No. 18- ____

IN THE
Supreme Court of the United States

THOMAS ALEXANDER PORTER,

Petitioner,

v.

DAVID ZOOK,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Porter v. Zook

United States Court of Appeals for the Fourth Circuit

January 23, 2018, Argued; August 3, 2018, Decided

No. 16-18

Reporter
898 F.3d 408 *; 2018 U.S. App. LEXIS 21576 **

THOMAS ALEXANDER PORTER, Petitioner - Appellant, v. DAVID ZOOK, Warden, Sussex I State Prison, Respondent - Appellee.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. (3:12-cv-00550-JRS). James R. Spencer, Senior District Judge.

Porter v. Zook, 2016 U.S. Dist. LEXIS 55127 (E.D. Va., Apr. 25, 2016)

Disposition: AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

Core Terms

juror, district court, actual bias, voir dire, evidentiary hearing, law enforcement officer, impartial, state court, gun, juror bias, apartment, biased, murder, merits, bias, answered, unreasonably, law enforcement, discovery, questions, police officer, trial counsel, pulled, inlaw, allegations, killing, convicted, ineffective, investigate, shot

Case Summary

Overview

HOLDINGS: [1]-In dismissing the actual juror bias claim of the *28 U.S.C.S. § 2254* petitioner--who was convicted in Virginia state court of capital murder and was sentenced to death--the district court failed to recognize the applicability of U.S. Supreme Court precedent requiring a hearing in the circumstances, erected inappropriate legal barriers and faulted petitioner for not overcoming them, and ignored judicially-recognized factors in determining whether a hearing was necessary; [2]-The district court also erred in by dismissing the petitioner's separate but related juror bias claim brought pursuant to McDonough Power Equipment, Inc. v. Greenwood; [3]-Although *Fed. R. Evid. 606(b)* might prevent certain testimony from being solicited in an evidentiary hearing, it would not preclude the petitioner or other jurors from testifying altogether.

Outcome
Affirmed in part, vacated in part, and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Habeas Corpus > Evidentiary Hearings > Review of Denials

Criminal Law & Procedure > Habeas Corpus > Procedure > Discovery

HN1[] **Contrary & Unreasonable Standard, Contrary to Clearly Established Federal Law**

Pursuant to the *Antiterrorism and Effective Death Penalty Act of 1996*, the United States Court of Appeals for the Fourth Circuit generally applies a highly deferential standard of review to federal habeas petitions challenging state court decisions: An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --(1) resulted in a decision that was contrary to, or involved an unreasonable application

of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *28 U.S.C.S. § 2254(d)(1)-(2)*. However, where a state court has not considered a properly preserved claim on its merits, a federal court must assess the claim de novo. The Fourth Circuit also reviews for abuse of discretion a district court's failure to conduct an evidentiary hearing or to authorize discovery in a *§ 2254* proceeding.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Burdens of Proof

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Tests for Juror Bias & Prejudice

HN2[] **Bias & Prejudice, Burdens of Proof**

Actual jury bias and bias based on McDonough Power Equipment, Inc. v. Greenwood are distinct because while a McDonough claim requires a showing of juror misconduct, an actual bias claim may succeed regardless of whether the juror was truthful or deceitful.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Burdens of Proof

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN3[] **Bias & Prejudice, Burdens of Proof**

Ineffective assistance of counsel claims are subject to a substantially different -- and more demanding -- standard of proof than actual bias claims. In order to demonstrate ineffective assistance of counsel in a habeas proceeding under Strickland, a petitioner must demonstrate first, counsel's performance was deficient, and second, the deficient performance prejudiced the defense. Deficient performance requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the *Sixth Amendment*. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. In contrast, on the merits of an actual bias claim, an appellant must prove that a juror, because of his or her partiality or bias, was not capable and willing to decide the case solely on the evidence before it. Thus, what a petitioner must prove to succeed in a Strickland claim -- that not only did counsel make grave errors, but that those errors affected the outcome of the proceedings -- is a much higher bar that what he must prove on an actual bias claim.

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Burdens of Proof

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Tests for Juror Bias & Prejudice

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Hearing Requirement

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN4[] **Bias & Prejudice, Burdens of Proof**

The Strickland inquiry focuses on counsel's representation measured against established professional norms, but the actual bias inquiry focuses on a juror's lack of partiality, for which the Constitution lays down no particular tests and procedure. U.S. Supreme Court case law contemplates further fact finding once sufficient allegations of juror bias have been made, whereas Strickland claims are generally based on a concluded and comprehensive record. A habeas petitioner need only demonstrate that he diligently pursued his actual bias claim in state court; his allegations, if true, could entitle him to relief; and he fulfills at least one of six factors set forth in Townsend v. Sain.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Right to Unbiased Jury

HN5 **Criminal Process, Right to Jury Trial**

The *Sixth Amendment*, made applicable to the states through the *Fourteenth Amendment*, requires that a state provide an impartial jury in all criminal prosecutions. If even one partial juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence. The remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. And preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Hearing Requirement

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Tests for Juror Bias & Prejudice

HN6 **Procedural Due Process, Scope of Protection**

Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. To be sure, due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Rather, due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Again, this determination may properly be made at a hearing. A court is not, however, obliged to hold an evidentiary hearing any time that a defendant alleges juror bias.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN7 **Review, Burdens of Proof**

At the motion to dismiss stage, a district court must accept a petitioner's well-pleaded allegations as true, and draw all reasonable inferences therefrom in the petitioner's favor.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Privacy of Deliberations

Evidence > ... > Competency > Jurors > Deliberations

HN8 **Jury Deliberations, Privacy of Deliberations**

Federal Rule of Evidence 606(b) provides: During an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. *Fed. R. Evid. 606(b)(1)*. There are three exceptions to this general rule, however. A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form. *Fed. R. Evid. 606(b)(2)*. *Rule 606(b)* applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire. However, if jurors lie in voir dire in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to employ nonjuror evidence even after the verdict is rendered.

Criminal Law & Procedure > Habeas Corpus > Evidentiary Hearings > State Prisoners

HN9 **Evidentiary Hearings, State Prisoners**

A petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the U.S. Supreme Court in Townsend v. Sain. The Townsend factors are:"(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the

material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Tests for Juror Bias & Prejudice

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN10[] Review, Antiterrorism & Effective Death Penalty Act

To prove a juror bias claim under McDonough Power Equipment, Inc. v. Greenwood, the petitioner must show: (1) a juror failed to answer honestly a material question on voir dire, and (2) a correct response would have provided a valid basis for a challenge for cause. When the state habeas court has addressed this issue on the merits, the United States Court of Appeals for the Fourth Circuit reviews under the deferential *AEDPA* standard, which requires an appellant to demonstrate that the state habeas court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. *28 U.S.C.S. § 2254(d)(1)*.

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review

HN11[] Standards of Review, Contrary & Unreasonable Standard

When a habeas petitioner's claims were adjudicated on the merits in state court, the United States Court of Appeals for the Fourth Circuit is tasked with deciding whether the state habeas court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or 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.S. § 2254(d)(1)-(2)*.

Criminal Law & Procedure > ... > Discovery by Defendant > Expert Testimony > Indigent Defendants

Evidence > Burdens of Proof > Allocation

Evidence > ... > Testimony > Expert Witnesses > Criminal Proceedings

HN12[] Expert Testimony, Indigent Defendants

Under Virginia law, the indigent defendant who seeks the appointment of an expert must show a particularized need. A defendant is required to show that the expert testimony will focus on the particular facts of his history and background, and the circumstances of his offense. This standard has repeatedly been held to be within federal constitutional standards.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > ... > Review > Specific Claims > Jury Instructions

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN13[] Criminal Process, Assistance of Counsel

To prevail on *Sixth Amendment* ineffective assistance of counsel claims, a habeas petitioner is required to show (1) his counsel's performance fell below an objective standard of reasonableness measured by prevailing professional norms, and that counsel's deficient performance prejudiced him. The court must evaluate the conduct from counsel's perspective at the time, and apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance, in order to eliminate the distorting effects of hindsight. In all cases, the petitioner's burden is to

show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*. In order to show prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome, and the likelihood of a different result must be substantial, not just conceivable.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

HN14[] **Brady Materials, Brady Claims**

To establish a violation of Brady v. Maryland, a defendant must show (1) that the undisclosed information was favorable, either because it was exculpatory or because it was impeaching; (2) that the information was material; and (3) that the prosecution knew about the evidence and failed to disclose it.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Evidence > Burdens of Proof > Allocation

HN15[] **Brady Materials, Brady Claims**

The burden of proof of a Brady violation rests with the defendant.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel

HN16[] **Criminal Process, Assistance of Counsel**

To invoke Martinez v. Ryan, an appellant must demonstrate that state habeas counsel was ineffective or absent, and that the underlying ineffective assistance of counsel claim is substantial.

Counsel: ARGUED: Robert Edward Lee, Jr., VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, Virginia, for Appellant.

Matthew P. Dullaghan, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

ON BRIEF: Dawn M. Davison, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Charlottesville, Virginia; Trey R. Kelleter, VANDEVENTER BLACK, LLP, Norfolk, Virginia, for Appellant.

Mark R. Herring, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Judges: Before THACKER and HARRIS, Circuit Judges, SHEDD, Senior Circuit Judge. SHEDD, Senior Circuit Judge, concurring in part and dissenting in part.

Opinion by: THACKER

Opinion

[*414] THACKER, Circuit Judge:

This death penalty case is before us for the second time. In 2007 Thomas Alexander Porter ("Appellant") was convicted in Virginia state court of capital murder for killing a Norfolk law enforcement officer, Stanley Reaves. He was sentenced to death.

After he pursued direct and collateral review **[**2]** in state court, Appellant filed the operative *28 U.S.C. § 2254* petition in the district court, raising a host of challenges to his conviction and sentence. Chief among them was a claim that one of the jurors was biased against him. Specifically, when asked at voir dire whether any jurors had relatives in law enforcement, the juror did not disclose that his brother was a law enforcement officer in the jurisdiction adjacent to Norfolk.

The district court dismissed the *§ 2254* petition. *See* *Porter v. Davis, No. 3:12-cv-550, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *52 (E.D. Va. Aug. 21, 2014) ("Porter I")*. Appellant filed a plenary appeal of that dismissal, and we dismissed the appeal and remanded for further consideration of Appellant's actual bias claim, which the district court failed to address in the first instance. *See* *Porter v. Zook, 803 F.3d*

694 (4th Cir. 2015) ("Porter II"). On remand, the district court dismissed Appellant's actual bias claim as a matter of law without holding an evidentiary hearing. *See* Porter v. Zook, No. 3:12-cv-550, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *1 (E.D. Va. Apr. 25, 2016) ("Porter III"). We now consider an appeal of that decision and the dismissal of his other claims.

Although we affirm on the majority of Appellant's claims, we are constrained to remand once again on the juror bias issue. In dismissing the actual bias claim, the district court **[**3]** failed to recognize the applicability of Supreme Court precedent requiring a hearing in these circumstances; erected inappropriate legal barriers and faulted Appellant for not overcoming them; and ignored "judicially-recognized factors" in determining whether a hearing is necessary. United States v. Henry, 673 F.3d 285, 291 (4th Cir. 2012). We likewise conclude that the district court erred in *Porter I* by dismissing Appellant's separate but related juror bias claim brought pursuant to McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).

We therefore affirm in part, vacate in part, and remand with instructions that the district court allow discovery and hold an evidentiary hearing on Appellant's two separate juror bias claims.

I.

A.

In Virginia state court on March 7, 2007, Appellant was convicted of using a firearm in the commission of a felony, grand larceny of a firearm, and capital murder for killing a law enforcement officer in order to interfere with the performance of his official duties.[1] The following facts were adduced at Appellant's trial:

> At approximately 3:30 p.m. on October 28, 2005, Porter and Reginald Copeland **[*415]** traveled in Porter's Jeep to the Park Place apartment complex located at 2715 DeBree Avenue in the City of Norfolk to inquire about purchasing marijuana. Porter was carrying **[**4]** a concealed, nine-millimeter Jennings semi-automatic pistol. The two men entered the apartment of Valorie Arrington, where several people were present, including Valorie and her daughters, Latoria and Latifa . . . .
>
> Once inside, Porter began arguing with the women, brandishing his gun, and threatening that he might shoot one of them if provoked. Copeland left the residence, but Porter remained behind, locking the door so Copeland could not reenter. After being locked out of Valorie's apartment, Copeland walked away from the apartment complex and happened upon three uniformed police officers a block away, including Norfolk Police Officer Stanley Reaves. Copeland reported Porter's behavior to Officer Reaves and directed him to Valorie's apartment.
>
> Officer Reaves drove his police cruiser to the front curb of the apartment building, parked the car, and walked across the grass towards the sidewalk leading from the street to the apartment door. As Officer Reaves approached the apartment, Porter left Valorie's apartment and began walking away. Officer Reaves confronted Porter, grabbed Porter's left arm, and instructed him to take his hands out of his pockets. Porter then drew his concealed **[**5]** weapon from his pocket and fired three times, killing Officer Reaves. Porter took Officer Reaves' service pistol and then fled in his Jeep.
> Several eyewitnesses, along with Porter, testified at trial and provided various descriptions of the events leading up to and immediately following Officer Reaves' death. . . .
> Copeland testified that he and Porter entered Valorie's apartment because she was Copeland's friend and because he had smoked marijuana with her before. . . . [A]t some point in the conversation Porter began arguing with one of the women.
>
> Copeland "didn't know what to do" but left the apartment and "ran down [to the next block] and told [Officer Reaves, 'Look, there is a man up in the house with some girls, and he shouldn't be in there.'" Copeland described the apartment building to Officer Reaves, and Officer Reaves drove his patrol car to the building with Copeland "running behind" the vehicle. Officer Reaves arrived at the building before Copeland, and as Copeland approached he saw "Officer Reaves in the car and Porter was coming out [of] the building." Copeland identified Porter to Officer Reaves, and Officer Reaves instructed Copeland to stay back and then approached **[**6]** Porter. Moments later, Porter and Officer Reaves disappeared from Copeland's viewpoint behind a parked van, but Copeland "heard gunshots and started running," and he "ran and told the [other] officers what happened."
> . . .
>
> Simone Coleman testified that she was walking on the sidewalk near the apartment complex when she saw Officer Reaves' patrol car arrive. Coleman watched as

[1] Virginia law provides that an individual is guilty of capital murder if he is convicted of "[t]he willful, deliberate, and premeditated killing of a law-enforcement officer . . ., when such killing is for the purpose of interfering with the performance of his official duties." Va. Code Ann. § 18.2-31.6.

Officer Reaves stepped out of his patrol car, and she saw Porter walking across the grass from the apartment, coming to "within a few feet" of her. She testified that Porter's hands were "[i]n his pockets" as Coleman passed by, and she "was looking back" to watch the confrontation between Officer Reaves and Porter. Coleman heard Officer Reaves instruct Porter to "take his hands out of his pockets," and then Officer Reaves "grabbed Mr. Porter's left arm." Coleman testified that Officer **[*416]** Reaves "didn't have a gun out," and that Porter, in response to Officer Reaves grabbing his arm, pulled a gun out of his pocket, pointed the gun at Officer Reaves' head, and pulled the trigger. Coleman watched Officer Reaves collapse to the ground, and she testified that Porter then shot Officer Reaves two more times. Coleman identified **[**7]** Porter in court as the man who killed Officer Reaves.

Selethia Anderson, who lived across the street from the apartment complex, was sitting on her front porch when she saw Officer Reaves arrive. Anderson testified that she watched Officer Reaves exit his vehicle and walk towards Porter as Porter was leaving the apartment complex. She described how Officer Reaves confronted Porter and "used his right hand to grab [Porter's] left hand," and then Porter immediately reached into his hoodie pocket with his right hand, pulled out a gun, and shot Officer Reaves in the head. Anderson testified that after Officer Reaves fell, Porter shot him twice more "between the back of the head and neck." According to Anderson, Porter knelt over Officer Reaves' body after the shooting, and when Porter left the scene, he was carrying a "bigger gun" than the one he had used to shoot Officer Reaves. Anderson identified Porter in court as the man who shot Officer Reaves.

Valorie testified that she was in her apartment that afternoon when Copeland arrived with Porter. According to Valorie, the two men "came for some marijuana" but the women did not have any, and asked the men to leave. Copeland agreed to leave, **[**8]** but Porter stayed inside, locked the door and kept Copeland outside. Valorie testified that she felt scared because Porter had "locked us in our own house." Valorie asked Porter why his hands were in his sweatshirt pocket, and Porter responded by pulling out his gun and asking, "[s]o are you going to give me the bag of weed or what?" Valorie testified that she uttered a prayer, and when Porter realized she was a Muslim, he told the women that they were "lucky" and he put away the gun. When Porter realized a police car had arrived, he left the apartment and ran "like some horses going down the stairs." Moments later, Valorie heard gunshots.

Latoria's testimony confirmed that Porter entered Valorie's apartment along with Copeland, and that Copeland left the apartment but Porter remained inside, locking the door. Latoria testified that Porter threatened that he would "get to clapping" if any of the women made a sudden move, and she explained that "clapping" was a term for "shooting." She testified that she looked out the window, noticed Officer Reaves arrive in his patrol car, and asked, "Why is Reggie [Copeland] talking to the police officer?" Latoria testified that Porter then immediately **[**9]** exited the apartment, and she watched through the window as Officer Reaves approached Porter, grabbed Porter's arm, and then Porter "reach[ed] into his right pocket and he pull[ed] out his gun and he shot him." Latoria testified that Officer Reaves did not have a weapon drawn when Porter shot him.

. . .

After killing Officer Reaves, Porter traveled to New York City where he was apprehended one month later in White Plains, New York. The murder weapon was found in his possession at the time of his arrest. Officer Reaves' gun was eventually located in Yonkers, New York.

The autopsy report revealed that Officer Reaves suffered three close-range **[*417]** wounds to his head: one to the forehead, one to the left back of the head, and a flesh wound near the right ear. "The cause of death was two separate close range gunshot wounds to the head."

Porter did not dispute that he shot Officer Reaves, but his version of the events differed from that of the eyewitnesses. Porter testified in his own defense that he drove to Valorie's apartment with Copeland "[t]o get a bag of marijuana" because Copeland was his "means of getting marijuana." Porter parked the vehicle outside the apartment, and he "grabbed the gun **[**10]** out of the glove compartment box" before leaving the vehicle "[b]ecause the area . . . is a bad area." Porter testified that he gave Copeland $10 to purchase marijuana, and that he waited outside while Copeland went inside to make the purchase.

Porter testified that after a few minutes had passed, Copeland emerged from an upstairs apartment and invited him inside. Porter confirmed that Copeland left the apartment, but Porter denied locking the door and keeping Copeland outside. Porter also denied brandishing his gun inside the apartment or making a statement about shooting any of the women. Porter claimed that he left the apartment when he learned from the women that Copeland had not paid them for marijuana, and he denied that any of the women knew about Officer Reaves' arrival because "[w]asn't nobody

even looking out the window."

Porter testified that he left the apartment and was walking to his vehicle "when Officer Reaves stepped in front of me and grabbed me." Porter and his counsel then had the following exchange:

> Q. Did anything else happen when he did that?
> A. Yes. I seen him pulling his gun.
> Q. What do you mean, you saw him pulling his gun?
>
> A. Well, when he grabbed me with his left **[**11]** arm on my left arm, we were still standing face to face. I seen him pulling his gun. That's when I put my hands up in the air and backed up, looking at him, like, "What [are] you doing?"
> Q. You just described that you put your hands up in the air?
> A. Yes.
> Q. And at that point, what happened?
> A. Well, I got my hands in the air when he finally gets the gun out and point it at me. I take my hands down and pull my gun and started shooting.
> Q. Why did you do that, Mr. Porter?
> A. Because I was scared. I thought he was going to kill me because he looked angry at the time, so I was just worried for my safety.

