Gott's reliance on cross-examination was well within the range of competence demanded of counsel.

Next, Walton argues that Gott should have highlighted the inconsistencies between Johnson's statement and the statements of other inmates, showing that although Johnson's statement was replete with detail, the others were more cursory. Gott, however, believed it best not to compare the statements, because the overall effect would have been the corroboration of Johnson's testimony. Though the statements may have differed in detail, the overall picture would have been that Walton committed three murders and talked about them while in jail. The court is not at liberty to second-guess Gott's strategic and tactical decisions.

Lastly, Walton claims that Gott should have cross-examined Johnson regarding his involvement in the Saunders' capital case. Specifically, Gott should have questioned Johnson about a rating of "deceptive" on certain questions in the polygraph Johnson took for his testimony against Saunders. Gott indicated that he did not believe the results of the polygraph tests were proper for cross-examination. Gott noted that such a line of questioning would have opened the door to the Commonwealth's presentation of evidence that Johnson rated "truthful" during the polygraph examination in Walton's case.

In light of all the evidence, the court finds that Gott's cross-examination of Johnson was well within the range of competence the Sixth Amendment demands. Accordingly, the court will dismiss claim VIII.B.1.

(iii.) Improper Re-Direct

²³ These inmates are Roger Dale Williams, Pedro Crespo, David Allen Burke, and Tony Lamont Stanfield.

[Claim VIII.B.3]

Walton claims Gott failed to object to the Commonwealth's allegedly improper re-direct examination of Johnson.²⁴ Specifically, Walton points to the fact that although Gott's cross-examination had not opened the door to this evidence, Johnson testified on re-direct that Walton told him he was going to "play crazy." Gott did not object to this statement when it was made, or address it on "re-cross-examination." Gott believed an objection on a purely "technical" ground would have been futile and that it was likely the judge would have overruled such an objection. The court is constrained to defer to Gott's tactical decisions. Accordingly, the court will dismiss claim VIII.B.4.

h. Ineffective Assistance on Direct Appeal
[claim VIII.C]

Walton claims that Gott was ineffective because he failed to raise on direct appeal the claims he now raises in this petition (except his effective assistance claims and a claim that he is currently entitled to an evidentiary hearing). The Supreme Court of Virginia dismissed this claim as lacking merit. Based on this court's analysis of all the relevant claims, the Supreme Court of Virginia's determination was not contrary to or an unreasonable application of Strickland. Accordingly, the court will dismiss claim VIII.C.²⁵

²⁴ The Supreme Court of Virginia found that the rule in Anderson barred this claim.

²⁵ Walton claims that the Commonwealth knowingly allowed Lacy Johnson to testify falsely and that Gott was ineffective in failing to raise a claim under Napue v. Illinois, 360 U.S. 264 (1959), on direct appeal. Under the Napue line of cases, the prosecution violates a defendant's due process rights if it knowingly fails to correct false testimony against the defendant. See id.; Hoke v. Netherland, 92 F.3d 1350, 1358 (4th Cir. 1996).

On habeas review the Supreme Court of Virginia summarily concluded that the effective assistance claim lacked merit. When a state court does not give reasoning, this court conducts an independent review of the record and applicable law to determine whether conclusions reached by the state court represent a decision that is contrary to, or an unreasonable application of, clearly established federal law. Bell, 236 F.3d at 163.

Walton complains that the Supreme Court of Virginia failed to indicate what law it applied when it found the claim lacked merit. Walton argues that this court must presume that the Supreme Court of Virginia relied on its

In summary, the court finds that Walton's ineffective assistance claims have no merit. Therefore, Walton cannot use ineffective assistance as cause and prejudice to excuse his procedural default as to his other claims.

2. Actual Innocence

In addition to cause and prejudice Walton argues that the court should excuse his procedural default because he is actually innocent. To demonstrate actual innocence, Walton must show (1) new evidence that an error of constitutional magnitude probably resulted in the conviction of an innocent person, or (2) clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. Schlup v Delo, 513 U.S. 298, 323-27 (1995).