Porter testified on direct examination that he could not remember how many times he pulled the trigger, but after he shot Officer Reaves, he bent down, picked up Officer Reaves' gun and ran. Porter explained that he left the scene because he "was scared" because he realized he "just killed an officer."

Porter testified repeatedly on cross-examination that he "never wanted to kill anybody" but he also admitted that he "pulled out the gun" and "shot [Officer Reaves] in the forehead." Porter and opposing counsel had this exchange on cross-examination:

> Q. You meant to hit Stanley Reaves with a bullet, **[**12]** didn't you?
> A. Yes, sir.
> Q. All right. And you took aim -- therefore, you took aim at him, correct?
> A. Yes, sir.
>
> **[*418]** Q. You took aim at a part of his body, correct?
> A. Yes, sir.
> Q. And the part of his body that you took aim at and then before pulling the trigger from less than six inches away was directly into his forehead, correct?
> A. Yes, sir.
> . . . .
> Q. And you agree that you knew you were aiming at his head, correct?
> A. Yes, sir.

Porter also had this exchange on cross-examination:

> Q. You admit that you . . . pulled your gun out?
> A. Yes, sir.
> Q. And that you shot him in the head?
> A. Yes, sir.
> Q. You admit that you stole his gun?
> A. Yes, sir.
> Q. So according to your version of events, you claim that Officer Reaves pulled his gun, correct?
> A. Yes.
> Q. And the only thing about the crime that's alleged you committed, the capital murder of Officer Stanley Reaves, using a gun to commit that murder and stealing Officer Reaves' gun, the only part of the crime that we're here that you're on trial for that you dispute, really, is the reason why you shot Officer Reaves; is that correct?
> A. Yes.

Porter v. Commonwealth of Va., 276 Va. 203, 661 S.E.2d 415, 419-23 (Va. 2008). On March 14, 2007, a jury assigned the death penalty after finding there was a probability that Appellant "would commit criminal **[**13]** acts of violence that would constitute a continuing serious threat to society." J.A. 1579[2] (quoting *Va. Code Ann. § 19.2-264.2*).[3] Appellant received terms of imprisonment totaling 22 years on the remaining convictions.

The Virginia Supreme Court affirmed Appellant's conviction and death sentence on June 6, 2008, *see Porter, 661 S.E.2d at 419*, and the United States Supreme Court denied certiorari, *see Porter v. Virginia, 556 U.S. 1189, 129 S. Ct. 1999, 173 L.*

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[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

[3] The entire statute provides:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Va. Code Ann. § 19.2-264.2.

Ed. 2d 1097 (2009). Appellant then filed a state habeas petition on August 10, 2009, attacking his conviction on the following grounds: (1) juror bias; (2) the Commonwealth failed to **[**14]** disclose exculpatory information, in violation of *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, and presented false testimony or allowed it to go uncorrected in violation of *Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)*, and *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*; (3) trial counsel rendered ineffective assistance in numerous ways; and (4) the trial judge was biased against Appellant based on his former **[*419]** career as a prosecutor. *See Porter v. Warden, 283 Va. 326, 722 S.E.2d 534, 538-50 (Va. 2012)*. The Supreme Court of Virginia rejected his arguments and dismissed his habeas petition. *See id. at 550*.

On July 30, 2012, the district court granted Appellant's motion for stay of execution and entered a briefing schedule, directing Appellant to file his federal habeas petition within 70 days. On October 9, 2012, Appellant filed a federal habeas petition and on May 10, 2013, he amended his petition to add defaulted claims pursuant to *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)* (holding that the ineffective assistance of initial post-conviction review counsel may establish cause for defaulting an ineffective assistance of trial counsel claim). *See* J.A. 2515-2618 ("Amended Petition"). The claims in the Amended Petition are as follows:

> **Claim I**: Juror Misconduct Violated Porter's Right to an Impartial Jury and to Due Process
>
> **Claim II**: The Prosecution Violated *Brady* Regarding Reaves's History of Unprofessional Conduct
>
> **Claim III**: The **[**15]** Prosecution Violated *Brady* and *Napue* Regarding Selethia Anderson
>
> **Claim IV**: Counsel Unreasonably Failed To Have Reaves's Holster Examined For Fingerprints
>
> **Claim V**: Trial Counsel Unreasonably Failed to Call Powerful Exculpatory Testimony to the Jury's Attention in Closing
>
> **Claim VI**: Counsel Unreasonably Failed to Obtain a Jury Instruction on First-Degree Murder
>
> **Claim VII**: Trial Counsel Failed to Investigate Reaves's History of Unprofessional Conduct
>
> **Claim VIII**: Counsel Failed to Conduct an Adequate Investigation into Porter's Chaotic and Abusive Childhood and Failed to Present the Evidence They Had Uncovered
>
> **Claim IX**: Counsel Failed to Reasonably Investigate the Prosecution's Aggravating Evidence
>
> **Claim X**: Counsel Failed to Investigate and Present Evidence of Porter's Correctional Experiences
>
> **Claim XI**: The State Court Violated Porter's Rights Under the *8th* and *14th Amendments* by Denying Porter the Assistance of a Risk Assessment Expert
>
> Defaulted Claims:
>
> **Claim XII**: The Prosecution Withheld Material Evidence Impeaching a Penalty-Phase Witness
>
> **Claim XIII**: Counsel Unreasonably Failed to Protect Porter's Constitutional Right to Testify
>
> **Claim XIV**: Counsel Unreasonably Failed to Assert that His Proposed Risk Assessment Would **[**16]** Be of the Same Nature as that Contained in his Expert's Declaration
>
> **Claim XV**: Counsel Unreasonably Failed to Object to Improper "Curative" Instructions and Comments by the Trial Court during his Closing that Denied Porter a Fair Sentencing
>
> **Claim XVI**: Counsel Failed to Adequately Investigate the Shooting of Officer Reaves
>
> **Claim XVII**: The Prosecution Withheld Material Evidence Impeaching a Guilt-Phase Witness

J.A. 2516-17.

The Warden filed a motion to dismiss on June 3, 2013, and the district court granted the motion on August 21, 2014, but it also issued a certificate of appealability "regarding all claims." *Porter I, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *52*.

[*420] B.

We now turn to the specific factual and procedural background of Appellant's Claim I, the juror bias claim.

1.

During voir dire, the state trial court sitting in Arlington told the prospective jurors that Appellant's trial would "involve[] a charge of capital murder" of a "Norfolk police officer," J.A. 223, 227, and the case was moved from Norfolk because "we've had some publicity and wanted to try to select jurors who have not seen or heard any substantial information about

the case," *id.* at 222. Defense counsel later asked the jury panel, "Have you, any member of your family or close personal **[**17]** friend worked for or with any law enforcement organization, either as an employee or on a volunteer basis?" *Id.* at 250-51. Juror Bruce Treakle responded, "My nephew is an Arlington County police officer." *Id.* at 251. He said this relationship would not affect his ability to be impartial. He said nothing further. Juror Treakle was ultimately selected to sit on the jury that convicted Appellant and sentenced him to death.

On May 30, 2009, after Appellant's direct appeal, state habeas counsel Maryl Sattler interviewed Juror Treakle. Sattler, a law student at the time, produced an affidavit memorializing her interview. *See* J.A. 1718-20 (the "Sattler Affidavit").[4] According to the Sattler Affidavit, Juror Treakle said that sitting through Officer Reaves's wife's testimony at trial "had been difficult for him." *Id.* at 1719. He explained that Officer Reaves's wife's testimony was "moving" and "very emotional" for him "because [Juror Treakle's] brother is a sheriff's officer" in the Norfolk area. *Id.* He also "expressed sympathy for law enforcement officers." *Id.*

2.

Upon discovering this information, Appellant alleged in his state habeas petition that his rights to an impartial jury and due process were violated "by the participation **[**18]** of a juror who concealed during voir dire that his brother," like Officer Reaves, "was a veteran law enforcement officer." J.A. 1651. Appellant also alleged that Juror Treakle's brother worked in Chesapeake, the jurisdiction adjacent to Norfolk. Officer Reaves and his family also lived in Chesapeake, and at the time of Officer Reaves's murder, community members were mourning the death of another officer similarly killed in the line of duty. And significantly, after Officer Reaves's murder, Chesapeake and Norfolk law enforcement officers joined in a manhunt for Appellant. Indeed, Officer Reaves's wife wrote a letter in the local newspaper thanking the Chesapeake Police Department for its support in the aftermath of her husband's death.

Appellant raised three theories of juror bias in the state habeas petition based on these allegations: (1) actual bias; (2) implied bias;[5] and (3) juror silence foreclosing counsel's ability to conduct an adequate voir dire pursuant to *McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)*. The state habeas court dismissed the claim, explaining:

> In determining whether to grant a new trial based on an allegation that a juror was dishonest during voir dire, this Court applies the two-part test enunciated **[*421]** in *McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* **[**19]** , which states that
>
> > to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.
>
> *Id. at 556*.
> . . .
> The record demonstrates that Juror T[reakle] answered truthfully that he had a nephew who was an Arlington County Police Officer, Arlington County being the jurisdiction where the case was being tried following a change of venue, and that he was not asked, nor did he have the opportunity to answer, if he had any additional relationships with law enforcement officers. Thus, petitioner has failed to demonstrate that Juror T[reakle] failed to answer honestly a material question during voir dire.

Porter v. Warden, 283 Va. 326, 722 S.E.2d 534, 539 (Va. 2012) (some citations omitted). By this analysis, the state habeas court addressed Appellant's *McDonough* juror bias claim, but it failed to address Appellant's actual bias claim.

In the Amended Petition, Appellant raised both an actual bias claim and a *McDonough* claim. In **[**20]** dismissing that petition, the district court likewise failed to address actual bias, but it did reject the *McDonough* claim, stating:

> It is clear that Juror Treakle did not volunteer false information. The main question of import is whether Juror T[reakle]'s omission of an additional family member that was a law enforcement officer amounted to a "material omission." *McDonough* provides for relief only where a juror gives a dishonest response to a question actually posed, not where a juror innocently fails to disclose information that might have been elicited by questions counsel did not ask.
> . . .
> It may be true that officers from the Chesapeake Sherriff's Office were more involved in his case than officers in Arlington County. However, [Appellant] presents only circumstantial evidence of bias, and a showing of implied bias is a very high bar.

[4] Sattler worked on this case during her internship with the Virginia Capital Representation Resource Center.

[5] Appellant did not raise an implied bias claim in his federal petition.

*Porter I, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677 at *11* (internal quotation marks omitted). The district court also denied Appellant's request for an evidentiary hearing as unnecessary.

Appellant appealed the dismissal of his *§ 2254* petition. We dismissed the appeal on October 20, 2015, because the district court failed to address and resolve Appellant's actual bias claim, and therefore, we did not possess jurisdiction. **[**21]** *See Porter II, 803 F.3d at 695*. Specifically, we explained:

> [T]he district court dismissed [Appellant]'s petition without ruling on or seeming to recognize [Appellant]'s actual bias claim. Instead, the portion of the court's opinion devoted to juror bias addresses only the *McDonough* test for juror misconduct during voir dire . . . . It does not acknowledge a distinct actual bias claim, and it never passes on a central component of that claim: the law-student affidavit that has Treakle drawing a connection between his relationship with his brother and his response to certain trial testimony.

Id. at 698-99. We remanded the case "so that [the district court] can decide [Appellant]'s actual bias claim," and instructed **[*422]** that "the district court may consider any argument or defense properly raised by [Appellant] or the Warden, and may conduct an evidentiary hearing or any other proceedings it deems necessary to resolve the claim." *Id. at 699*.

On remand, the district court ordered further briefing on the actual bias issue. After briefing, it dismissed the actual bias claim without an evidentiary hearing on April 25, 2016, reasoning:

> (1) that [Appellant] exhausted his actual bias claim by fairly presenting the same to the Supreme Court of Virginia; **[**22]** (2) that the Supreme Court of Virginia decided the merits of the actual bias claim; and, (3) that under either the deferential standard set forth in *28 U.S.C. § 2254(d)(1)-(2)*, or a de novo standard of review, the actual bias claim lacks merit and may be dismissed without conducting an evidentiary hearing.

*Porter III, No. 3:12-cv-550, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *1 (E.D. Va. Apr. 25, 2016)* (footnote omitted). The district court denied Appellant's motion to alter or amend the judgment, and denied a certificate of appealability ("COA") on this issue on September 22, 2016. But this court granted Appellant's request to expand his original COA to include the actual bias claim, and this appeal followed.

Because we have yet to rule on the remaining non-juror claims, and because we did not remand those claims to the district court in *Porter II*, we retain jurisdiction and in the interest of expediency, see fit to address them at this juncture.

II.

HN1[↑] Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we generally apply a highly deferential standard of review to federal habeas petitions challenging state court decisions:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be **[**23]** granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). However, "where a state court has not considered a properly preserved claim on its merits, a federal court must assess the claim de novo." *Monroe v. Angelone, 323 F.3d 286, 297 (4th Cir. 2003)* (footnote omitted). We also review for abuse of discretion a district court's failure to conduct an evidentiary hearing or to authorize discovery in a *§ 2254* proceeding. *Conaway v. Polk, 453 F.3d 567, 582 (4th Cir. 2006)*.

III.

Juror Claims

Appellant's *§ 2254* petition raises two juror claims: ***HN2***[↑] actual bias and bias based on *McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)*. The two are "distinct" because "while a *McDonough* claim requires a showing of juror misconduct, an actual bias claim may succeed 'regardless of whether the juror was truthful or deceitful.'" *Porter II, 803 F.3d 694, 698 (4th Cir. 2015)* (quoting *Jones v. Cooper, 311 F.3d 306, 310 (4th Cir. 2002)*). We address these claims in turn.

[*423] A.

The Actual Bias Claim

1.

Was the State Habeas Court Decision "On the Merits"?

As explained **[**24]** above, whether the state habeas court adjudicated the actual bias claim on the merits dictates our standard of review. Thus, we turn to that question first.

The district court stated that the state habeas court "did not address whether Bruce Treakle was actually biased in connection with the juror bias claim." J.A. 2942. However, it nonetheless concluded that the state habeas court adjudicated the actual bias claim on the merits by addressing the issue in the wholly distinct context of Appellant's ineffective assistance of counsel ("IAC") claim. In the state habeas court, Appellant claimed that trial and appellate counsel were ineffective pursuant to *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, because they failed to raise the issue that Treakle "was biased due to his brother's employment as a law enforcement officer." *Porter, 722 S.E.2d at 549*. In disposing of this IAC claim, the state habeas court stated:

> [The IAC claim] satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and [an] affidavit of counsel, demonstrates that counsel did not know that Juror T[reakle] had a brother in law enforcement. More importantly, [Appellant] has provided no admissible **[**25]** evidence that Juror T[reakle] was biased against [Appellant] as a result of his brother's employment.

Id. The district court cited to this passage and explained, "Specifically, the Supreme Court of Virginia adjudicated the merits of [Appellant]'s actual bias claim when it found that '[Appellant] has provided no admissible evidence that Juror T[reakle] was biased against [Appellant] as a result of his brother's employment.'" *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *7* (quoting *Porter, 722 S.E.2d at 549*). We find this conclusion to be erroneous. The state court's disposition on Appellant's IAC claim was not an adjudication on the merits of his *separate* actual bias claim.

a.

To begin, ***HN3***[↑] IAC claims are subject to a substantially different -- and more demanding -- standard of proof than actual bias claims. In order to demonstrate ineffective assistance of counsel in a habeas proceeding under *Strickland*, a petitioner must demonstrate first, "counsel's performance was deficient," and second, "the deficient performance prejudiced the defense." *466 U.S. at 687*. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Id.* Prejudice "requires showing that counsel's errors were **[**26]** so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In contrast, on the merits of an actual bias claim, Appellant must prove that a juror, because of his or her partiality or bias, was not "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*. Thus, what a petitioner must prove to succeed in a *Strickland* claim -- that not only did counsel make grave errors, but that those errors affected the outcome of the proceedings -- is a much higher bar that what he must prove on an actual bias claim.

Moreover, ***HN4***[↑] the *Strickland* inquiry focuses on counsel's representation **[*424]** measured against established professional norms, but the actual bias inquiry focuses on a juror's lack of partiality, for which "the Constitution lays down no particular tests and procedure." *Frazier v. United States, 335 U.S. 497, 511, 69 S. Ct. 201, 93 L. Ed. 187 (1948)*. Supreme Court case law contemplates further fact finding once sufficient allegations of juror bias have been made, whereas *Strickland* claims are generally based on a concluded and comprehensive record. And at this juncture Appellant is, at base, requesting discovery and an evidentiary hearing on his allegations of juror partiality -- an even lower bar than proving a juror was **[**27]** actually biased against him. As explained further below, Appellant need only demonstrate that he diligently pursued his actual bias claim in state court; his allegations, if true, could entitle him to relief; and he fulfills at least one of six factors set forth in *Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)*. *See Juniper v. Zook, 876 F.3d 551, 563 (4th Cir. 2017)*. We thus decline the invitation to conflate the IAC and actual bias standards for purposes of *§ 2254(d)*.[6]

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[6] To the extent the State relies on the state habeas court's and district court's view that there was no "admissible" evidence demonstrating bias, this view is legally erroneous. The Virginia Supreme Court has held that inadmissible evidence is nonetheless "sufficient to require the court to hold a hearing" on a juror bias issue. *Kearns v. Hall, 197 Va. 736, 91 S.E.2d 648, 652-53 (Va. 1956)*. The Virginia court explained, "When allegations of the misconduct of a jury are of such a nature as to indicate that the verdict was affected thereby, it becomes the duty of the court to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct." *Id. at 653*. In any event, one can conceive of admissible purposes for which the Sattler Affidavit and other out of court statements may be offered, such as to demonstrate not that Juror Treakle's brother was actually in a law enforcement position, but that Juror Treakle had knowledge of that fact at the time of voir dire. *See In re C.R. Bard, Inc., 810 F.3d 913, 926 (4th Cir. 2016)* ("A statement that would otherwise be hearsay may nevertheless be

b.

In concluding that the actual bias claim was adjudicated on the merits, the district court relied on *Sturgeon v. Chandler, 552 F.3d 604, 612 (7th Cir. 2009)*, and *Albrecht v. Horn, 485 F.3d 103, 116 (3d Cir. 2007)*. *Sturgeon* held that where a state court evaluated a defendant's right to a competency hearing in the context of an IAC claim, rather than a stand-alone claim, "the merits were effectively reached" because "[t]he court could not have decided the same . . . question any differently" in the context of the stand-alone claim. *552 F.3d at 612*. But the state court in this case *could have* concluded that Appellant produced evidence of actual bias sufficient for a hearing, while still deciding that no evidence of bias existed at the time of trial or appeal to support a claim that trial counsel acted unreasonably. In fact, one of the state habeas court's reasons for denying the *Strickland* claim was that trial counsel did not know at the **[**28]** time of trial that Juror Treakle had a brother in law enforcement. This conclusion certainly does not preclude a finding that an actual bias hearing is warranted.

Similarly, in *Albrecht*, the Third Circuit reasoned that the state habeas court addressed a claim that jury instructions were ambiguous "on the merits" in a related IAC claim. *485 F.3d at 116*. That court explained, "The state Supreme Court identified **[*425]** the correct governing legal principle, and then purported to apply it, which constitutes an adjudication on the merits sufficient for purposes of the statute." *Id.* (citation omitted). But here, the state habeas court *did not* recognize the governing legal principle with regard to the actual bias claim, especially Appellant's requests for an evidentiary hearing on that claim. *See Smith, 455 U.S. at 215* (The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). In fact, the state habeas court failed to even recognize that Appellant lodged an actual bias claim separate from his *McDonough* claim.

Thus, *Sturgeon* and *Albrecht* are not only nonbinding, they are also inapposite, and we decline to follow them. For these **[**29]** reasons, we hold that Appellant's actual bias claim was not heard "on the merits." As such, this court and the district court are not bound by the deference afforded in *§ 2254(d)*, but rather, may conduct our review of the actual bias issue de novo. *See Monroe, 323 F.3d at 297*.

2.

The District Court's Dismissal of the Actual Bias Claim

Employing a de novo standard of review, we hold that the district court erred in dismissing the actual bias claim as a matter of law without conducting discovery and holding an evidentiary hearing. We recognize that in our remand to the district court in *Porter II*, we stated the district court "*may* conduct an evidentiary hearing or any other proceedings it deems necessary to resolve the claim." *803 F.3d at 699* (emphasis supplied). Nonetheless, in reviewing anew the district court's latest decision, we conclude that its reasoning for dismissing the actual bias claim without an evidentiary hearing is contrary to law. First, the district court failed to appreciate that this case is controlled by *Williams v. Taylor*, in which the Supreme Court held that a hearing was warranted. Second, it held Appellant to unreasonable standards. Third, it misinterpreted the effect of *Federal Rule of Evidence 606(b)*. And finally, it failed to apply the **[**30]** proper analysis to Appellant's hearing request.

a.

HN5[↑] "[T]he *Sixth Amendment*, made applicable to the states through the *Fourteenth Amendment*, requires that a state provide an impartial jury in all criminal prosecutions." *Jones, 311 F.3d at 310* (citing *Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)*). "If 'even one partial juror is empaneled' and the death sentence is imposed, 'the State is disentitled to execute the sentence.'" *Id.* (alteration omitted) (quoting *Morgan v. Illinois, 504 U.S. 719, 727, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*). The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith, 455 U.S. at 215*; *see also id. at 222* (O'Connor, J., concurring) ("[I]n most instances a postconviction hearing will be adequate to determine whether a juror is biased."). And "[p]reservation of the *opportunity* to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States, 339 U.S. 162, 171-72, 70 S. Ct. 519, 94 L. Ed. 734 (1950)* (emphasis supplied).

Nonetheless, ***HN6***[↑] "[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith, 455 U.S. at 221-22* (O'Connor, J., concurring). **[*426]** "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the **[**31]** Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *Frazier, 335 U.S. at 511*. To be sure, "due process does not require a new trial every time a juror

admissible if it is offered to prove something other than its truth, and this includes statements used to charge a party with knowledge of certain information."). This, of course, may be taken up in the district court on remand.

has been placed in a potentially compromising situation." *Smith, 455 U.S. at 217*. Rather, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* Again, this determination "may properly be made at a hearing." *Id.* (citing *Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954))*.

A court is not, however, "obliged to hold an evidentiary hearing any time that a defendant alleges juror bias." *Billings v. Polk, 441 F.3d 238, 245 (4th Cir. 2006)*. But in determining that a hearing was not warranted here, the district court failed to recognize the applicability of a significant actual bias decision, *Williams v. Taylor, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)*. In *Williams*, the Supreme Court addressed a claim of bias where a juror, when asked if she was related to anyone on the witness list and where her ex-husband was listed as a witness, remained silent, "indicating the answer was 'no.'" *529 U.S. at 440*. Then, when asked if she had ever been represented by any of the attorneys involved in the case, she said nothing, even though **[**32]** she had been represented by the prosecutor during her divorce. *See id. at 440-41*.

The Court reasoned that even though the juror may not have been technically "related" to her ex-husband at the time of the trial, "her silence . . . could suggest to the finder of fact an unwillingness to be forthcoming; this in turn could bear on the veracity of her explanation for not disclosing that [the prosecutor] had been her attorney." *Williams, 529 U.S. at 441*. The Court characterized the juror's silence on the second question to be "misleading as a matter of fact," and coupled with the prosecutor's failure to speak up, the omissions as a whole "disclose[d] the need for an evidentiary hearing." *Id. at 442*. At such a hearing, the Court explained, the petitioner "could establish that [the juror] was not impartial." *Id.*

This case falls squarely within the confines of *Williams*. Juror Treakle remained silent regarding the fact that his brother was a law enforcement officer, in the neighboring jurisdiction no less. In addition, Juror Treakle told counsel after the verdict that he felt "sympathy for law enforcement officers" and found Mrs. Reaves's testimony "moving" and "very emotional" *because* of the fact that he had a brother who worked as a law **[**33]** enforcement officer. J.A. 1719. Mrs. Reaves was the State's first witness. Her testimony set the tone for the entire trial. Moreover, the jury venire was told that the victim was a law enforcement officer and that the case originated in Norfolk. To withhold information that one's brother was an officer in the adjacent jurisdiction certainly "suggest[s] . . . an unwillingness to be forthcoming," and at the very least, "disclose[s] the need for an evidentiary hearing." *Williams, 529 U.S. at 441-42*. The district court failed to recognize the applicability of *Williams* and therefore erred in dismissing Appellant's actual bias claim as a matter of law without a hearing.

b.

The district court also erred by erecting three legal hurdles out of whole cloth and **[*427]** then faulting Appellant for not overcoming them: (1) it placed an insurmountable burden on counsel conducting voir dire; (2) it held Appellant to an evidentiary standard that is both unwarranted and scarcely possible without the chance for discovery; and (3) it made assumptions adverse to Appellant about Juror Treakle's answers without the benefit of Juror Treakle's in-court testimony.

i.

First, the district court stated, "[C]ounsel . . . did not ask Treakle . . . to **[**34]** identify *every* member of his family who had a connection to law enforcement" and "did not engage in any searching scrutiny of how each individual law enforcement relationship may play out with respect to the particular evidence to be introduced." *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *11* (emphasis supplied). And it categorized counsel's voir dire as seeking merely "a general assurance . . . that [one's] connection to law enforcement personnel would not impair his or her ability to remain impartial." *Id.*

This analysis is erroneous. Counsel specifically asked, "Ha[s] . . . any member of your family . . . worked for any law enforcement organization" as "an employee"? *2016 U.S. Dist. LEXIS 55127, [WL] at *2*. We have held that if a juror is asked a specific question which encompasses two answers, a juror "fail[s] to answer honestly a material question on voir dire" if he only mentions one of them. *Conaway v. Polk, 453 F.3d 567, 585 (4th Cir. 2006)*. Moreover, the district court places a burden on trial counsel uncontemplated by the Supreme Court or this court -- that counsel must keep asking questions until the juror gives a complete answer, without knowing whether the answer is complete. Indeed, counsel had no opportunity to ask whether Juror Treakle could be impartial even though his *brother* was an officer *in the* ***[**35]*** *jurisdiction adjacent to the scene of the crime*. In other words, defense counsel had no chance to "engage in any searching scrutiny" of Juror Treakle's relationship with his brother because he did not know about it. *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *11*. Counsel is entitled to expect that when venire panel members take an oath to answer truthfully all questions put to them in voir dire, they will indeed tell the *whole* truth.

ii.

Second, the district court held Appellant to an incorrect and insurmountable evidentiary standard when it stated, "The record fails to plausibly suggest that [Juror] Treakle deliberately omitted material information in response to questions asked on voir dire." *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *11* (internal quotation marks omitted). How could Appellant meet this standard without discovery or a hearing? "[I]t would create a 'classic catch-22' if a [habeas] defendant were obliged to submit admissible evidence to the [district] court in order to be accorded an evidentiary hearing, when the defendant is seeking the hearing because he cannot, without subpoena power or mechanisms of discovery, otherwise secure such evidence." *Conaway, 453 F.3d at 584*. The district court further opined, "Perhaps if [Juror Treakle's brother] had been murdered or shot in the line **[**36]** of duty one could doubt [Juror] Treakle's assurances that he could remain impartial in the trial of [Appellant] for the capital murder of a police officer." *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, *12*. But suggesting that bias could only arise if Juror Treakle's brother himself had been a victim not only undermines the district court's own analysis, but it creates an unworkable inquiry that flies in the face of *Williams*, *Smith*, and *Conaway*.

[*428] iii.

Third, ***HN7***[↑] at the motion to dismiss stage, a district court must "accept a petitioner's well-pleaded allegations as true, and . . . draw all reasonable inferences therefrom in the petitioner's favor." *Conaway, 453 F.3d at 582*. However, here the district court ignored this standard and made assumptions adverse to Appellant about Juror Treakle's answers at voir dire. For example, the district court called Juror Treakle "honest" (twice) and "forthright." *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *12-13*. He found that Juror Treakle "did not intentionally conceal the fact that he had a brother who was a deputy sheriff." *2016 U.S. Dist. LEXIS 55127, [WL] at *12*. These determinations are not only contrary to the legal standard, but should be properly made *after an evidentiary hearing. See Teleguz v. Zook, 806 F.3d 803, 811 (4th Cir. 2015)* (explaining earlier remand was appropriate for the district court to make credibility determinations at "an evidentiary **[**37]** hearing"). The district court *assumed* Juror Treakle did not purposely lie based on a cold record as opposed to the efficacy of a live hearing. It reasoned, "[Appellant]'s suggestion that [Juror] Treakle volunteered information about his nephew, who was a police officer, but not about his brother, who was a deputy sheriff, for fear of losing his place on the jury suggests a cageyness that is refuted by the record." *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *11*. But the "record" to which the district court refers is woefully undeveloped and incomplete. Appellant has not had a chance to develop the record and prove that Juror Treakle, rather than somehow simply forgetting about his brother, purposely omitted or concealed his relationship.

The dissent's logic suffers from the same fatal flaw. It states, "There is no evidence in the record that Treakle was aware of the community's feelings or that he had ever spoken to his brother about the case," and "Pernell's affidavit does not suggest any communication between the brothers." *Post* at 69 n.4. But Appellant was never given a chance to ask Juror Treakle or his brother these crucial questions. Thus, "the dissent ignores a critical component underlying the Supreme Court's concern in cases involving **[**38]** juror bias -- that without a hearing, a criminal defendant is deprived of the opportunity to uncover facts that could prove a *Sixth Amendment* violation." *Barnes v. Joyner, 751 F.3d 229, 250 (4th Cir. 2014)*.

c.

The district court also relied on the general rule that juror testimony may not be used to impeach a verdict. If Juror Treakle is called to the stand in an evidentiary hearing, some of his testimony may be barred by ***HN8***[↑] *Federal Rule of Evidence 606(b)*, which provides:

> During an inquiry into the validity of a verdict . . ., a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict . . . . The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Fed. R. Evid. 606(b)(1). There are three exceptions to this general rule, however. A juror may testify about whether:

> (A) extraneous prejudicial information was improperly brought to the jury's attention;
> (B) an outside influence was improperly brought to bear on any juror; or
> (C) a mistake was made in entering the verdict on the verdict form.

Fed. R. Evid. 606(b)(2). The Supreme Court has held, "*Rule 606(b)* applies to juror testimony during a proceeding in **[*429]** which a party seeks to secure a new **[**39]** trial on the ground that a juror lied during voir dire." *Warger v. Shauers, 135 S. Ct. 521, 525, 190 L. Ed. 2d 422 (2014)*. However, the Court also recognized, "[I]f jurors lie in voir dire in a way that conceals bias, juror impartiality is

adequately assured by the parties' ability . . . to employ nonjuror evidence even after the verdict is rendered." *Id. at 529*. The Sattler Affidavit, as well as other nonjuror evidence,[7] is being offered here in order to demonstrate actual bias.

Additionally, after discovery, should Juror Treakle be called to testify in an evidentiary hearing, Appellant ought to be able to ask questions regarding external prejudicial information or "whether any outside influence was improperly brought to bear," *Barnes, 751 F.3d at 257* (quoting *Tanner v. United States, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987)* -- for example, pressure from Appellant's family or from other members of the Chesapeake police. Thus, although *Rule 606(b)* may prevent certain testimony from being solicited in an evidentiary hearing, it would not preclude Appellant or other jurors from testifying altogether.

d.

Finally, in considering whether Appellant was entitled to a hearing, the district court failed to apply the proper analysis, which is itself a legal error and abuse of discretion. *See United States v. Henry, 673 F.3d 285, 291 (4th Cir. 2012)* ("A district court abuses its discretion when it . . . fails **[**40]** to consider judicially-recognized factors limiting its discretion . . . ."); *In re Wray, 433 F.3d 376, 378 n.* (4th Cir. 2005)* ("[A]n error of law by a district court is by definition an abuse of discretion."). We have held:

> *HN9*[] A petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)*.[8]

Juniper v. Zook, 876 F.3d 551, 563 (4th Cir. 2017) (citation omitted); *see also Fullwood **[*430]** v. Lee, 290 F.3d 663, 681 (4th Cir. 2002)*.

First, Appellant "diligently pursued his [actual bias] claim in state court" by raising it as a distinct claim in his petition and requesting a hearing on that claim at least twice, to no avail. *See* J.A. 1651 (August 2009, state habeas petition); 2374 (February 2012, motion for evidentiary hearing in state habeas court). Second, he has alleged facts that, if true, "might well entitle him to relief." *Fullwood, 290 F.3d at 681*. Under *Williams*, a juror's silence about a matter of importance to the trial "could suggest . . . an unwillingness to be forthcoming; this in turn could bear on the veracity of [the juror's] explanation for" nondisclosure, which leads **[**41]** to "the need for an evidentiary hearing." *529 U.S. at 441-42*. If, at that hearing, the court determines that Juror Treakle was biased and unwilling or unable to decide the case "solely on the evidence before [him]," *Smith, 455 U.S. at 217*, then Appellant might well be entitled to relief. *Cf. Conaway, 453 F.3d at 582, 588, 590* (requiring evidentiary hearing where allegations of juror dishonesty under *McDonough* give rise to inference of bias that would affect fairness of trial).

Finally, the district court did not even mention the *Townsend* factors. Yet Appellant clearly satisfies the fifth *Townsend* factor -- which is "the material facts were not adequately developed" in state court. *372 U.S. at 313*; *see also Fullwood, 290 F.3d at 681* (explaining that *§ 2254* petitioner met the fifth *Townsend* factor where he "raised troubling allegations" of juror influence "but was not afforded a hearing to develop the issue").

Of course, it is not clear at this stage whether a finding of actual bias is appropriate. What is clear, however, is that the failure of the state habeas court to permit Appellant to adequately develop the facts entitles him to discovery and an evidentiary hearing -- a hearing he requested at multiple junctures, *see* J.A. 1651 (state habeas petition); 2374 (motion for evidentiary hearing in state habeas **[**42]** court on juror

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[7] Juror Treakle's brother submitted an affidavit explaining that he was a law enforcement officer in Chesapeake at the time of the murder. *See* J.A. 1721. Other evidence demonstrates that the victim in this case, Officer Reaves, and his family lived in the Chesapeake area, *see id.* at 1861; Chesapeake was mourning the death of another officer, Michael Saffran, similarly killed in the line of duty, *see id.* at 1858 (local police detective, who attended both Officer Saffran's and Officer Reaves's funerals, stating, "Once you hear an officer has been killed, everyone knows and the ripples run through every law enforcement agency[.]"); some Chesapeake law enforcement officers participated in the manhunt for Appellant when he fled after killing Officer Reaves, *see id.* at 1652, 1851-52; and after her husband's death, Mrs. Reaves wrote a letter in the Virginia Pilot, the local newspaper, stating, "We wish to acknowledge with heartfelt thanks the . . . support during the sudden loss of Officer Stanley C. Reaves. We are so appreciative of the Norfolk and Chesapeake Police Departments . . .," *id.* at 1861.

[8] The *Townsend* factors are: "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *372 U.S. at 313*.

issue); 2529, 2534 (evidentiary hearing requested in district court); Brief, *Porter v. Zook*, No. 3:12-cv-550 (E.D. Va. filed Nov. 9, 2015), ECF No. 93 at 9 (request for hearing and discovery in district court after *Porter II* remand).

For these reasons, we hold that the district court erred in dismissing the actual bias claim as matter of law without discovery and a proper hearing. We, therefore, vacate and remand with instructions to provide Appellant this opportunity.

B.

The McDonough Claim

Appellant's *McDonough* claim meets the same fate. ***HN10***[ ] To prove a juror bias claim under *McDonough*, the petitioner must show: (1) "a juror failed to answer honestly a material question on voir dire," and (2) "a correct response would have provided a valid basis for a challenge for cause." *McDonough, 464 U.S. at 556*. Because the state habeas court addressed this issue on the merits, we review under the deferential *AEDPA* standard, which requires Appellant to demonstrate that the state habeas court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *28 U.S.C. § 2254(d)(1)*.

Even under this deferential standard, the state habeas court **[**43]** unreasonably applied clearly established federal law. Both the state habeas and district courts concluded that Juror Treakle did not fail to "honestly" answer the relevant voir dire question because he does, in fact, have a **[*431]** nephew in law enforcement in Arlington. *See Porter, 722 S.E.2d at 539* ("Juror T[reakle] answered truthfully that he had a nephew who was an Arlington County Police Officer . . . and . . . he was not asked, nor did he have the opportunity to answer, if he had any additional relationships with law enforcement officers."); J.A. 2819 (Juror Treakle's "failure to advise that he had *additional* relationships with law enforcement officers did not amount to a deliberate omission of material information." (emphasis supplied)). This is an unreasonable application of *McDonough*.

1.

In *Conaway v. Polk*, this court addressed a strikingly similar case on *§ 2254* review. The issue in *Conaway* was whether a juror was biased under *McDonough* for failing to disclose that he was a relative of the key prosecution witness, a man named Harrington, when asked if he knew anyone on the witness list or recognized any names. *453 F.3d at 573*. He did, however, acknowledge that he knew another person on the witness list. The trial hinged on a credibility **[**44]** determination between the defendant Conaway and Harrington, and Conaway was convicted of first degree murder and sentenced to death. *See Conaway, 453 F.3d at 573-75*. On the first prong of *McDonough*, we concluded that the state habeas court unreasonably applied clearly established federal law in dismissing the claim. We reasoned that an allegation that the juror "failed to disclose" he was Harrington's relative was "sufficient under *McDonough* to state a constitutional claim for relief." *Conaway, 453 F.3d at 585*. This is true even though that juror swore that nothing would affect his ability to render an impartial verdict. *See id.* Therefore, we have viewed the "honesty" aspect of the first *McDonough* prong as encompassing not just straight lies, but also failures to disclose. The State has offered no principled distinction between Appellant's *McDonough* claim and the one in *Conaway*.

The dissent attempts to distinguish *Conaway* by explaining that in the case at hand, "[t]here are not 'multiple questions' that could 'candidly be answered' only by acknowledging that [Treakle's] brother was a sheriff's deputy." *Post* at 63. But *Conaway*'s holding did not hinge on the fact that counsel asked more than one question; rather, that holding depended on the fact **[**45]** that the juror did not answer truthfully the questions posed to him. Indeed, *McDonough* itself states that the first prong is satisfied if the "juror failed to answer honestly *a* material question on voir dire." *McDonough, 464 U.S. at 556* (emphasis supplied). Here, the question was straightforward: "Have you, any member of your family or close personal friend worked for or with any law enforcement organization, either as an employee or on a volunteer basis?" J.A. 250-51. Broken down, the question asked was: Has any member of your family worked for a law enforcement organization? The dissent faults counsel for failing to ask a follow up question or a more specific question, *see post* at 63, but that position creates a situation where counsel must necessarily assume that jurors who have taken an oath are, at best, withholding critical information, and at worst, lying. Point blank, Juror Treakle did not candidly answer counsel's question. Appellant is entitled to find out why.