First, Walton argues that he is actually innocent because he was incompetent at the time he entered his guilty plea. However, competency to stand trial has nothing to do with actual

analysis in Williams v. Warden, 487 S.E.2d 194 (Va. 1997), which the Supreme Court of the United States later rejected. Williams v. Warden concluded that the United States Supreme Court's decision in Lockhart v. Fretwell, 506 U.S. 364 (1993), added a third prong to Strickland. In addition to meeting the performance and prejudice prongs, the court held that the petitioner must also show that as a result of counsel's performance, the trial was fundamentally unfair. In Terry Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court of the United States rejected this toughened standard and adhered to the Strickland two-part test. Id. at 390-95. Walton argues that this court should presume that, in his case, the Virginia court applied the incorrect standard it applied in Williams v. Warden, and find that the Virginia court's ruling on the merits in his case was contrary to established Supreme Court precedent. The Supreme Court of Virginia did not cite Williams v. Warden, however, when it found that Walton's claim lacked merit, and it would conflict with the principles of federalism woven in the fabric of § 2254 to presume that a state court has applied the wrong legal standard.

The court agrees that Johnson, who proved unreliable in the past, had strong motives to testify falsely. Furthermore, the court finds it regrettable that Fuller would use Johnson as a witness considering Johnson's history. However, this court's view of the matter is not controlling. The Supreme Court of Virginia rejected the claim on the merits, and this court does not find that the Supreme Court of Virginia's decision was an unreasonable application of federal law.

First, Gott's decision not to pursue a Napue claim was not objectively unreasonable. There is little evidence that Johnson's testimony against Walton was actually false and that Fuller knew it to be false. Second, Walton cannot show prejudice. A successful Napue claim requires a reasonable likelihood that the false testimony affected the judgment of the fact-finder. Napue 360 U.S. at 271. Here, the evidence against Walton was so overwhelming that it is not reasonably likely that Johnson's testimony affected Judge Ingram's decision. Accordingly, the court will dismiss this claim.

innocence. See Sawyer v. Whitley, 945 F.2d 812, 824 (5th Cir. 1991). Thus, the court rejects this aspect of Walton's actual innocence argument.

Second, Walton argues that he is actually innocent because he lacked the ability to form the *mens rea* necessary to commit capital murder. A claim of actual innocence is proper where the defendant was the causative agent of the crime, but claims he is not guilty because he is incapable of satisfying an essential element of that crime. Jones v. Delo, 56 F.3d 878, 883 (8th Cir. 1995). Under Virginia law, only a defendant capable of willful, deliberate, and premeditated killing is eligible for the death penalty. Va. Code § 18.2-31. Walton argues that he is actually innocent because he was not capable of a willful, deliberate and premeditated killing.

Walton supports this argument with evidence of his strange behavior and the evaluations of Doctors Gur, Pandurangi and Kreutzer suggesting that Walton was schizophrenic and likely insane at the time of the murders. However, none of these new doctors evaluated Walton close to the time of the murders and the information in the record available to these new doctors is essentially the same as what was available to Samenow, who concluded that Walton was sane at the time of the offenses. Thus, the recent reports not only attempt to assess Walton's mental state at a time years earlier, but also offer nothing more than a conclusion different from that reached by Samenow. As such, they are not new evidence under the Schlup standard. See Bannister v. Delo, 100 F.3d 610, 618 (8th Cir. 1996) ("putting a different spin on evidence that was presented to the jury does not satisfy the requirements set forth in Schlup."); Cf. Jones v. Delo, 56 F.3d 878, 883 (8th Cir. 1995) (finding that mental health experts who had testified at trial that defendant was capable of deliberation and then changed their opinions to conclude on habeas review that defendant suffered from an organic brain disease at the time of the offenses was "new evidence").

Even if the court considered Walton's abnormal behavior and the reports of Doctors Gur, Pandurangi and Kreutzer as "new evidence," Walton still would not meet his burden under the actual innocence standard. The new reports are simply too attenuated in time to provide much support and although the lay evidence documents some strange conduct it does not demonstrate that Walton was unable to premeditate.