2.

We also cannot say as a matter of law that the *McDonough* claim should be dismissed based on the second prong. This prong requires that Appellant would have had a "valid basis for a challenge for **[*432]** cause" of Juror Treakle. *McDonough, 464 U.S. at 556*. Because we cannot **[**46]** surmise which follow up questions (and answers) may have followed from Juror Treakle's correct answer that his brother worked in law enforcement in Chesapeake, we cannot say as matter of law that Appellant would not have had a valid basis to challenge for cause. This is a matter that must be further

explored in an evidentiary hearing upon remand.

C.

In sum, the district court erred in dismissing the actual bias claims in *Porter III* without discovery and a hearing, and it also erred in *Porter I* by failing to follow *Conaway* and dismissing the *McDonough* claims without a hearing. We vacate and remand so that Appellant, once and for all, may be able to investigate his bias claims.

IV.

Non-Juror Claims

Appellant raises a host of other challenges to the state court proceedings and dismissal of the Amended Petition. Except for the defaulted *Martinez* claims, discussed in Part IV.D. *infra*, all of the following ***HN11***[↑] claims were adjudicated on the merits in state court, and thus, we are tasked with deciding whether the state habeas court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted **[**47]** 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)-(2).*

A.

Risk Assessment Testimony

Appellant claims that the state habeas court unreasonably applied clearly established federal law when it denied Appellant the opportunity to present individualized risk assessment testimony as mitigating evidence in the penalty phase of his trial. The district court was correct in rejecting this claim.

Before trial, Appellant moved for the appointment of Dr. Mark Cunningham "as an expert on the assessment of the risk of violence by prison inmates and, in particular, the risk of future dangerousness posed by [Appellant] if incarcerated in a Virginia penitentiary for life." J.A. 66. The expert would have examined Appellant's history and determined the likelihood of violence in a prison setting. The trial court denied the motion, explaining "the Virginia Supreme Court has consistently upheld the denial of use of public funds for such an expert, as it's not considered to be . . . proper mitigation evidence." Id. at 206. In addition, the trial court decided that the testimony would not be "particular[ized]" to Appellant but rather, **[**48]** "very general testimony" about prisons and Appellant's likely behavior there. Id. at 207. The Supreme Court of Virginia affirmed. Here, Appellant claims that the denial of this expert violated his *Fourteenth Amendment* right to due process because in a death penalty case, he "must be allowed to present rebuttal evidence." Appellant's Br. 24.[9]

After our remand in Porter II, this court decided Morva v. Zook, which held on *§ 2254(d)* review that a Virginia state court's decision -- that the defendant, Morva, had no due process right to appointment of a prison risk-assessment expert **[*433]** because he did not make the required particularized showing -- was not contrary to or an unreasonable application of clearly established federal law. See *821 F.3d 517, 524-25 (4th Cir. 2016)*.

Morva controls this argument.[10] Quite simply, "the U.S. Supreme Court has never addressed a capital defendant's right to a state-funded nonpsychiatric expert." *Morva, 821 F.3d at 524*. As *Morva* explains, two key cases upon which Appellant relies, *Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)*, and *Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994)*, are inapposite. In *Skipper*, the Supreme Court held that Skipper, a capital defendant, was entitled to present mitigating evidence to the jury about his good behavior for the seven months he spent in jail awaiting trial. *See 476 U.S. at 4*. And in *Simmons*, the Court held that "[w]here the **[**49]** state puts future dangerousness at issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible." *512 U.S. at 177-78* (O'Connor, J., concurring in the judgment). As we stated in *Morva*, these cases "do not clearly establish a capital defendant's right to a state-funded nonpsychiatric expert." *Morva, 821 F.3d at 526*.

Appellant sought to introduce the same type of evidence as Morva, and indeed, the very same expert, Dr. Cunningham, who would take the defendant's history and place it in a broader context to show his likelihood of future dangerousness. Indeed, Appellant's motion for appointment of Dr. Cunningham describes his use of "context and statistical

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[9] The trial court granted Appellant's request for a mental health expert and a neuropsychological expert.

[10] Appellant contends that Morva interpreted the ***Eighth Amendment*** risk assessment claim as a ***Sixth Amendment*** claim, and that it did not address the ***Fourteenth Amendment*** claim. See Appellant's Br. 23 n.10. We disagree. Although this court framed the issue as a defendant's right to a state-funded, court-appointed expert, it nonetheless analyzed the issue as an alleged "violat[ion of] [Appellant's] ***Eighth*** and ***Fourteenth Amendment*** rights." *Morva, 821 F.3d at 523*.

and actuarial data" to come up with a "determination of risk" of his future dangerousness in prison. J.A. 70. The state court found that Appellant's proffer was not "individualized" or "particularized" to Appellant, and that determination is not unreasonable. *Porter, 661 S.E.2d at 438*. ***HN12***[↑] Under Virginia law, "[t]he indigent defendant who seeks the appointment of an expert must show a particularized need." *Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920, 925 (Va. 1996)*. A defendant is required to show that the **[**50]** expert testimony will "focus . . . on the particular facts of [his] history and background, and the circumstances of his offense." *Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872, 893 (Va. 2001)*. This standard "has repeatedly been held to be within . . . federal constitutional standard[s]." *Yarbrough v. Johnson, 490 F. Supp. 2d 694, 720 (E.D. Va. 2007)* *aff'd*, *520 F.3d 329, 337 (4th Cir. 2008)*; *see also Weeks v. Angelone, 176 F.3d 249, 266 (4th Cir. 1999)* ("[T]he *Husske* rule recognizing a federal constitutional right to non-psychiatric experts in Virginia state cases upon a particularized showing of such need adds to an existing guarantee of due process.").

Therefore, the state court did not unreasonably find that Appellant did not make a particularized and individualized proffer for his expert testimony, and it did not violate clearly established federal law in rejecting Appellant's request for the risk assessment expert.[11]

[*434] B.

Ineffective Assistance of Counsel Claims

Appellant also raises several *Sixth Amendment* IAC claims. ***HN13***[↑] To prevail on such claims, Appellant is required to show "(1) his counsel's performance 'fell below an objective standard of reasonableness' measured by 'prevailing professional norms,' and that counsel's 'deficient performance prejudiced' him." *Christian v. Ballard, 792 F.3d 427, 443 (4th Cir. 2015)* (citation omitted) (quoting *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*).

> The court must evaluate the conduct from counsel's perspective at the time, and apply a strong presumption that counsel's **[**51]** representation was within the wide range of reasonable professional assistance, in order to eliminate the distorting effects of hindsight. In all cases, the petitioner's burden is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the *Sixth Amendment*.

Id. (citations and internal quotation marks omitted). In order to show prejudice, "the petitioner must . . . show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Richardson v. Branker, 668 F.3d 128, 139 (4th Cir. 2012)* (quoting *Strickland, 466 U.S. at 694*). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, and the likelihood of a different result must be *substantial*, not just conceivable[.]" *Id. at 139-40* (citations, alteration, and internal quotation marks omitted) (emphasis in original).

1.

Did counsel fail to reasonably investigate Officer Reaves's history of alleged unprofessional conduct?

After trial, Appellant uncovered incidents of allegedly unprofessional conduct in Officer Reaves's past that Appellant claims should have been discovered by his trial counsel. In 1994, when Officer Reaves was a police officer with Baltimore City, he **[**52]** Reaves was in his cruiser pursuing a 17 year old who was riding a dirt bike. The 17 year old lost control of his bike, hit a curb, was thrown head first into a utility pole and died of head injuries. handled a drug suspect roughly (pushing him and causing him to fall) and slashed his bicycle tires. A fellow officer was so rough with a protesting bystander, a man named Hite (whom he was arresting for disorderly conduct), that Hite ultimately died of head injuries. During the subsequent investigation, an eyewitnesses contradicted Reaves's version of the events, and Reaves stated that he believed his fellow officer acted appropriately. Then, in 2001,[12] Reaves was in his cruiser pursuing a 17 year old who was riding a dirt bike. The 17 year old lost control of his bike, hit a curb, was thrown head first into a utility pole and died of head injuries.

The state habeas court concluded:

[11] Appellant also claims that district court "did not address [his] constitutional claims." Appellant's Br. 26. To the contrary, the district court placed Appellant's claim within the purview of the ***Due Process Clause of the Fourteenth Amendment***, as explained by *Ake v. Oklahoma, 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)* ("Our concern is that the indigent defendant have access to a competent [expert] . . ., and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.").

[12] It appears this incident also occurred when Reaves was employed in Baltimore.

> Petitioner acknowledges that counsel was not on notice of Reaves' alleged prior employment history. Petitioner fails to articulate how personnel records relating to Officer Reaves' employment as a Baltimore police officer, which do not show any formal disciplinary proceedings and do not reference any instances **[**53]** of Officer Reaves inap **[*435]** propriately displaying or using his service weapon, would have been relevant in bolstering petitioner's testimony that Officer Reaves forcefully approached petitioner with his gun drawn.

Porter, 722 S.E.2d at 549. The district court followed suit, explaining that it was not an unreasonable application of the facts to find that counsel was not on notice of Reaves's employment history. Also, it was not an unreasonable application of the law to hold that counsel was not deficient, where counsel chose to limit his investigatory energy to other areas in light of the trial court's rejection of a self-defense argument. *See Porter I, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *13-14*.

We affirm the district court on this point. Under the deferential *AEDPA* standard, it was not an unreasonable determination of fact that counsel was not on notice of Reaves's employment history -- Appellant has not rebutted that finding by clear and convincing evidence. On the law, it was not unreasonable to conclude that Appellant did not show deficient performance. Counsel was precluded from arguing that Appellant acted in self-defense, so the fact that counsel did not ask for Reaves's personnel records is not particularly egregious. *See Jordan v. Commonwealth, 219 Va. 852, 252 S.E.2d 323, 325-26 (Va. 1979)* (trial court may refuse to admit **[**54]** evidence of victim's reputation for violence if self-defense is not a viable defense).

2.

Did trial counsel unreasonably fail to call exculpatory information to the jury's attention?

This claim focuses on the trial testimony of Reggie Copeland and Latoria Arrington. Copeland testified that he followed Reaves's cruiser back to Arrington's apartment on foot, and upon approaching the building, he saw "Officer Reaves in the car and [Appellant] was coming out [of] the building." J.A. 541. Appellant claims this contradicts Arrington's testimony that Appellant only exited the building upon seeing Copeland and Reaves talking to each other outside. Indeed, at closing, the prosecution harped on the fact that the women in the apartment "commented on the police arriving" and that prompted Appellant to exit the building. *Id.* at 1167-68. Appellant claims that counsel should have "attack[ed] [Arrington]'s account" with Copeland's testimony. *See* Appellant's Br. 38.

The state habeas court concluded:

> [C]ounsel reasonably chose to pursue a trial strategy of attacking the credibility of the Commonwealth's witnesses, Reggie Copeland and Latoria Arrington. Furthermore, petitioner's own statement established that he saw Officer **[**55]** Reaves on the sidewalk before the shooting, which would support the Commonwealth's argument that petitioner chose to confront Officer Reaves. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that [Appellant was prejudiced].

Porter, 722 S.E.2d at 543. The district court decided the state court decision was not unreasonable because counsel chose "to use Copeland's testimony sparingly," while impeaching some of it. *Porter I, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *19*. Also, it found no prejudice because other testimony established that Appellant saw Reaves before he approached him and thus, he chose to confront him rather than to just react to him. *See 2014 U.S. Dist. LEXIS 116738, [WL] at *20*.

We affirm on this issue because the state habeas court did not unreasonably apply *Strickland* in concluding that Appellant failed to demonstrate that counsel's performance was deficient. Trial counsel explained in an affidavit that he and co-counsel **[*436]** "made the strategic decision not to argue that Copeland's testimony . . . contradicted [that] of the other women in the apartment" because they "did not believe that Copeland was a credible witness." Exhibit 15 to Application for Habeas Corpus, *Porter I*, No. 3:12-cv-550 (E.D. Va. filed Oct. 9, 2012), ECF No. 22-15 at 6 ¶ 5. This choice **[**56]** certainly does not "f[a]ll below an objective standard of reasonableness." *Christian, 792 F.3d at 443* (internal quotation marks omitted).

3.

Did counsel fail to reasonably investigate aggravating evidence?

Appellant claims that counsel failed to "meet their duty" to investigate aggravating evidence, even though they were put on notice that the prosecution would present such evidence. Appellant's Br. 40. He claims that counsel:

> never spoke with [Appellant] about the prosecution's evidence until witnesses took the stand; failed to familiarize themselves with documents that would have enabled them to impeach prosecution witnesses and identify rebuttal and mitigating information; and never

> contacted witnesses identified in [Appellant]'s files who could have provided testimony showing [Appellant] did not pose a future danger to society.

Id. at 41 (citing J.A. 1774-58, 1586, 1772-75).

The aggravating evidence introduced by the prosecution included: (1) Appellant's attack on an inmate in 1997; (2) assault of an inmate in 1998; (3) refusing to go to court "without a fight" in 2007; and (4) running away from police into a "stranger's house." *Porter, 722 S.E.2d at 544-45*. Appellant claims that if counsel would have looked into these incidents more, they would **[**57]** have seen that the attacks were in response to aggression by another inmates; in 2007, he refused to go to court because he was to be subjected to an unnecessary strip search; when he fled police, he was fleeing to his own house; and he was known by other inmates as peaceful and good hearted.

The state habeas court concluded, "Petitioner fails to allege how [the details mentioned above] serve[] to mitigate petitioner's actions." *Porter, 722 S.E.2d at 545*. The district court agreed, explaining, "Even assuming that [Appellant's] version of the events in his affidavit were true, . . . there is a low probability that at least one person on the jury would have come to a different decision . . . ." *Porter I, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *33*. We agree and affirm on this issue because the state habeas court did not unreasonably apply *Strickland*. Even if counsel presented the so-called mitigating evidence, a reasonable juror could conclude that Appellant's actions in each of these instances were still not justified. Therefore, even if counsel were deficient, the state court was not unreasonable in concluding that Appellant cannot demonstrate prejudice.

4.

Should counsel have argued for a first-degree murder instruction?

Appellant believes counsel should have asked **[**58]** for a first-degree murder instruction because the prosecution would have had to prove that Reaves's actions were "within the boundaries of official law enforcement protocols," and Appellant could have "provided jurors the means for finding the prosecution's evidence insufficient on this element." Appellant's Br. 47.

The state habeas court concluded,

> The record . . . demonstrates that counsel made a strategic decision not to request a jury instruction that was not **[*437]** supported by the evidence. [Appellant] testified that he knew there was a warrant out for his arrest, that he knew he was carrying a firearm although he was a convicted felon, and that he saw Officer Reaves in his police uniform. Although [Appellant] also testified that he was not thinking about the warrant and that he thought Officer Reaves was 'pulling a gun on him,' accepting petitioner's testimony as true, and viewing the evidence in the light most favorable to him, nothing supports a finding that [Appellant] reasonably believed the officer was not engaged in the execution of official duties at the time of the shooting.

Porter, 722 S.E.2d at 543. As for the district court, first, it concluded the state court's finding that "nothing supports a finding **[**59]** that [Appellant] reasonably believed the officer was not engaged in the execution of official duties" was incorrect because at the least, Appellant himself testified that he believed Reaves was not engaging in the execution of official duties. *Porter I, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *20-21*. Nonetheless, the district court did not find unreasonable the state court's finding that Appellant "could not have reasonably believed" that Officer Reaves was not engaged in the execution of official duties. *See 2014 U.S. Dist. LEXIS 116738, [WL] at *21*. Second, on the law, "[a] defendant is not entitled to a first-degree jury instruction if there is no evidence to support it." *Id.* (citing *Pruett v. Thompson, 996 F.2d 1560, 1564 (4th Cir. 1993))*.

It was not an unreasonable determination of fact for the state habeas court to discredit Appellant's testimony that he actually believed Reaves to be acting outside of his official capacity. Further, the state court did not unreasonably conclude that, even if counsel were deficient in failing to argue for this instruction, Appellant did not demonstrate the outcome of his trial would have been different. As the state court explained, "central to petitioner's defense was counsel's argument that petitioner did not premeditate his action. Therefore, a first-degree murder instruction, which would necessarily **[**60]** include the element of premeditation, would have been inconsistent" with this theory. *Porter, 722 S.E.2d at 543*. And even though Appellant argues that he could negate the mens rea of the first-degree murder instruction, the trial court held that Appellant could not make out a case of self-defense. *See* J.A. 1143 ("I don't believe you're entitled to a self-defense instruction as it's set forth in the facts of this case. I'm going to refuse this instruction."). We affirm on this issue as well.

C.

Brady v. Maryland Claim

Based on the information recounted above regarding Officer Reaves's allegedly unprofessional conduct, Appellant

contends that the state violated *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, by failing to disclose that Officer Reaves had a history of acting unprofessionally during the course of his employment. ***HN14***[ ] To establish a violation of *Brady*, a defendant must show "(1) that the undisclosed information was favorable, either because it was exculpatory or because it was impeaching; (2) that the information was material; and (3) that the prosecution knew about the evidence and failed to disclose it." *United States v. Parker, 790 F.3d 550, 558 (4th Cir. 2015)*.

The state habeas court rejected these *Brady* claims, explaining that this evidence was not known to the Commonwealth at the time of trial. *See* ***[**61]*** *Porter, 722 S.E.2d at 541*. The court reasoned:

> The record, including a 2009 *Freedom of Information Act* response from the Assistant City Attorney for the City of **[*438]** Norfolk and the affidavit of Philip Evans II, Deputy Commonwealth's Attorney for the City of Norfolk, demonstrates that the Commonwealth did not possess any information concerning the 1994 or 2001 incidents. Furthermore, pursuant to *Brady*, there is no obligation to produce information available to the defendant from other sources, including diligent investigation by the defense.

Id. (citing *Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002)*; *Cherrix v. Commonwealth, 257 Va. 292, 513 S.E.2d 642, 649 (Va. 1999)*). Appellant claims this conclusion contains both an unreasonable determination of the facts under *§ 2254(d)(1)* because Appellant could not have obtained these records even with diligent investigation, and an unreasonable application of federal law under *§ 2254(d)(2)*.

HN15[ ] "The burden of proof [of a *Brady* violation] rests with [Appellant]." *United States v. King, 628 F.3d 693, 701-02 (4th Cir. 2011)*. Although "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*, and "police knowledge is plainly imputed to the prosecution for purposes of the prosecutor's *Brady* duties," *Jean v. Collins, 221 F.3d 656, 661 (4th Cir. 2000)*, in this case, Appellant has not shown that this "favorable evidence" of **[**62]** Reaves's background was ever *possessed* by Norfolk police or the state. Indeed, during Officer Reaves's own deposition testimony as part of the Hite litigation, which was presented to the state habeas court, Reaves testified that although there was an investigation into the incident, "[n]obody really formally told [him] anything yet" about the results; he never received paperwork about it; and although he was removed from street duty, he did not indicate whether that action was captured in his personnel file. J.A. 2010-12. And Appellant likewise points to no other evidence that the 2001 incident was memorialized in such a way.

Moreover, Appellant conceded in the district court that "[a] reasonable investigation [by his trial counsel] would have identified Reaves as the primary actor" in the bike incident, and the "Hite incident was a matter of public record and garnered significant publicity." J.A. 2559. This severely undermines his argument that the state court unreasonably found facts under *§ 2254(d)(1)*, because it is clear Appellant could have obtained these records with diligent investigation. For these reasons, we reject the *Brady* argument in Claim II of the Amended Petition.

D.

Appellant's Martinez ***[**63]*** *Claims*

Finally, Appellant, with new counsel, raises arguments with regard to three defaulted claims (Claims XV, XVI, and XVII) pursuant to *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272 (2012)* ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). These claims are: (1) counsel failed to object to improper curative instructions and comments during closing arguments; (2) the district court denied discovery on the claims that counsel failed to investigate Reaves's misconduct; and (3) the prosecution violated *Brady* when it failed to disclose a quid pro quo between the Commonwealth and Valorie Arrington.***HN16***[ ] To invoke *Martinez*, Appellant must demonstrate that state habeas counsel was ineffective or absent, and that the underlying IAC claim is substantial. *See Martinez, 132 S. Ct. at 1318*; *see also Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 1921,* ***[*439]*** *185 L. Ed. 2d 1044 (2013)*. None of these claims meet these requirements.[13] Therefore, we decline to consider the *Martinez* claims.[14]

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[13] The third claim mentioned above (the quid pro quo claim), although characterized in Petitioner's brief as a *Martinez* claim, is more appropriately characterized as a defaulted *Brady* claim. In any event, Petitioner has not demonstrated cause and prejudice to excuse the default. *See Juniper v. Zook, 876 F.3d 551, 564-65 & n.6 (4th Cir. 2017)*.

[14] Appellant raised six issues in his first appeal that are not raised in this appeal. First, "The district court repeatedly began its ***§ 2254(d)(2)*** analysis by improperly applying ***§ 2254(e)(1)***'s presumption of correctness to the state's courts determination of facts in the state court record." Appellant's Br. 5, *Porter v. Zook*, No. 14-5

V.

For the foregoing reasons, we affirm the district court's dismissal of Appellant's *§ 2254* petition, except for Claim I. We vacate the district court's decision on the juror bias claims set forth in Claim I **[**64]** of the Amended Petition and remand with instructions that the district court conduct discovery and an evidentiary hearing in resolving those claims.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS

Concur by: SHEDD (In Part)

Dissent by: SHEDD (In Part)

Dissent

SHEDD, Senior Circuit Judge, concurring in part and dissenting in part:

The majority grants Thomas Porter his request for discovery and an evidentiary hearing on his claims of juror bias. In my view, Porter's claim for dishonesty during voir dire was examined and rejected by the Supreme Court of Virginia, and that determination is not an unreasonable application of federal law. Moreover, even assuming his actual bias claim was not adjudicated on the merits by the Supreme Court, it is without merit. Accordingly, I would affirm the district court's dismissal of Porter's *28 U.S.C. § 2254* petition in full. I therefore dissent from Part III of the majority opinion.[1]

I.

I begin by recounting the facts pertinent to Porter's juror bias claims, claims that hinge on the actions of a single juror, Bruce Treakle. Initially, there is no doubt as to Porter's guilt: he murdered Officer Stanley Reaves in Norfolk. Due to the publicity surrounding the murder, Porter's trial was moved **[**65]** from Norfolk to Arlington County in northern Virginia. At the beginning of voir dire, the circuit judge informed the potential jurors that the case was moved from Norfolk because of "publicity" (J.A. 222), and that the case involved "a charge of capital murder of a law **[*440]** enforcement officer." (J.A. 223). The judge also told the jurors that the law enforcement officer was "a Norfolk police officer," (J.A. 227), and the jurors assured the judge that they had not seen or heard "anything about this case either today or any other time," (J.A. 228).

During voir dire, Porter's attorney, Joseph Migliozzi, first asked jurors if they "belonged to any organizations" that "support[] law enforcement objectives in your community." (J.A. 248). He then pivoted to a "little more specific question," that is, "[h]ave you, any member of your family or close personal friend worked for or with any law enforcement organization, either as an employee or on a volunteer basis." (J.A. 250-51). Migliozzi noted that several jurors had already provided an answer to that question in response to his first question and clarified what he was asking: "But is anyone here, or a member of your close personal family, worked **[**66]** in law enforcement in any capacity as a volunteer or an employee?" (J.A. 251). This question prompted the following exchange:

> MR. MIGLIOZZI: I'm going to start in the back row. Mr. Treakle.
> MR. TREAKLE: My nephew is an Arlington County police officer.
> MR. MIGLIOZZI: Your nephew?
> MR. TREAKLE: Yes.
> MR. MIGLIOZZI: In this county here?
> MR. TREAKLE: Yes.
> MR. MIGLIOZZI: Do you think, with that being the case, that that would impair your ability to sit on this jury and render a fair and impartial verdict in this case?
> MR. TREAKLE: No.

(J.A. 251-52).

Multiple jurors answered that they had a relative in law enforcement; all stated that they could remain impartial, and counsel did not move to strike any juror for cause on this basis. Despite the publicity the case had generated in the Norfolk area, Migliozzi did not ask the jurors if they had any family or friends in Norfolk.

After conducting voir dire with the full panel, the circuit judge placed the venire into groups of four to probe their ability to sit impartially on a capital case involving a police

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(4th Cir. filed March 9, 2015). In this appeal, Appellant interwove this argument with some of the substantive issues. Second, the *Strickland* claims were improperly addressed because they were not analyzed cumulatively. Third, trial counsel was ineffective in failing to request that Reaves's holster be tested for fingerprints (Claim IV). Fourth, prosecutors violated *Brady* and *Napue* in withholding allegedly conflicting testimony by Simone Coleman (Claim III). Fifth, counsel failed to investigate prison conditions and Appellant's adaptability to prison (Claim X). Sixth, counsel failed to investigate allegations of Appellant's abuse by his mother and other relatives for mitigation purposes at sentencing (Claim VIII). We have reviewed each of these arguments and find no error. We also note that Petitioner has not challenged, in either appeal, the district court's dismissal of Claims XII, XIII, and XIV.

[1] I concur in the remainder of the majority opinion, which affirms the dismissal of Porter's other claims.

officer's murder. During the small group questioning, Migliozzi reminded Treakle that the case involved the capital murder of a police officer and asked, **[**67]** "If you should convict, the defendant, Mr. Porter, of capital murder, could you follow the Court's instructions and consider voting for a sentence of less than the death penalty?" (J.A. 318). Treakle responded, "Yes." (J.A. 318). Migliozzi probed the jurors' ability to weigh testimony from law enforcement officers, asking "[d]o you believe that the testimony of a law enforcement official, a police officer, is more believable than the testimony of another witness just because he or she is a law enforcement officer?" (J.A. 316). Treakle shook his head no. Finally, Treakle and the other venire persons in his small group were asked, "[D]o any of the four of you know of any reason why you could not or would not be able to fairly and impartially determine the facts of the case or abide by the instructions of the Court on the sentencing issues?" (J.A. 316). All four jurors responded in the negative.

Treakle was seated on Porter's jury, and Porter was convicted of Reaves' murder and sentenced to death. After the Supreme Court of Virginia affirmed Porter's conviction and sentence, Porter pursued his state collateral review. As part of the investigation into any potential claims, Porter's habeas **[**68]** counsel, Dawn Davison, had a law student, Maryl Sattler, assist in interviewing jurors. The law student summarized the interview with Treakle as follows:

> **[*441]** Ms. Davison . . . explained to Mr. Treakle that we were there representing Thomas Porter, and that we were interviewing jurors as part of our review of the entire case. Mr. Treakle indicated that he understood and was willing to speak with us. He explained that he had to pick up his wife at 3:00 pm, so he would only be available for a few minutes.
>
> Ms. Davison asked Mr. Treakle which of the witnesses made the greatest impression on him during the trial. Without hesitation, Mr. Treakle replied that he found the officer's wife (Treva Reaves) to be a very powerful witness. He indicated that he found her testimony moving and very emotional for him because his brother is a sheriff's officer in Norfolk. We were very surprised by this statement because we had read his voir dire prior to the interview and Mr. Treakle had never said anything about this brother. When Ms. Davison asked for clarification, Mr. Treakle repeated that his brother works for the sheriff's department "down in Norfolk." Mr. Treakle said sitting through Mrs. Reaves's testimony **[**69]** had been difficult for him. He expressed sympathy for law enforcement officers, and emphasized that they put their lives on the line every day for the community.
>
> We only spoke with Mr. Treakle for a short while. At approximately 2:45 pm, Mr. Treakle said that he wished he could speak with us longer, but he did not want to be late to pick his wife up from work at 3:00 pm. We thanked him for his time and left his home.

(J.A. 1719) (the Sattler affidavit). According to Sattler, Treakle was "warm and collegial," and he was not asked to sign an affidavit during their discussion. (J.A. 1720).

After speaking to Treakle, Porter obtained an affidavit from Treakle's brother, Pernell, confirming that since 2000 he has been a deputy sheriff in Chesapeake, the neighboring jurisdiction to Norfolk.[2] Neither affidavit suggests that Treakle and his brother spoke before or during the trial or have ever spoken about Porter's case. Porter also submitted an affidavit from an alternate juror noting that he was "surprised to learn that some jurors had close family members who were law enforcement officers," and that he was "shocked when one juror said that he had a brother who was a law enforcement officer." **[**70]** (J.A. 1722). Porter did not provide any affidavits suggesting that Treakle exerted any pressure on jurors because of his brother's occupation or that Treakle informed any jurors that his brother lived in Chesapeake.

In his state habeas petition, Porter argued that Treakle provided materially misleading statements during voir dire and was actually biased against him. The Supreme Court of Virginia denied the claim. The court rejected the voir dire claim on the merits, concluding that Treakle "answered **[*442]** truthfully that he had a nephew who was [a police officer in Arlington], Arlington County being the jurisdiction where the case was being tried . . . and that he was not asked, nor did he have the opportunity to answer, if he had any additional relationships with law enforcement officers." *Porter v. Warden, 283 Va. 326, 722 S.E.2d 534, 539 (Va.*

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[2] In state habeas proceedings, Porter contended that Pernell's job was "transporting prisoners in the custody of the Department of Corrections." (J.A. 1652). In Chesapeake, the Police Department "is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances" in the jurisdiction. *Va. Code § 15.2-1704(A)*. Pernell's employer, the Chesapeake Sheriff's Department, is primarily responsible for operating the city jail and assisting with judicial process. *Va. Code. § 15.2-1609*. *See also* Virginia Sheriff's Association, *Sheriffs' Offices Responsibilities*, https://vasheriff.org/sheriffs-resources/sheriffs-offices-responsibilities/ (last visited July 12, 2018) (saved as ECF attachment) (noting that City of Chesapeake Sheriff is responsible for civil process, court security, and local jail operation but not for law enforcement).

2012).

Although the Supreme Court did not address whether Treakle was actually biased, it did review a claim that Porter's attorney was ineffective for failing to uncover Treakle's alleged bias. Specifically, Porter claimed that "he was denied the effective assistance of counsel because counsel failed to raise the claim that [Treakle] was biased due to his brother's **[**71]** employment as a law enforcement officer at trial and on direct appeal." Id. at 549. The court rejected this claim, noting it satisfied neither the "performance" nor the "prejudice" prong of the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> The record, including the trial transcript and the September 8, 2009 affidavit of counsel, demonstrates that counsel did not know that [Treakle] had a brother in law enforcement. More importantly, *petitioner has provided no admissible evidence that [Treakle] was biased against petitioner* as a result of his brother's employment. Petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

Porter v. Warden, 722 S.E.2d at 549 (emphasis added).

Porter next filed a *§ 2254* petition, renewing his claims of juror bias. The district court first rejected the claim that Treakle was dishonest during voir dire. The court found that Treakle's "failure to advise that he had additional relationships . . . did not amount to a deliberate omission of material information." Porter v. Davis, No. 3:12-cv-550, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *11 (E.D.Va. Aug. 21, 2014) ("Porter I"). Even assuming otherwise, the court explained, Porter still could **[**72]** not show that he was prejudiced because he could not show that a correct answer would have given rise to a valid basis to challenge Treakle for cause. 2014 U.S. Dist. LEXIS 116738, [WL] at *11-12. The district court did not specifically address any claim for actual bias.

On Porter's prior appeal, we concluded that the district court failed to address Porter's actual bias claim and that, "[b]ecause the district court did not resolve [the actual bias] claim, its decision was not a final order over which we have jurisdiction." Porter v. Zook, 803 F.3d 694, 695 (4th Cir. 2015) ("*Porter II*"). After the remand, the district court requested briefing on the actual bias claim alone. The court then granted the State's motion to dismiss. Porter v. Zook, No. 3:12-cv-550, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765 (E.D. Va. Apr. 25, 2016) ("Porter III"). The court first determined that the Supreme Court of Virginia adjudicated the actual bias claim when, in the course of reviewing Porter's related ineffective assistance claim, the Supreme Court concluded that Porter had produced no admissible evidence of bias. 2016 U.S. Dist. LEXIS 55127, [WL] at *7. The court next found that Porter's actual bias claim concerned intrinsic rather than extrinsic bias, 2016 U.S. Dist. LEXIS 55127, [WL] at *9-10, and that Porter "has failed to substantiate his claim with competent evidence that tends to show Bruce Treakle was biased," 2016 U.S. Dist. LEXIS 55127, [WL] at *13. The court also **[**73]** noted that, even assuming that the Supreme Court of Virginia did not adjudicate Porter's claim, "under a *de novo* standard of review, no relief is warranted because Treakle's innocuous statements [in the Sattler affidavit] do not indicate that he was biased." *Id.* In the court's view, **[*443]** Treakle's statements at most amounted to a generally favorable view of law enforcement, not actual bias.

The majority now concludes that the district court erred in dismissing the actual bias and voir dire claims without an evidentiary hearing. I address each ruling in turn.

II.

Because the state habeas court adjudicated the voir dire claim on the merits, "a federal court may not grant habeas relief unless the adjudication '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 '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.'" Jones v. Clarke, 783 F.3d 987, 991 (4th Cir. 2015) (quoting *28 U.S.C. § 2254(d)*). The Supreme Court has consistently reminded us that this standard is "difficult to meet and highly deferential," and "demands that state-court **[**74]** decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (internal quotation marks omitted). Importantly, "an *unreasonable* application of federal law differs from an *incorrect* application of federal law." Jones, 783 F.3d at 991 (emphasis in original).

We apply the two-prong test from McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) in weighing claims of juror dishonesty during voir dire. Under *McDonough*:

> [T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for

> a challenge for cause. . . . [O]nly those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556. The test applies "equally to deliberate concealment and to innocent non-disclosure." *Conner v. Polk, 407 F.3d 198, 205 (4th Cir. 2005)*. "[T]he bar for juror misconduct" under *McDonough* "is set high." *Porter II, 803 F.3d at 697*.

To show a "valid basis" for a challenge for cause, a party must show the juror's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)*. This showing is satisfied if (1) a court "demonstrate[d] a clear disregard for the actual bias" of the juror or (2) "a per se rule **[**75]** of disqualification applies" such that bias should be implied. *United States v. Fulks, 454 F.3d 410, 432 (4th Cir. 2006)*. "[T]he doctrine of implied bias is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988)*. Examples include employer/employee relationships, close relatives involved in the litigation, and a witness to (or individual somehow involved in) the criminal transaction. *Fitzgerald v. Greene, 150 F.3d 357, 364 (4th Cir. 1998)*.

In concluding that the state habeas court unreasonably applied *McDonough*, the majority relies on *Conaway v. Polk, 453 F.3d 567 (4th Cir. 2006)*. The facts of *Conaway*, however, are far removed from those of this case. In *Conaway*, a juror was asked whether he knew any of the State's witnesses. The juror answered that **[*444]** he knew the local sheriff. The juror then responded in the negative when asked if he had any family or friends who had interacted with the District Attorney's office. In reality, the juror was a cousin of a co-defendant who happened to be the State's primary witness. We concluded that there were "multiple questions posed to [the juror] that could candidly be answered only by acknowledging **[**76]** his kinsman," and that the state court was unreasonable to find otherwise. *Id. at 585*.

Here, in contrast, after being informed that the case was about the murder of a police officer, Treakle answered that he had a close family member in law enforcement: a nephew serving as a police officer in the very jurisdiction the case was being tried. After affirming that his nephew's occupation would not affect his ability to be impartial, counsel moved on to other jurors without asking follow-up questions. There are not "multiple questions" that could "candidly be answered" only by acknowledging that his brother was a sheriff's deputy.

"*McDonough* provides for relief only where a juror gives a dishonest response to a question actually posed, not where a juror innocently fails to disclose information that might have been elicited by questions counsel did not ask." *Billings v. Polk, 441 F.3d 238, 245 (4th Cir. 2006)*. Porter's attorney asked only if "anyone here" or "a member of your close personal family" was in law enforcement. He did not ask the jurors to name every family member in law enforcement and he did not follow up with Treakle to ask if any other members of his family were in law enforcement. As we previously acknowledged, "a juror's failure to **[**77]** elaborate on a response that is factually correct but less than comprehensive may not meet [*McDonough*] where no follow-up question is asked." *Porter II, 803 F.3d at 697*. Porter's attorney asked if a member of a juror's family was in law enforcement, and Treakle answered truthfully that a member of his family was a police officer in the jurisdiction where the case was being tried. Treakle's answer is not "misleading, disingenuously technical, or otherwise indicative of an unwillingness to be forthcoming." *Billings, 441 F.3d at 245 n. 2*.

The facts of this case are akin to *United States v. Benabe, 654 F.3d 753 (7th Cir. 2011)*. In *Benabe*, the defendants were members of the Insane Deuces gang. During voir dire, Juror 79 answered affirmatively when asked if she had any friends or relatives involved in gangs. No follow-up question was posed, but during the trial the jury foreperson informed the trial judge that Juror 79 told her that her son had been a member of the Insane Deuces for two years. *Id. at 780*. The Seventh Circuit determined that Juror 79 was not dishonest during voir dire; while confessing that the court's "eyebrows went up" when first confronted with Juror 79's son, the court explained that Juror 79 "answered correctly during voir dire that her son had been involved in a gang," and that "nobody **[**78]** asked her" which gang. *Id. at 781*. Defense counsel "did not ask any follow-up questions," and, in light of this failure, the defendants "lost their ability to seek a new trial on this basis." *Id. See also Marquez v. City of Albuquerque, 399 F.3d 1216, 1224 (10th Cir. 2005)* (rejecting *McDonough* claim where counsel "asked the juror only about her participation in dog training and never about her knowledge of dog training;" the juror's "specialized knowledge" was not uncovered during voir dire because counsel failed "to fully examine the juror," not because of "any misrepresentation by the juror"). Like *Benabe*, in my opinion, the failure to uncover Treakle's brother's occupation and residency stems from Porter's counsel's failure to ask a follow-up question.

[*445] Moreover, even assuming we believe Treakle should have listed every family member with ties to law enforcement, it certainly is not "unreasonable *under Supreme Court precedent*" to conclude, as did the state habeas court,

that Treakle did not fail to answer the question honestly. *Billings, 441 F.3d at 247* (emphasis in original). After all, "an *unreasonable* application of federal law differs from an *incorrect* application of federal law." *Jones, 783 F.3d at 991* (emphasis in original).