Additionally, the evidence contemporaneous to the murders sufficiently demonstrates Walton's premeditation, willfulness, and consciousness of guilt. For example, Walton's method of killing Mr. Kendrick—pressing a gun to his head and pulling the trigger—supports a finding of a premeditated, deliberate killing. Moreover, Walton's actions during the murders further support such a finding. First, Walton devised a ruse to gain entry into Moore's home. Second, after he murdered Moore, Walton hid the body in a closet, dousing it with cologne to mask the smell of decomposition. Third, Walton stole property from both homes. Fourth, he disposed of the murder weapon in a lake. Fifth, when questioned by the police, Walton falsely claimed that he had not been in Moore's car. Finally, Samenow never doubted Walton's sanity at the time of the offenses, and a June 28, 1996 psychological evaluation of Walton found no indication of insanity or mental disorder.²⁶ In light of these facts, Walton has failed to show that it is probable that he was actually innocent of capital murder because he lacked the ability to form the requisite intent.

Walton also claims that he is actually innocent of the death penalty. However, this argument also fails. Judge Ingram found that Walton was a continuing dangerous threat to society and sentenced him to death. The circumstances of the murders that Walton committed justify that finding. See Delong v. Commonwealth, 362 S.E.2d 669, 677 (Va. 1987).

Additionally, Walton had an extensive criminal record prior to the murders. Based on these

²⁶ This evaluation was conducted in conjunction with a different crime for which Walton had been charged.

facts, the court finds that Walton has failed to show that no reasonable juror would have found him eligible for the death penalty.

In summary, Walton has failed to show cause and prejudice or actual innocence to overcome the procedural default of claims I, II, IV, V, VI, VII, and X. Accordingly, the court will dismiss these claims.

B. Non-defaulted Claims [claims III, IX, and XI]

**1. Plea was not Knowing, Intelligent and Voluntary
[Claim III]**

Walton claims that his guilty plea was not knowing, intelligent, and voluntary. The Supreme Court of Virginia applied Anderson to this claim; therefore, the court will consider it on the merits.²⁷

A guilty plea is constitutionally valid if it represents a voluntary and intelligent choice among the available alternatives. Beck v. Angelone, 261 F.3d 377, 394 (4th Cir. 2001) (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970)). Courts must consider the totality of the circumstances when determining if a guilty plea is valid. Id. (citing Brady v. United States, 397 U.S. 742, 749 (1970)). However, a guilty plea is presumed truthful. Id. (citing Henderson v. Morgan, 426 U.S. 637, 648 (1976)). Thus, Walton is bound by the representations he made during the plea colloquy unless he can provide clear and convincing evidence contradicting those

²⁷ In Anderson v. Warden, 281 S.E.2d 885 (Va. 1981), the Supreme Court of Virginia held that a petitioner on state habeas cannot challenge the truth and accuracy of the representations he made regarding the adequacy of his court-appointed counsel and the voluntariness of his guilty plea, unless he offers a valid reason to explain why he should be allowed to controvert his statements. Id. at 888. Recently, the Fourth Circuit has declined to apply this interpretation of Anderson as a procedural bar because the scope of the rule is unclear. See Royal v. Taylor, 188 F.3d 239, 246-48 (4th Cir. 1999), cert. denied, 528 U.S. 1000, (1999); see also Burket v. Angelone, 208 F.3d 172, 184 (4th Cir. 2000), cert. denied, 530 U.S. 1283 (2000). In accordance with Royal and Burket, this court will not apply Anderson as a procedural bar and will address the merits of Walton's claim.

representations. Fields v. Attorney General of State of Maryland, 956 F.2d 1290, 1299 (4th Cir. 1992).

During the plea colloquy, Walton affirmed that he understood the charges against him; that his attorneys had explained what the Commonwealth must prove in order to convict him of such charges; that he had discussed any possible defenses he might have; that he decided to plead guilty; that he was pleading guilty freely and voluntarily; that he was pleading guilty because he was, in fact, guilty; that he was waiving his right to trial by jury, his right not to incriminate himself, his right to confront and cross-examine his accusers and his right to defend himself; that no one had forced him to plead guilty or threatened him in any way; that no one had made any promises of any kind; that he understood that the court could impose multiple death sentences; that he was satisfied with the services of his attorneys; that his attorneys had “gone over” the guilty plea questionnaire with him in advance; that he understood all of the questions; that he understood the judge’s questions; and, that he still wished to plead guilty.²⁸ Following the plea colloquy the court found as follows:

Let the record show, the Court has inquired of the defendant, Percy Levar Walton, as to his understanding of the nature of the charges against him . . . the freeness and voluntariness of his pleas of guilty to the charges . . . to his understanding of his waiver of his right to be tried by a jury . . . his waiver of his right to appeal decisions the court . . . as to his understanding of the limits of punishment, which might be imposed upon the conviction of these offenses. The Court hereby finds, as a matter of fact, that the defendant has tendered a plea of guilty to each of the charges . . . *has done so freely, voluntarily, intelligently, and with a full knowledge and understanding of the consequences.*

²⁸ It appears that Walton did become confused at two points during the colloquy. First, when Judge Ingram asked Walton if his attorneys advised him regarding his guilty plea, Walton answered in the negative, and then after conferring with Gott, answered in the positive. Second, Walton testified incorrectly about his age, saying he was nineteen years old instead of eighteen. However, Walton was capable of conferring with his attorney and was able to correct himself.

The court then accepted Walton's guilty pleas.

Despite Walton's statements in the plea colloquy and Judge Ingram's explicit findings, Walton claims that his plea was not knowing, voluntary or intelligent. First, Walton claims his plea was involuntary because he was incompetent. Walton argues that, given the information before the court, Judge Ingram had sufficient reason to doubt Walton's competence and was obligated to make a finding of competency prior to determining that Walton's guilty plea, which was a waiver of his constitutional rights, was knowing, intelligent, and voluntary. See Godinez v. Moran, 509 U.S. 389, 400-01 n. 13 (1993).

As the court stated earlier, Walton procedurally defaulted the claim that he was incompetent to stand trial [claim I] and Walton has not shown cause and prejudice or actual innocence to excuse the default. Furthermore, the court finds that Judge Ingram's finding that Walton's plea was given "freely, voluntarily, intelligently, and with a full knowledge and understanding of the consequences" is an implicit finding that Walton was competent to plead guilty.

In a federal habeas proceeding, the court is rarely the trier of facts. Instead, the state court's factual determinations are presumed to be correct, and the petitioner can overcome that presumption of correctness only by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). "The presumption of correctness accorded to state court findings 'only applies to basic, primary facts, and not to mixed questions of law and fact.'" Combs v. Coyle, 205 F.3d 269, 277 (6th Cir. 2000). Although "the proper characterization of a question as one of fact or law is sometimes slippery," Thompson v. Keohane, 516 U.S. 99, 110-11 (1995), "the competency determination should be treated as a question of fact for purposes of § 2254(d)," Mackey v. Dutton, 217 F.3d 399, 412 (6th Cir 2000), Akers v. Angelone, 147 F. Supp. 2d 447, 449 (W.D. Va. 2001).

Furthermore, the “presumptive weight accorded an explicit or implicit competency determination is not dependent upon formalism. The failure to conduct a competency hearing is not tantamount to a failure to find competency.” Akers, 147 F. Supp. 2d at 449.

Here, Judge Ingram knew that Walton’s mental state was a concern. Judge Ingram received various expert opinions relating to Walton’s competence and mental ability. It would be myopic to conclude that Judge Ingram’s finding that Walton’s guilty plea was knowing, voluntary and intelligent was not also a finding that Walton was competent to stand trial. Therefore, the court rejects Walton’s argument that his guilty plea was not knowing, voluntary and intelligent because Judge Ingram did not make a formal finding of competency.

Second, Walton claims that his plea was not knowing, voluntary and intelligent because the court did not adequately inquire into his understanding of the charges against him and did not inquire as to Walton’s intellectual and mental deficiencies. The question involved in the “knowing, voluntary” analysis differs from the competency determination. See Banta v. Ingacio, 28 F. Supp. 2d 1182, 1187 (D. Nev. 1998).

[W]hereas competency involves the defendant’s general ability to understand the proceedings against him, “[t]he purpose of the ‘knowing and voluntary’ inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision.” United States v. Christensen, 18 F.3d 822, 826 (9th Cir. 1994) (citing Godinez v. Moran, 509 U.S. 389, 400 (1993)).