In addition, even assuming Porter has satisfied the first prong of *McDonough* ***[**79]*** , he cannot show that a correct answer would have given rise to a valid challenge for cause. Pernell Treakle's occupation as a deputy sheriff would not provide a basis for finding implied bias. Implied bias has been limited to "exceptional and extraordinary situations," such as familial relationship with a trial participant, being an employee of the prosecuting agency, or being involved in the charged crime. *Fitzgerald, 150 F.3d at 365* (internal quotation marks omitted). We have thus rejected its application where a juror inadvertently failed to disclose her husband's murder in a capital murder case, *Fulks, 454 F.3d at 432-33*, and where a juror withheld her belief that her son had been murdered, *Gardner v. Ozmint, 511 F.3d 420, 424-25 (4th Cir. 2007)*. Regarding ties to law enforcement, in *United States v. LaRouche, 896 F.2d 815, 830 (4th Cir. 1990)*, we rejected a challenge to the district court's refusal to strike three jurors with such ties, including one whose husband was an FBI agent because it was "consistent" with "case law that refuses to establish a per se rule excluding any person who has had an association with an investigatory agency." *See also United States v. Umaña, 750 F.3d 320, 342 (4th Cir. 2014)* ("A juror's generally favorable impression of law enforcement does not necessarily amount to bias any more than does a juror's personal association with law enforcement."). It is clear that Pernell **[**80]** Treakle's occupation does not create a per se rule of disqualification.

Likewise, there is no showing that a truthful answer would yield a finding of actual bias *during* the voir dire. Treakle admitted to having a close family member in law enforcement and affirmed that the relationship would not impact his ability to be impartial. As the voir dire continued, Treakle affirmed on multiple occasions that the fact that the case involved the murder of a police officer would not affect his ability to be impartial. There is no evidence that Treakle was anything less than truthful when he answered these questions.

The majority addresses the second *McDonough* prong by positing that it "cannot surmise which follow up questions (and answers) may have followed" from Treakle mentioning his brother's employment. (Majority Op. at 38). In my view, we can; counsel asked the same follow-up question to each juror with ties to law enforcement, and Treakle repeatedly stated that he could be impartial in this case. As the district court aptly explained:

> Although Porter now suggests that exploring the nuances of each venire person's relationships with, and any empathy for, law enforcement officials was critical **[**81]** to assessing whether a juror could remain impartial, the contemporaneous voir dire suggests otherwise. . . . [T]he attorneys trying the case and who were most familiar with the facts were content with a general reassurance from the venire person that any relationship he or she had with law enforcement officials would not impair his or her ability to render a fair and impartial verdict[.]

[*446] *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *2*. Porter's current counsel is of the belief that ties to law enforcement and the Norfolk area should have been red flags to sitting a juror; Porter's trial counsel did not—asking only a general follow-up about impartiality and failing to inquire into ties to Norfolk.

The majority concludes that the district court committed reversible error in dismissing Porter's *McDonough* claim and remands the case for discovery and an evidentiary hearing. Given the way in which the majority reaches this conclusion, I am left to wonder, "What is left to consider?" *United States v. Blackledge, 751 F.3d 188, 214 (4th Cir. 2014)* (Shedd, J., dissenting). In reversing the district court's dismissal of the *McDonough* claim, the majority necessarily concludes not that Treakle might have been dishonest at voir dire, or that there is a factual disagreement about his honesty, but that it **[**82]** was unreasonable as a matter of clearly established federal law to conclude that he was honest. Presumably, regardless of Treakle's testimony at a future evidentiary hearing regarding his answers at voir dire, the district court cannot find him credible. On the second prong of *McDonough*, the majority remands because it cannot speculate as to what questions would have emerged had Treakle mentioned his brother. Is the district court also supposed to speculate? Is Porter's trial counsel going to testify? Will his testimony be anything other than self-serving in favor of Porter? I believe the district court correctly determined that the Supreme Court of Virginia did not unreasonably apply clearly established law, and I would affirm dismissal of the *McDonough* claim.

III. Actual Bias

The majority, applying a de novo standard of review,[3] also remands Porter's actual bias claim for further proceedings, including discovery and an evidentiary hearing. In contrast to

[3] For purposes of my opinion, I will assume (without deciding) that the Supreme Court of Virginia did not "adjudicate[]" Porter's actual bias claim within the meaning of ***28 U.S.C. § 2254(d)***.

the majority, I believe the district court correctly denied an evidentiary hearing because Porter "had ample opportunity at voir dire to discover" further information about Treakle's alleged bias. *Billings, 441 F.3d at 245*.

In *Smith v. Phillips, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*, the Court stated that it "has **[**83]** long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith*, however, "does not mean that a court is obliged to hold an evidentiary hearing any time that a defendant alleges juror bias, regardless of whether he utilized the pre-trial procedures available for ensuring the jury's impartiality." *Billings, 441 F.3d at 245-46*. After all, a juror's dishonesty during voir dire "is the best initial indicator of whether the juror in fact was impartial." *McDonough, 464 U.S. at 556* (Blackmun, J., concurring). Granting a hearing even in situations where trial counsel failed to adequately conduct voir dire would let defendants "sandbag the courts by accepting jurors onto the panel without exploring on voir dire their possible sources of bias and then, if their gambit failed and they were convicted, challenging their convictions by means of post-trial evidentiary hearings based on newly discovered evidence of possible juror bias." *Billings, 441 F.3d at 246*.

Thus, as we noted in *Billings*, evidentiary hearings are appropriate where the potential biases were not discoverable during **[*447]** voir dire, either because the juror deliberately omits material information or because the potential bias is the **[**84]** result of a later-occurring external influence. *Id. at 246 n.4*. As discussed *supra*, Treakle was not dishonest during voir dire, and there is simply no credible allegation of an external influence.[4] Porter's "evidence," including the Sattler affidavit, at most suggests a preexisting juror bias, but *Smith's* rule in favor of evidentiary hearings "applies only to prejudicial extraneous contacts, not to preexisting juror bias." *Benabe, 654 F.3d at 780*; *Robinson v. Polk, 438 F.3d 350, 363-64 (4th Cir. 2006)* (emphasizing the importance of distinguishing between internal and external influences upon a jury). Instead, "[a] postverdict inquiry into intrinsic juror influences is almost never justified." *Benabe, 654 F.3d at 780* (citing *Fed. R. Evid. 606(b)*; *Marquez, 399 F.3d at 1223* ("A juror's personal experience . . . does not constitute extraneous prejudicial information."). "The tool for examining an intrinsic influence like juror bias . . . is a voir dire." *United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998)*. *See also McDonough, 464 U.S. at 554* ("Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors.").

Moreover, in my view any hearing would be futile. Apart from the claim of dishonesty during voir dire, Porter's claim of actual bias also relies on the allegation from the Sattler affidavit that Bruce Treakle was "moved" by testimony from Office **[**85]** Reeves's widow. This "innocuous statement[] do[es] not indicate that he was biased." *Porter III, 2016 U.S. Dist. LEXIS 55127, 2016 WL 1688765, at *13*, because every piece of evidence is meant to be moving to a juror; after all, we do not expect them "to come into the juror box and leave behind all that their human experience has taught them," *J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 149, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)* (O'Connor, J., concurring) (internal quotation marks omitted). What if Bruce Treakle was recently widowed and told Sattler that Mrs. Reaves' testimony was moving precisely because he, too, was adjusting to life as a single parent? Or if another juror was moved by the testimony of Valorie Arrington (who Porter terrorized before murdering Officer Reaves) because of their experience living in a low-income housing complex? The Commonwealth put forth Mrs. Reaves' testimony precisely because it hoped that it would be moving to the jury. The fact that it was successful is not, in my view, evidence of bias.

Moreover, and more importantly, Treakle's statement is barred by *Federal Rule of Evidence 606(b)(1)*, which prohibits a juror from testifying "[d]uring an inquiry into the validity of a verdict," about "the effect of anything on that juror's . . . vote" or "any juror's mental processes concerning the verdict or indictment." The Rule permits a juror **[**86]** to testify if "extraneous prejudicial information was improperly brought to the jury's attention;" or if "an outside influence was improperly brought to bear on any juror." *Fed. R. Evid. 606(b)(2)*(A,B). "Jurors' personal experiences **[*448]** do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room." *Warger v. Shauers, 721 F.3d 606, 611 (8th Cir. 2013)*, *aff'd 135 S.Ct. 521, 190 L. Ed. 2d 422 (2014)*. *Cf. Robinson, 438 F.3d at 363 (4th Cir. 2006)* (noting as internal an influence that merely "invites the listener to examine his or her own conscience from within"). *Rule 606(b)* extends to testimony suggesting that a juror was dishonest during voir dire. *Warger v. Shauers, 135 S.Ct. 521, 525, 190 L. Ed. 2d 422 (2014)*. Applying *Rule 606(b)*, the alternate juror's affidavit would be inadmissible in any evidentiary hearing, as would Treakle's comments

[4] The majority adopts Porter's "evidence" that the areas of Norfolk and Chesapeake were deeply affected by the death of Reeves and a Chesapeake police officer, Michael Saffran. I do not doubt this fact, only the inferences drawn from it—namely, that Treakle was biased against Porter because of his brother's occupation and residence. There is no evidence in the record that Treakle was aware of the community's feelings or that he had ever spoken to his brother about the case. Treakle stated during voir dire that he had not heard about the case, and Pernell's affidavit does not suggest any communication between the brothers.

referenced in the Sattler affidavit. The fact of Treakle's brother's occupation and the impact of Mrs. Reaves' testimony on Treakle are both "'internal' matters subject to exclusion under *Rule 606(b)*." *Id. at 530*.

Ultimately, my determination that the failure to uncover Treakle's brother's occupation lies at the feet of Porter's counsel rather than Treakle undermines the request for an evidentiary hearing on the actual bias claim. Apart from the alleged dishonesty at voir dire, the actual bias claim rests on evidence that, in my view, is either barred **[**87]** by *Rule 606(b)* or does not suggest improper juror bias.

IV.

For the foregoing reasons, I would affirm the dismissal of Porter's *§ 2254* petition in full.

End of Document

FILED: August 3, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-18
(3:12-cv-00550-JRS)

THOMAS ALEXANDER PORTER

Petitioner - Appellant

v.

DAVID ZOOK, Warden, Sussex I State Prison

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part and vacated in part. This case is remanded with instructions to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: August 31, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-18
(3:12-cv-00550-JRS)

THOMAS ALEXANDER PORTER

Petitioner - Appellant

v.

DAVID ZOOK, Warden, Sussex I State Prison

Respondent - Appellee

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Thacker, Judge Harris, and Senior Judge Shedd .

For the Court

/s/ Patricia S. Connor, Clerk

FILED: September 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-18
(3:12-cv-00550-JRS)

THOMAS ALEXANDER PORTER

Petitioner - Appellant

v.

DAVID ZOOK, Warden, Sussex I State Prison

Respondent - Appellee

STAY OF MANDATE UNDER
FED. R. APP. P. 41(d)(1)

Under Fed. R. App. P. 41(d)(1), the timely filing of a petition for rehearing or rehearing en banc or the timely filing of a motion to stay the mandate stays the mandate until the court has ruled on the petition for rehearing or rehearing en banc or motion to stay. In accordance with Rule 41(d)(1), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

FILED: October 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-18
(3:12-cv-00550-JRS)

THOMAS ALEXANDER PORTER

Petitioner - Appellant

v.

DAVID ZOOK, Warden, Sussex I State Prison

Respondent - Appellee

M A N D A T E

The judgment of this court, entered August 3, 2018, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

Porter v. Zook

United States District Court for the Eastern District of Virginia, Richmond Division

April 25, 2016, Decided; April 25, 2016, Filed

Civil Action No. 3:12CV550

Reporter
2016 U.S. Dist. LEXIS 55127 *

THOMAS ALEXANDER PORTER, Petitioner, v. DAVID ZOOK, Respondent.

Subsequent History: Reconsideration denied by, Certificate of appealability denied *Porter v. Zook, 2016 U.S. Dist. LEXIS 129800 (E.D. Va., Sept. 22, 2016)*

Affirmed in part and vacated in part by, Remanded by *Porter v. Zook, 2018 U.S. App. LEXIS 21576 (4th Cir. Va., Aug. 3, 2018)*

Prior History: *Porter v. Zook, 803 F.3d 694, 2015 U.S. App. LEXIS 18202 (4th Cir. Va., Oct. 20, 2015)*

Core Terms

juror, voir dire, actual bias, bias, impartial, juror bias, law enforcement officer, police officer, biased, venire, evidentiary hearing, inlaw, assurance, concealed, merits, law enforcement, capital murder, deliberations, allegations, intrinsic, impair, fair and impartial, defense counsel, volunteer, external, instructions, exhaustion, citations, nephew, sit

Counsel: [*1] For Thomas Alexander Porter, Petitioner: Robert Edward Lee, Jr., LEAD ATTORNEY, Virginia Capital Representation Resource Center, Charlottesville, VA USA; Brian French, PRO HAC VICE, Nixon Peabody LLP, Boston, MA USA; Trey Robert Kelleter, Vandeventer Black LLP, Norfolk, VA USA.

For Keith W. Davis, Warden, Sussex I State Prison, Respondent: Matthew P. Dullaghan, LEAD ATTORNEY, Office of the Attorney General, Richmond, VA USA.

Judges: James R. Spencer, Senior United States District Judge.

Opinion by: James R. Spencer

Opinion

MEMORANDUM OPINION

Thomas Alexander Porter filed this petition for habeas corpus under *28 U.S.C. § 2254* challenging his capital murder conviction and death sentence for the 2005 shooting death of a Norfolk police officer.[1] By Memorandum Opinion and Order entered on August 21, 2014, the Court granted Respondent's Motion to Dismiss the *§ 2254* Petition. *See Porter v. Davis, No. 3:12—CV—550—JRS, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *1 (E.D. Va. Aug. 21, 2014)*. Porter appealed.

On October 20, 2015, the United States Court of Appeals for the Fourth Circuit dismissed Porter's appeal and remanded the matter back to this Court. See *Porter v. Zook, 803 F.3d 694, 695 (4th Cir. 2015)*. The Fourth Circuit observed that, "[a]mong the multiple **[*2]** claims Porter presented to the district court was one alleging that a juror[2] in his case was 'actually biased,' in violation of his right to trial by an impartial jury." *Id.* (citing *Smith v. Phillips, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*). The Fourth Circuit noted that, "[b]ecause the district court did not resolve [the actual bias] claim, its decision was not a final order over which we have jurisdiction" and remanded the matter to this Court. *Id.*

Thereafter, by Memorandum Order entered on October 29, 2015, the Court directed the parties to submit further briefing that set forth all of the facts, law, and argument with respect to the actual bias claim. For the reasons set forth below, the Court finds: (1) that Porter exhausted his actual bias claim by fairly presenting the same to the Supreme Court of Virginia; (2) that the Supreme Court of Virginia decided the merits of

[1] The Court has amended the caption to reflect Porter's current custodian.

[2] The juror's name is Bruce Treakle.

the actual bias claim;[3] and, (3) that under either the deferential standard set forth in *28 U.S.C. § 2254(d)(1)—(2)*, or a *de novo* standard of review, the actual bias claim lacks merit and may be dismissed without conducting an evidentiary hearing.

I. The Applicable Constraints upon Federal Habeas Corpus Review

In order to obtain federal habeas relief, at a minimum, a petitioner must demonstrate that he is "in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. § 2254(a)*. The *Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996* further circumscribed this Court's authority to grant relief by way of a writ of habeas corpus. Specifically, "[s]tate court factual determinations are presumed to be correct and may be rebutted only by clear and convincing evidence." *Gray v. Branker, 529 F.3d 220, 228 (4th Cir. 2008)* (citing *28 U.S.C. § 2254(e)(1)*). Additionally, under *28 U.S.C. § 2254(d)*, a federal court may not grant a writ of habeas corpus based on any claim that was adjudicated on the merits in state court unless the adjudicated claim:

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence **[*4]** presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court has emphasized that the question "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)* (citing *Williams v. Taylor, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*).

II. Factual and Procedural Background Regarding the Actual Bias Claim

Porter was charged and ultimately convicted of the capital murder of Stanley Reaves, a Norfolk Police Officer. *See Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415, 419-24 (Va. 2008)*. Porter moved for a change of venue from the Circuit Court for the City of Norfolk to the Circuit Court for the County of Arlington.[4] *Id. at 423*. The Norfolk Circuit Court granted the motion and transferred Porter's trial to the Circuit Court of the County of Arlington ("Circuit Court"). *Id*.

A. Pertinent Voir Dire with Respect to Law Enforcement Officers

At the inception of voir dire, the Circuit Court informed the venire that Porter was charged with the capital murder of a Norfolk police officer. (State Habeas Record ("SH") 1197, 1201.) Juror Treakle and the rest of the venire assured the Circuit Court that they were not aware of any bias or prejudice against the Commonwealth or the accused. (SH 1202.) Defense counsel asked the venire:

> Have you, any member of your family or close personal friend worked for or with any law enforcement organization, either as an employee or on a volunteer basis?
>
> . . . .
>
> . . . [I]s anyone here, or a member of your close personal family, worked in law enforcement in any capacity as a volunteer or an employee?

(SH 1224-25.) A number of jurors raised their hands and then the following exchange occurred:

> MR. MIGLIOZZI: I'm going to start in the back row. Mr. Treakle.
>
> MR. TREAKLE: My nephew is an Arlington County police officer.
>
> MR. MIGLIOZZI: Your nephew?
>
> MR. TREAKLE: Yes.
>
> MR. MIGLIOZZI: In this county here?
>
> MR. TREAKLE: Yes.
>
> MR. MIGLIOZZI: Do you think, with that being the case, that that would impair your ability to sit on this jury and render a fair and impartial **[*6]** verdict in this case?

---

[3] As reflected below, it is fairly apparent simply by reviewing the procedural history that Porter raised the actual bias claim before **[*3]** the Supreme Court of Virginia and that the Supreme Court of Virginia resolved the merits of the claim when it rejected a separate ineffective assistance of counsel claim.

[4] The Fourth Circuit noted that:

> As was to be expected, Officer Reaves's senseless killing provoked widespread mourning and outrage in Norfolk and the surrounding communities. The killing also generated extensive media coverage, both during the manhunt for Porter and after his apprehension and indictment. Citing concerns about the ability to empanel an impartial jury in Norfolk, Porter filed a motion for a change of venue, to which the Commonwealth consented. **[*5]**

Porter v. Zook, 803 F.3d 694, 696 (4th Cir. 2015)

MR. TREAKLE: No.

(SH 1225-26.) Defense counsel then proceeded to question briefly the other seven members of the venire who had raised their hands. (SH 1226-29.)

Although Porter now suggests that exploring the nuances of each venire person's relationships with, and any empathy for, law enforcement officials was critical to assessing whether a juror could remain impartial, the contemporaneous voir dire suggests otherwise. As reflected in the below exchange, the attorneys trying the case and who were most familiar with the facts were content with a general reassurance from the venire person that any relationship he or she had with law enforcement officials would not impair his or her ability to render a fair and impartial verdict:

> MR. SHARP: My uncle is a retired NYPD officer.
>
> MR. MIGLIOZZI: Okay. Knowing that, and that this involves the alleged shooting of a police officer, would you have any -- do you believe that those facts and that relationship would impair your ability to sit and render a fair and impartial verdict in this case?
>
> MR. SHARP: No.
>
> MR. MIGLIOZZI: Mr. Hurley.
>
> MR. HURLEY: I was a consultant to the U.S. Department of Housing & Urban Development, and part **[*7]** of my job was to develop security plans for public housing projects. And I was in charge of the law enforcement and in charge of keeping the places safe.
>
> MR. MIGLIOZZI: Okay. Same question as everyone else. Do you think that that would impair your ability to sit in a case such as this?
>
> MR. HURLEY: No.
>
> MR. MIGLIOZZI: Thank you. Mr. Delaney.
>
> MR. DELANEY: My cousin is a prison guard in Erie, Pennsylvania, but it doesn't impair my ability.
>
> MR. MIGLIOZZI: And I will go down the front row. Mr. Zacate.
>
> MR. ZACATE: Yes. My cousin is a Metropolitan police officer, D.C.
>
> MR. MIGLIOZZI: Same question to you. Do you think that would affect your ability to sit --
>
> MR. ZACATE: No.
>
> MR. MIGLIOZZI: -- on this jury?
>
> MR. ZACATE: No.
>
> MR. MIGLIOZZI: All right. Any more hands?