“A plea may be involuntary because the defendant does not understand the nature of the constitutional protections he waives, or because he does not understand the charge against him.” Banta, 28 F. Supp. 2d at 1187 (citing Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938) and Smith v. O’Grady, 312 U.S. 329, 334 (1941)). Although the voluntariness of a guilty plea presents a question of law, state court determinations of underlying facts are entitled to a presumption of

correctness. Id. (quoting Parke v. Raley, 506 U.S. 20, 35 (1992) and Marshall v. Lonberger, 459 U.S. 422, 431-32 (1983)). The question of “whether the defendant understood the consequences of pleading guilty falls within the scope of factual findings entitled to deference.” Id. (citing Iaea v. Sunn, 800 F.2d 861, 864 (9th Cir. 1986)). Also, whether a defendant’s guilty plea is entered “knowingly” is a question of fact. Id. (citing U.S. v. Read, 778 F.2d 1437, 1440 (9th Cir. 1985)).

Therefore, under § 2254(e)(1), Judge Ingram’s finding that Walton entered his guilty plea “freely, voluntarily, intelligently, and with a full knowledge and understanding of the consequences” should be presumed correct unless Walton rebuts this presumption with clear and convincing evidence. Walton has not shown that he can meet this burden. To the contrary, the evidence supports Judge Ingram’s findings.

Walton argues that his guilty plea was not entered knowingly, voluntarily or intelligently because Judge Ingram did not inquire into Walton’s intellectual and mental deficiencies. However, Judge Ingram already had evidence before him regarding Walton’s intellectual and mental deficiencies. Judge Ingram appointed Samenow to assist the defense and ordered Ryans to evaluate Walton. Judge Ingram had both of their reports and both reports indicated that Walton was capable of understanding the proceedings. He also observed Walton during the plea colloquy. Although Judge Ingram failed to expressly inquire into Walton’s intellectual functioning during the plea colloquy, the court does not find that Judge Ingram failed to ensure that Walton’s plea was knowing, voluntary and intelligent.

Walton argues that his plea was not knowing, voluntary and intelligent because Judge Ingram did not ask Walton his reasons for pleading guilty. However, this court is unaware of such a requirement, and Walton has offered no authority in support of this argument. Judge Ingram did ask Walton, however, if he was in fact guilty, and Walton responded that he was.

Walton argues that because of the confusion over the potentially missing written stipulation, it is likely that he did not know the extent of the evidence against him prior to pleading guilty. However, Walton points to nothing specific to demonstrate that he was not apprized of the evidence against him prior to entering his plea.

In summary, Walton has not demonstrated why the court should not afford a presumption of correctness under § 2254(e)(1) to Judge Ingram's findings. Judge Ingram's findings are not mere formalisms. They are entitled to deference for a reason. Judge Ingram was in the best position to determine whether Walton's plea was knowing, voluntary and intelligent. Judge Ingram made this determination, and Walton has not shown that he can rebut Judge Ingram's findings with clear and convincing evidence. Accordingly, the court will dismiss claim III.

2. Walton is Incompetent to be Executed
[Claim IX]

Walton claims that his past and current behavior demonstrates that he is not competent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). However, a Ford claim is not ripe for disposition until execution is imminent. Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998). Because Walton's execution is not imminent, the court will dismiss this claim without prejudice.²⁹

3. Evidentiary Hearing
[Claim XI]

Walton claims that he is entitled to an evidentiary hearing in federal court to resolve the factual disputes in the record. This court has already conducted a hearing on the issues it

²⁹The opinions Walton offers to support this claim are in conflict with prison psychiatrists who find he is malingering. One such psychiatrist essentially summarized Walton's world view: "old people who have things that he wants should expect that their resistance to his efforts to take those things away from them will result in their justifiable deaths." (Respondants Federal Exhibits filed (April 26, 2000), Exhibit 9.)

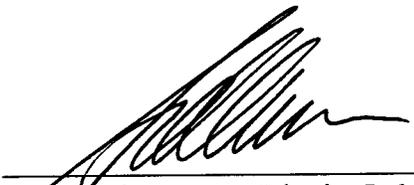
believed were warranted. Inasmuch as this court has determined as a matter of law that all of the claims should be dismissed, there is no basis for any further evidentiary hearing. Therefore, the court denies the request.

IV. CONCLUSION

This court has thoroughly reviewed Walton's petition, held an evidentiary hearing, and has determined that Walton's claims lack merit. Therefore, the court will dismiss Walton's petition.

The court will enter an order in accordance with this opinion.

ENTER: This March 27, 2002.



Chief United States District Judge