(SH 1228-29.)

Additional voir dire provided assurance that the jurors, including Bruce Treakle, could remain impartial in deciding the appropriate punishment despite the fact the case involved the capital murder of a police officer. Specifically, the Circuit Court broke the venire down into groups of four persons to pose specific questions about their ability to fairly decide a capital case. During that questioning, Treakle repeatedly assured the **[*8]** Circuit Court that he could remain impartial and follow the Circuit Court's instructions, even though the case involved the capital murder of a police officer. (SH 1285-94.) For example, defense counsel reminded Treakle that the case involved the capital murder of a police officer (SH 1285) and asked, "If you should convict, the defendant, Mr. Porter, of capital murder, could you follow the Court's instructions and consider voting for a sentence of less than the death penalty." (SH 1292.) Treakle responded, "Yes." (SH 1292.) Thereafter, defense counsel asked:

> If after you have already found that Mr. Porter is guilty beyond a reasonable doubt of the willful, deliberate and premeditated killing of a police officer, you were then presented with evidence in aggravation that there was a probability that Mr. Porter would commit criminal acts of violence that would constitute a serious threat to society, could you follow your instructions and consider voting against the death penalty and in favor of a life sentence without parole?

(SH 1293.) Treakle responded in the affirmative. (SH 1293.) Treakle and the three other venire persons were also asked, "[D]o any of the four of you know of any reason **[*9]** why you could not or would not be able to fairly and impartially determine the facts of the case or abide by the instructions of the Court on the sentencing issues?" (SH 1290.) All four jurors responded in the negative. (SH 1290.)

B. State Habeas Investigation

Following Porter's conviction and direct appeal, members of Porter's state habeas team interviewed individuals who were members of Porter's jury. (SH 6214.) On May 30, 2009, Maryl Sattler and Dawn Davison spoke to Bruce Treakle. (SH 6214.) During the state habeas proceedings, Porter submitted an affidavit from Sattler memorializing her conversation with Bruce Treakle:

> Ms. Davison . . . explained to Mr. Treakle that we were there representing Thomas Porter, and that we were interviewing jurors as part of our review of the entire case. Mr. Treakle indicated that he understood and was willing to speak with us. He explained that he had to pick up his wife at 3:00 p.m., so he would only be available for a few minutes.
>
> Ms. Davison asked Mr. Treakle which of the witnesses made the greatest impression on him during the trial. Without hesitation, Mr. Treakle replied that he found the officer's wife (Treva Reaves) to be a very powerful witness. **[*10]** He indicated that he found her testimony

> moving and very emotional for him because his brother is a sheriff's officer in Norfolk.[5] We were very surprised by this statement because we had read his voir dire prior to the interview and Mr. Treakle had never said anything about this brother. When Ms. Davison asked for clarification, Mr. Treakle repeated that this brother works for the sheriff's department "down in Norfolk." Mr. Treakle said sitting through Mrs. Reaves's testimony had been difficult for him. He expressed sympathy for law enforcement officers, and emphasized that they put their lives on the line every day for the community.
>
> We only spoke with Mr. Treakle for a short while. At approximately 2:45 p.m. Mr. Treakle said that he wished he could speak with us longer, but he did not want to be late to pick his wife up from work at 3:00 p.m. We thanked him for his time and left his home.

(SH 6215 (punctuation and spacing corrected) (paragraph numbers omitted).) Porter asserts that when his "representatives returned to visit again with [Bruce] Treakle, he refused to speak further." (Porter Br. 6, ECF No. 93.)

On June 18, 2009, Ms. Davison also obtained an affidavit from Bruce Treakle's brother, Pernell Treakle. (SH 5491.) Pernell stated that he is a Deputy Sheriff with the Chesapeake Sheriff's Office in Chesapeake, Virginia and had been employed in that position for the past nine years. (SH 5491.)

Porter notes that Chesapeake is adjacent to Norfolk and that the Chesapeake law enforcement personnel were involved in the manhunt for Porter and "were outspoken in their grief and support for Officer Reaves and his family." (Porter Br. 4 (citing SH 7702-7804), ECF No. 93.) Despite his counsel's conversation with Bruce and Pernell Treakle, Porter has not pointed the Court to any allegations that suggest Bruce and Pernell Treakle discussed anything about Porter's crimes prior to Porter's trial. Moreover, during voir dire, in response to the Circuit Court's questions, Bruce Treakle and the rest of the venire assured the Court that they had not seen or heard "anything about this case either today or any **[*12]** other time." (SH 1202.)

C. State Habeas Proceedings with Respect to the Juror Bias Claim

During the state habeas proceedings, with respect to the juror bias claim, Porter asserted, in pertinent part:

> Treakle's relationship with his brother impacted his participation at Porter's trial. For example, he found Officer Reaves's widow to be a very powerful witness. He found her testimony moving and very emotional precisely because his brother was an [law enforcement officer, "LEO"] in the Norfolk area. . . . Treakle was not a fair and impartial juror, and his concealment of his relationship with a Chesapeake LEO was intentionally misleading. As a result, Porter could not conduct a meaningful voir dire and was unaware of this basis for a peremptory strike or causal challenge.
>
> There are three alternative legal theories of juror bias. First, the juror may be actually biased. The test is whether the juror in fact was not fair and impartial. *Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*; *Rushen v. Spain, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)*. Second, bias may be implied. *United States v. Wood, 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936)* (juror's bias "may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law"); *Smith, 455 U.S. at 221-22* (O'Connor, J., concurring). Third, the juror's silence can foreclose counsel's ability to conduct an **[*13]** adequate voir dire. At a minimum, relief is warranted if the juror failed to answer a material question honestly and a correct response would have provided a valid basis for a causal challenge. *McDonough Power Equipment v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)*. Juror lies can be [a] sufficient basis for relief even absent proof that the juror would have been excludable for cause. "[W]hen possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answers on voir dire, the result is a deprivation of the defendant's right to fair trial." *United States v. Bynum, 643 F.2d 768, 771, 226 Ct. Cl. 478 (4th Cir. 1980)*. Juror bias is a structural error and is not amenable to harmless error analysis. *Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)*.

(SH 109-10 (last alteration in original) (footnote omitted).)

Initially, the Supreme Court of Virginia relied upon the *McDonough* test to reject Porter's juror bias claim:

> In determining whether to grant a new trial based on an allegation that a juror was dishonest during voir dire, this Court applies the two-part test enunciated in *McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984)*, which states that
>
> > to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer

---

[5] As reflected below, Bruce Treakle's brother, Pernell Treakle, actually worked **[*11]** for the Sheriff's Office in Chesapeake, Virginia. It is not clear from the record whether Bruce Treakle simply misspoke or whether he simply did not know the exact identity of his brother's employer.

> honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The **[*14]** motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556, 104 S. Ct. 845.

In this case, defense counsel, Joseph A. Migliozzi, Jr., asked the jurors, "But is anyone here, or a member of your close personal family, worked in law enforcement in any capacity as a volunteer or an employee?" Several prospective jurors, including Juror T, raised hands in response. The entirety of the exchange with Juror T was as follows:

> [JUROR T]: My nephew is an Arlington County police officer.
> MR. MIGLIOZZI: Your nephew?
> [JUROR T]: Yes.
> MR. MIGLIOZZI: In this county here?
> [JUROR T]: Yes.
> MR. MIGLIOZZI: Do you think, with that being the case, that that would impair your ability to sit on this jury and render a fair and impartial verdict in this case?
> [JUROR T]: No.

Upon receiving Juror T's negative response, counsel moved on to the next prospective juror. The record demonstrates that Juror T answered truthfully that he had a nephew who was an Arlington County Police Officer, Arlington County being the jurisdiction where the case was being tried following a change of venue, and that he was not asked, nor did he have the opportunity **[*15]** to answer, if he had any additional relationships with law enforcement officers. Thus, petitioner has failed to demonstrate that Juror T *failed to answer honestly a material question during voir dire*.

Porter v. Warden of Sussex I State Prison, 283 Va. 326, 722 S.E.2d 534, 539 (Va. 2012) (emphasis added). The Supreme Court of Virginia did not address whether Bruce Treakle was actually biased in connection with the juror bias claim.

Porter, however, also raised a separate ineffective assistance of counsel claim with respect to Bruce Treakle. Specifically, Porter claimed that "he was denied the effective assistance of counsel because counsel failed to raise the claim that Juror T was biased due to his brother's employment as a law enforcement officer at trial and on direct appeal." *Id. at 549*. The Supreme Court of Virginia rejected this claim, noting it satisfied

> neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and the September 8, 2009 affidavit of counsel, demonstrates that counsel did not know that Juror T had a brother in law enforcement. More importantly, *petitioner has provided no admissible evidence that Juror T was biased against petitioner as a result of his brother's employment*. Petitioner **[*16]** has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

Id. (emphasis added). In finding that Porter provided no admissible evidence of bias, the Supreme Court of Virginia apparently relied upon "the general rule that the testimony of jurors should not be received to impeach their verdict, especially on the ground of their own misconduct." *Caterpillar Tractor Co. v. Hulvey, 233 Va. 77, 353 S.E.2d 747, 750-51, 3 Va. Law Rep. 1924 (Va. 1987)* (citing *Phillips v. Campbell, 200 Va. 136, 104 S.E.2d 765, 767-68 (Va. 1958))*.

D. Exhaustion

Respondent's argument that Porter failed to exhaust his juror bias claim is limited to a discussion of the general jurisprudence regarding exhaustion. (Resp't's Br. 2-5, ECF No. 95.) Respondent fails to cite to any particularly persuasive authority for the proposition that Porter's citation of law and facts in his state habeas petition with respect to the issue of actual bias was inadequate to exhaust his actual bias claim. Moreover, the relevant authority demonstrates that Porter satisfied the exhaustion requirement with respect to his actual bias claim. *See Fullwood v. Lee, 290 F.3d 663, 676 n.4 (4th Cir. 2002)* (concluding that petitioner satisfied the exhaustion requirement with respect to his actual bias claim when, in state court, **[*17]** petitioner "framed the issue primarily as one of juror misconduct based on the jurors' purportedly untruthful affirmations during voir dire").

E. Virginia Adjudicated the Merits of the Actual Bias Claim

The deferential standard of review found in *28 U.S.C. § 2254(d)* only applies to claims that were "adjudicated on the merits in State court proceedings." *28 U.S.C. § 2254(d)*. Nevertheless, where, as here, a state court resolves the merits of the substantive constitutional claim in the context of ineffective assistance of counsel, such a ruling constitutes an adjudication on the merits of the separate substantive

constitutional claim for purposes of *28 U.S.C. § 2255(d)*. *See* *Sturgeon v. Chandler, 552 F.3d 604, 612 (7th Cir. 2009)* (concluding that because the state court held that "no bona fide doubt existed about [petitioner's] competency to stand trial and therefore he had not established either prong of . . . *Strickland* . . . . The court could not have decided the same 'bona fide doubt' question any differently in the context of [petitioner's] due-process claim, so the merits were effectively reached"); *accord* *Albrecht v. Horn, 485 F.3d 103, 116 (3d Cir. 2007)*. Specifically, the Supreme Court of Virginia adjudicated the merits of Porter's actual bias claim when it found that "petitioner has provided no admissible evidence that Juror T was biased **[*18]** against petitioner as a result of his brother's employment." *Porter, 722 S.E.2d at 549*.[6]

F. Federal Habeas Proceedings

With respect to Porter's allegation concerning Juror Treakle, this Court stated in pertinent part:

> In sum, Porter argues that the state habeas court erred when it held that Juror Treakle did not give a dishonest response or omit material information because Porter's trial counsel asked (1) whether Juror Treakle had any family that were law enforcement officers and (2) whether Juror Treakle had anything else to add. Porter's claim fails at the first step of the *McDonough* test. It is clear that Juror Treakle did not volunteer false information. The main question of import is whether Juror T's omission of an additional family member that was a law enforcement officer amounted to a "material omission." "*McDonough* provides for relief only where a juror gives a dishonest response to a question actually posed, not where a juror innocently fails to disclose information that might have been elicited by questions counsel did not ask." *See* *McDonough, 464 U.S. at 555*.
>
> Juror Treakle's failure **[*19]** to advise that he had additional relationships with law enforcement officers did not amount to a deliberate omission of material information. In *Billings v. Polk*, the Fourth Circuit highlighted a set of acts in *Williams v. Taylor* that were indicative of a material omission. *Billings, 441 F.3d at 244 n.2*. There, a juror indicated that she was not related to any of the witnesses even though she had been married to one of them for 17 years and was the mother of his four children. *Id.* (citing *Williams, 529 U.S. at 440*). Additionally, the woman stated that she had never been represented by any of the attorneys even though one of them had represented her during her divorce. *Id.* (*529 U.S. at 440-41*). In comparison, it does not appear that any of Juror Treakle's answers were submitted with scienter in mind, i.e., "misleading, disingenuously technical, or otherwise indicative of an unwillingness to be forthcoming." *Id.* Porter's trial counsel simply failed to ask Juror Treakle whether he had additional family members that were law enforcement officers. *See* *Billings, 441 F.3d at 245*. On the other hand, if the Court assumes that Juror Treakle knew that his brother transported prisoners in the custody of the department of corrections, it is hard to believe that he could have not realized that **[*20]** such a position constituted "law enforcement in any capacity." *See* *Porter II, 722 S.E.2d at 539*. A Deputy Sheriff is clearly a law enforcement officer. *Williams, 529 U.S. at 441-42*. In any event, even if Porter meets the first step of the *McDonough* test, **he cannot show actual or implied bias on the part of Juror Treakle**.
>
> The fact that a juror "once had a family member in law enforcement is plainly not one of the 'extreme situation[s]' in which bias may be implied." *United States v. Brewer, No. 1:12CR1, 2012 U.S. Dist. LEXIS 144205, 2012 WL 4757894, at *5 (N.D. W. Va. Oct. 5, 2012)*, aff'd, *533 F. App'x 234 (4th Cir. 2013)* (quoting *Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988)*; *see also* *United States v. LaRouche, 896 F.2d 815, 830 (4th Cir. 1990)*. Further, it appears that Porter's trial counsel and the trial court judge were convinced that Juror Treakle would act impartially because of his familial affiliation with another law enforcement officer. Porter now contends that Juror Treakle may have been biased because the city of Chesapeake and its law enforcement community were especially incited by the murder of Officer Reaves. Porter avers that Treakle's relationship with his brother impacted his perception of the evidence and his participation in deciding Porter's guilt and punishment. It may be true that officers from the Chesapeake Sherriff's Office were more involved in his case than officers in Arlington County. However, Porter presents only circumstantial evidence **[*21]** of bias, and a showing of implied bias is a very high bar.
>
> "[T]he doctrine of implied bias is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Person, 854 F.2d at 664* (internal quotation marks and citations omitted). "As examples of

[6] As explained below, Porter's failure to advance any competent evidence of juror bias is fatal to his actual bias claim. *See* *Fullwood v. Lee, 290 F.3d 663, 682 (4th Cir. 2002)* (citation omitted).

the 'exceptional' and 'extraordinary' situations that might require a finding of implied bias, Justice O'Connor cited 'a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.'" *Fitzgerald v. Greene, 150 F.3d 357, 365 (4th Cir. 1998)* (citing *Smith, 455 U.S. at 222*) (O'Connor, J., concurring). Porter's is not such an egregious situation. There is no *per se* rule requiring the exclusion of a juror whose close relative was a victim of a crime similar to that with which a defendant is being tried, *see United States v. Jones, 608 F.2d 1004, 1008 (4th Cir. 1979)*, and "[a]bsent a specific showing of bias, a defendant accused of murdering a police officer is not entitled to a jury free of policemen's relatives," *United States v. Caldwell, 543 F.2d 1333, 1347, 178 U.S. App. D.C. 20 (D.C. Cir. 1974)*. *See* ***[*22]*** *also Jones, 608 F.2d at 1008*. Absent the general connection of the Chesapeake law enforcement officers to the victim, nothing indicates that any of Juror Treakle's relatives had a particularly close connection to the murder. On the information provided, the Court cannot hold that Porter has shown that it was "highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Person, 854 F.2d at 664*.

In sum, it does not appear that the state habeas court unreasonably applied established federal law. While Porter argues that the best way to clear up any discrepancies is to hold an evidentiary hearing, such measures are unnecessary. Because the Court can decide this matter on the record at hand, the Court will deny Porter's request for a hearing.

*Porter v. Davis, 3:12—CV—550—JRS, 2014 U.S. Dist. LEXIS 116738, 2014 WL 4182677, at *11-12 (E.D. Va. Aug. 21, 2014)* (alterations in original) (emphasis added).

III. Analysis of the Actual Bias Claim

A. The Distinction between Extrinsic and Intrinsic Influences on Jurors

The Supreme Court has held "that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*. Contrary to Porter's suggestion, *Smith* does

not stand **[*23]** for the proposition that *any time* evidence of juror bias comes to light, due process requires the trial court to question the jurors alleged to have bias. *Smith* states that this "may" be the proper course, and that a hearing "is sufficient" to satisfy due process. *Smith* leaves open the door as to whether a hearing is always required and what else may be "sufficient" to alleviate any due process concerns.

Tracey v. Palmateer, 341 F.3d 1037, 1044 (9th Cir. 2003) (citation omitted). "In deciphering what due process requires, [the courts] distinguish[] between an extraneous contact that may have affected a jury's ability to remain fair and impartial and an intrinsic influence from a juror's pre-existing bias." *United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998)*.[7]

When substantial extraneous contacts may have affected a jury's ability to be fair, due process mandates a hearing. *Id.* (citing *Willard v. Pearson, 823 F.2d 1141, 1148 (7th Cir. 1987)*); *see Hurst v. Joyner, 757 F.3d 389, 398-400 (4th Cir. 2014)* (alteration in original) (remanding for an evidentiary hearing, when, during trial for a capital defendant, juror "asked her father where she 'could look in the Bible for help and guidance in making [her] decision for between life and death' and he directed her to an "undetermined 'eye for an eye' verse, which she consulted **[*24]** in private the night before returning the verdict"), *cert. denied*, *135 S. Ct. 2643, 192 L. Ed. 2d 944 (2015)*; *Barnes v. Joyner, 751 F.3d 229, 244 (4th Cir. 2014)* (holding that "a defendant is entitled to a hearing when he or she presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury"), *cert. denied*, *135 S. Ct. 2643, 192 L. Ed. 2d 944 (2015)*. The foregoing rule favoring post-trial hearings "applies only to prejudicial extraneous contacts, not to preexisting juror bias." *United States v. Benabe, 654 F.3d 753, 780 (7th Cir. 2011)* (citing *McClinton, 135 F.3d at 1186*; *Artis v. Hitachi Zosen Clearing Inc., 967 F.2d 1132, 1141 (7th Cir. 1992)*); *Robinson v. Polk, 438 F.3d 350, 363-64 (4th Cir. 2006)* (emphasizing the importance of distinguishing between internal and external influences upon a jury);[8] *Stockton v. Virginia, 852 F.2d 740, 744 (4th Cir. 1988)* (distinguishing between "juror impairment or predisposition" and the more serious danger of

[7] Courts use the terms external contacts and external influences interchangeably.

[8] In *Robinson*, the Fourth Circuit concluded that no evidentiary hearing was warranted when one juror read passages from the Bible to other jurors because the **[*25]** Bible was not deemed to be an external influence. *438 F.3d at 363-64*.

an "extraneous communication").[9] "A post-verdict inquiry into intrinsic juror influences is almost never justified." *Benabe, 654 F.3d at 780* (citing *Fed. R. Evid. 606(b)*; *Tanner v. United States, 483 U.S. 107, 117-20, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987)*; *Arreola v. Choudry, 533 F.3d 601, 606 (7th Cir. 2008))*; *see Marquez v. City of Albuquerque, 399 F.3d 1216, 1223 (10th Cir. 2005)* (internal quotation marks omitted) (citation omitted) ("A juror's personal experience . . . does not constitute extraneous prejudicial information.").[10] Rather, the proper "tool for examining an intrinsic influence like juror bias . . . is . . . voir dire." *McClinton, 135 F.3d at 1186* (citations omitted).

B. No Evidence of External Influences Exists

In support of his claim that Bruce Treakle was actually biased, Porter directs the Court to evidence of publicity and public outrage regarding Porter's crimes in the Tidewater area. (*See* Porter Br. 2 (citation omitted).) **[*26]** However, Porter fails to submit any plausible allegations that Bruce Treakle heard or saw anything about Porter's crimes prior to the trial. Indeed, the record affirmatively shows that Bruce Treakle and the other persons on his venire had not heard anything about Porter's case. (SH 1202.) Accordingly, the record conclusively demonstrates that Bruce Treakle was not actually biased because of some external contact.

C. Porter's Claim Involves Potential Intrinsic Bias

Porter contends that Bruce Treakle's affinity for his brother "impacted Treakle's perception of the evidence and his ultimate decisions to convict and sentence Porter to death." (Porter Reply 2, ECF No. 96.) As the evidentiary cornerstone of this claim, Porter relies upon Bruce Treakle's post-verdict comments that, *inter alia*, "he found the officer's wife (Treva Reaves) to be a very powerful witness," (SH 6215), and Treakle's explanation that he found Treva Reaves's "testimony moving and very emotional for him because his brother is a sheriff's officer in Norfolk." (SH 6215.) However, as explained more fully below, none of the above statements may be used to establish Juror Treakle's purported bias. *See Fed. R. Evid. 606(b)*. "[T]he 'firmly established' **[*27]** *general* rule is that juror testimony *may not* be used to impeach a jury verdict. . . . The only exception to this rule is for external influence . . . ." *Robinson, 438 F.3d at 365* (citations omitted). Indeed, as explained below, Porter's pursuit of this evidence from Bruce Treakle frustrates the very purpose of *Federal Rule of Evidence 606(b)*.

Rule 606(b)(1) provides, in pertinent part: "During an inquiry into the validity of a verdict . . . a juror may not testify about . . . the effect of anything on that juror's or another juror's vote; or *any juror's mental processes concerning the verdict or indictment*. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters." *Fed. R. Evid. 606(b)(1)* (emphasis added).[11] This rule embodies the recognition that "the proper functioning of the jury system requires that the courts protect jurors from being 'harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to aside a verdict.'" *United States v. Moten, 582 F.2d 654, 664 (2d Cir. 1978)* (quoting *McDonald v. Pless, 238 U.S. 264, 267, 35 S. Ct. 783, 59 L. Ed. 1300 (1915))*; *see Fullwood v. Lee, 290 F.3d 663, 679-80 (4th Cir. 2002)* (citations omitted) (observing that *Rule 606(b)* is designed "to protect the finality and integrity of verdicts and to guard against the harassment of jurors").

D. Establishing Intrinsic Bias after the Verdict

"To establish actual bias after a trial, a party must prove that a juror was not 'capable and willing to decide the case solely on the evidence before [him].'" *United States v. Sampson, 820 F. Supp. 2d 151, 163 (D. Mass. 2011)* (alteration in original) (quoting *McDonough Power Equip., Inc v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984))*. "Determining whether a juror is biased or has prejudged a

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[9] Examples of extrinsic influences include, "an attempt to bribe a juror, a juror's application for a job in the district attorney's office, and newspaper articles and media attention." *Williams v. Bagley, 380 F.3d 932, 945 (6th Cir. 2004)* (citation omitted).

[10] Porter repeatedly insists the controlling jurisprudence mandates a hearing when a petitioner raises a claim concerning juror partiality. (*See, e.g.*, Porter's Br. 7 (citing *Barnes, 751 F.3d at 243-44*). Porter, however, consistently fails to distinguish between a claim of juror partiality based on external contacts and a claim of juror partiality based on intrinsic bias. *See, e.g., Barnes, 751 F.3d at 249-53* (remanding habeas matter to conduct an evidentiary hearing with respect to claim that juror called her pastor following closing argument to discuss attorney's arguments that quoted the Bible regarding the propriety of the death penalty); *Billings v. Polk, 441 F.3d 238, 245-46 (4th Cir. 2006)* (dismissing claim pertaining to an intrinsic influence without conducting a hearing).

[11] That rule provides the following exceptions: "[a] juror may testify about whether: **[*28]** **(A)** extraneous prejudicial information was improperly brought to the jury's attention; **(B)** an outside influence was improperly brought to bear on any juror; or **(C)** a mistake was made in entering the verdict on the verdict form." *Fed. R. Evid. 606(b)(2)*.

case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith v. Phillips, 455 U.S. 209, 221-22, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)* (O'Connor, J., concurring). One may demonstrate that a juror was intrinsically biased by a combination of, *inter alia*: (1) the juror's admissions of bias on voir dire; (2) a juror's inaccurate or incomplete answers on voir dire; (3) non-juror evidence of bias; and, (4) an examination of the juror's actions during the trial. *See, e.g.*, *United States v. Lawhorne, 29 F. Supp. 2d 292, 312 (E.D. Va. 1998)*. A court is not "obliged to hold an evidentiary hearing any time that a defendant alleges juror bias, regardless of whether he utilized the pre-trial procedures available for ensuring **[*29]** the jury's impartiality." *Billings, 441 F.3d at 245-46* (footnote omitted). "To justify a post-trial hearing involving the trial's jurors, the defendant must do more than speculate; he must show clear, strong, substantial and incontrovertible evidence .. . that a specific, non-speculative impropriety occurred." *United States v. Wright, No. 96-4451, 1997 U.S. App. LEXIS 29798, 1997 WL 693584, at *2 (4th Cir. Oct. 28, 1997)* (omission in original) (quoting *Tejada v. Dugger, 941 F.2d 1551, 1561 (11th Cir. 1991)*). "[T]he Supreme Court has required a hearing [when] the source of potential bias was not discoverable on *voir dire*, either because a juror *deliberately omitted material information* in response to questions asked on *voir dire* or because the circumstances that potentially compromised the juror's impartiality did not arise until after the trial had begun." *Billings, 441 F.3d at 246 n.4* (emphasis added) (citations omitted).

E. Analysis of Actual Bias Claim

The record fails to plausibly suggest that Bruce Treakle "deliberately omitted material information in response to questions asked on *voir dire*." *Id.* (citations omitted). Defense counsel asked whether, "anyone here, or a member of your close personal family, worked in law enforcement in any capacity as a volunteer or an employee?" (SH 1225.) Bruce Treakle readily volunteered that he had a nephew who was a police officer in Arlington County, where the trial **[*30]** was being conducted. (SH 1225.) Bruce Treakle further assured defense counsel such a circumstance would not impair his ability to sit and render a fair and impartial verdict. (SH 1225-26.)

Porter faults Bruce Treakle for failing to also volunteer that he had another relative, a brother who worked in law enforcement for the Chesapeake Sheriff's Department. Trial counsel, however, did not ask Treakle, who was the first member of the venire to respond to the question, to identify every member of his family who had a connection to law enforcement. "[A] juror's failure to elaborate on a response that is factually correct but less than comprehensive" is not necessarily indicative of deceit where no follow-up question is asked. *Porter v. Zook, 803 F.3d 694, 697 (4th Cir. 2015)* (citing *Billings, 441 F.3d at 245*; *Fitzgerald v. Greene, 150 F.3d 357, 363-64 (4th Cir. 1998))*. Moreover, the voir dire regarding the connection of venire members to law enforcement did not engage in any searching scrutiny of how each individual law enforcement relationship may play out with respect to the particular evidence to be introduced in Porter's case. *Benabe, 654 F.3d at 781*;[12] (*see* Porter Reply Br. 3. n.3.) Rather, as reflected above, counsel just sought a general assurance from each member of the venire that his connection to law enforcement personnel would not **[*31]** impair his or her ability to remain impartial. Bruce Treakle already had provided that assurance.

On the current record, it would be counterfactual to suggest that Bruce Treakle intentionally concealed his relationship with his brother Pernell to secure a place on Porter's jury. First, Bruce Treakle readily admitted that he had a close family relative in law enforcement. Second, Bruce Treakle freely admitted to Porter's habeas counsel that his brother Pernell worked in law enforcement.[13] Porter's **[*32]** suggestion that Mr. Treakle volunteered information about his nephew, who was a police officer, but not about his brother, who was a deputy sheriff, for fear of losing his place on the jury suggests a cageyness that is refuted by the record. Bruce Treakle's circumstances are thus distinguishable from those instances where the record indicated that a juror purposely concealed information about his or her relationship to law enforcement officials, the prosecutor, or prosecution witnesses, in order to secure a place on the jury. *See Conaway v. Polk, 453 F.3d 567, 588 (4th Cir. 2006)*; *United States v.*

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[12] In *Benabe*, the defendants were members of the Insane Deuces street gang indicted on racketeering and related murder and drug charges. *654 F.3d at 756*. On voir dire, Juror 79 admitted that her child had been involved in a street gang when he was nine to eleven years old. *Id. at 779*. Juror 79 later revealed to the foreperson that the gang her son had been involved with was the Insane Deuces. *Id. at 780*. The Seventh Circuit upheld the district court's decision to reject the motion for new trial on juror bias without conducting an evidentiary hearing. *See id. at 781*. ("[T]he record shows that Juror 79 answered correctly during voir dire that her son had been involved in a gang. She did not say that it was the Insane Deuces, but nobody asked her.").

[13] Porter appears to suggest that Bruce Treakle also admitted to other members of the jury that he had a brother in law enforcement. (Porter Br. 6 (citing SH 5231).) This reinforces the notion that Bruce Treakle was not attempting to conceal his relationship to a brother in law enforcement.

Scott, 854 F.2d 697, 699-700 (5th Cir. 1988); Williams v. Netherland, 181 F. Supp. 2d 604, 608-10 (E.D. Va. 2002). Thus, Porter fails to demonstrate that Treakle deliberately omitted material information.

In remanding this case, the Fourth Circuit observed that, regardless of whether Treakle acted honestly on voir dire, another "factor that may give rise to distinct concerns about actual bias is a personal relationship that colors a juror's perspective on a case." Porter, 803 F.3d at 698 (citing *Fields v. Woodford, 309 F.3d 1095, 1103-06 (9th Cir. 2002)*; Scott, 854 F.2d at 698-700)). As **[*33]** Bruce Treakle did not intentionally conceal the fact that he had a brother who was a deputy sheriff, the mere fact of that relationship is not sufficient to warrant a further inquiry at this stage. *Compare* Scott, 854 F.2d at 698 (granting new trial where juror intentionally concealed that he had a brother in law enforcement in the jurisdiction that had investigated the crimes against the defendant) *with* Billings, 441 F.3d at 245 (concluding no need to conduct an evidentiary hearing with respect to juror bias based on preexisting contacts with prosecutor and defense counsel when the issue could have been explored on voir dire); *see* Fields v. Brown, 503 F.3d 755, 773 (9th Cir. 2007) (en banc) (internal quotation marks omitted) (citations omitted) ("Although we have recognized that bias may be implied where close relatives of a juror have been personally involved in a situation involving a similar fact pattern, we have never done so when the juror was honest on voir dire."). Perhaps if Pernell Treakle had been murdered or shot in the line of duty one could doubt Bruce Treakle's assurances that he could remain impartial in the trial of Porter for the capital murder of a police officer. *See Fields, 309 F.3d at 1103-06* (remanding for evidentiary hearing where defendant was on trial for, *inter alia*, rape and abduction, **[*34]** and a juror's wife had been raped and abducted two years prior to trial). That, however, is not the case.

What is before the Court is Bruce Treakle's honest, sworn assurance that he could remain impartial despite the fact that the case involved the murder of a police officer and he had a close relative who was a police officer. Porter v. Warden of Sussex I State Prison, 283 Va. 326, 722 S.E.2d 534, 539 (Va. 2012) (observing "petitioner has failed to demonstrate that Juror T failed to answer honestly a material question during voir dire"). Porter insists that Bruce Treakle's assurance of impartiality has been called into question by his post-trial comments indicating that he was particularly moved by the testimony of Officer's Reaves widow. However, "[a]s is reflected in Federal Rule of Evidence 606(b), requests to impeach jury verdicts pursuant to post-trial contact with jurors generally are disfavored." United States v. Sandalis, 14 F. App'x 287, 289 (4th Cir. 2001) (footnote omitted) (citing United States v. Gravely, 840 F.2d 1156, 1159 (4th Cir. 1998)). Thus, "when a party seeks to attack or support a verdict, Rule 606(b) prohibits all inquiry into a juror's mental process in connection with the verdict." United States v. Cheek, 94 F.3d 136, 143 (4th Cir. 1996) (citing Tanner v. United States, 483 U.S. 107, 117-22, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987); Stockton v. Virginia, 852 F.2d 740, 743-44 (4th Cir. 1988)).[14]

Porter insists that it is premature to require him to substantiate his actual bias claim with any admissible evidence. (Porter Reply 1(citation omitted).) Rather, he contends that, at this stage, the disposition of his claim is governed by the standards applicable for a motion to dismiss and the Court must accept his "well-pleaded allegations as true, and . . . to draw all reasonable inferences in his favor." (*Id.* (quoting Conaway, 453 F.3d at 582). Porter's contention, while accurate, is woefully incomplete. Because Virginia adjudicated the merits of his actual bias claim, Porter was required to "allege facts sufficient to meet the exacting standard set forth in *28 U.S.C. § 2254(d) . . . .*" Townes v. Jarvis, 577 F.3d 543, 551 (4th Cir. 2009) (citing Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000)). In assessing under *28 U.S.C. § 2254(d)* whether a federal habeas petitioner's claim is subject to dismissal without an evidentiary hearing, this Court looks to the character of the evidence before the Supreme Court of Virginia. *See* Strong v. Johnson, 495 F.3d 134, 140 (4th Cir. 2007). For example, in Strong, the Fourth Circuit examined the Supreme Court of Virginia's rejection of a habeas petitioner's claim that "his lawyer ignored his instruction to appeal his state convictions." Id. at 136. The Fourth Circuit emphasized that the first step of the analysis was "to clarify what evidence was properly before **[*36]** the Supreme Court of Virginia." Id. at 139. The Fourth Circuit concluded the Supreme Court of Virginia was not required to consider unsworn allegations or submissions not authorized by its rules. Id. at 139-41. Ultimately, the Fourth Circuit concluded that the Supreme Court of Virginia acted reasonably in rejecting the petitioner's claim "after considering Strong's conclusory (sworn) statement" and "his lawyers more detailed affidavit," which explained that after initially expressing a desire to appeal, after further discussion with counsel, Strong agreed not to appeal. Id. at 136.

Porter has failed to substantiate his claim with competent evidence that tends to show Bruce Treakle was biased. The prohibition of Rule 606(b) extends to the forecast of evidence

[14] In both Conaway v. Polk and Williams v. Netherland, the petitioner was able to substantiate his allegations of juror bias with evidence or allegations of discoverable evidence that did not run afoul of the prohibitions **[*35]** of Rule 606(b).

in affidavits when assessing the necessity of an evidentiary hearing. *See* Bacon v. Lee, 225 F.3d 470, 485 (4th Cir. 2000) (concluding no evidentiary hearing was warranted regarding juror bias claim where the forecasted evidence of juror bias pertained to racial jokes allegedly made during deliberations (citing Fed. R. Evid. 606(b); Tanner, 483 U.S. at 121; Gosier v. Welborn, 175 F.3d 504, 510-11 (7th Cir. 1999))). In Gosier, the federal habeas petitioner sought to impugn his state death sentence with an affidavit from a juror regarding the juror's failure to follow the trial court's instructions. 175 F.3d at 510. As the Seventh Circuit **[*37]** observed in rejecting a similar claim: "It would be altogether inappropriate for a federal court to entertain the kind of evidence [the petitioner] proffers just because this is a collateral attack, when neither a federal nor a state court allows a verdict to be challenged directly using evidence of this kind. His current effort to reconstruct the jury's deliberations is simply forbidden." Id. at 511.

Here, the Supreme Court of Virginia rejected Porter's actual bias claim because Porter "provided no admissible evidence that Juror T was biased against petitioner as a result of his brother's employment." Porter, 722 S.E.2d at 549. Because Porter has failed to support his claim that Juror Treakle was actually biased with any significant admissible evidence, the Supreme Court of Virginia did not act unreasonably in rejecting this claim. *See* Fullwood, 290 F.3d at 682 (citation omitted) (observing that "a petitioner who seeks to invalidate a verdict that has already withstood challenges on direct review and state collateral review must introduce competent evidence that there was juror misconduct in the first place").

Moreover, even if the Court could consider Bruce Treakle's post-verdict mental impression of the trial evidence and decide the matter **[*38]** under a *de novo* standard of review, no relief is warranted because Treakle's innocuous statements do not indicate that he was biased. *See* Bacon, 225 F.3d at 485. Treakle merely admitted that he "found the officer's wife (Treva Reaves) to be a very powerful witness" and that "he found her testimony moving and very emotional for him because [of] his brother['s]" employment. (SH 6215.) Treakle also "expressed sympathy for law enforcement officers, and emphasized that they put their lives on the line every day for the community." (SH 6215.)

"A juror's generally favorable impression of law enforcement does not necessarily amount to bias any more than does a juror's personal association with law enforcement." United States v. Umaña, 750 F.3d 320, 342 (4th Cir. 2014) (citing United States v. LaRouche, 896 F.2d 815, 830 (4th Cir. 1990)), *cert. denied*, 135 S. Ct. 2856, 192 L. Ed. 2d 894 (2015). Furthermore, the fact that Juror Treakle was moved by Mrs. Reaves's testimony because he had a sibling in law enforcement does not suggest that Juror Treakle disregarded his oath to ultimately decide the case on the law and the evidence. *See* United States v. Gumbs, 562 F. App'x 110, 115-16 (3d Cir. 2014) (concluding that district court did not err in failing to remove a juror who had cried when watching video of defendant sexually abusing an eight-year old victim); Miller v. Webb, 385 F.3d 666, 680 (6th Cir. 2004) (Gibbons, J., dissenting) ("Expressions of sympathy for a victim, without more, **[*39]** do not demonstrate actual bias where the juror has assured the court that she may decide the case fairly."); United States v. Jones, 716 F.3d 851, 857 (4th Cir. 2013) ("Because jurors will have opinions from their life experiences, it would be impractical for the *Sixth Amendment* to require that each juror's mind be a tabula rasa."). Moreover, the voir dire here thoroughly explored whether the jurors, including Treakle, could follow the Circuit Court's instructions and remain impartial in imposing a verdict, despite the fact that the case involved the capital murder of a police officer. Scott v. Mitchell, 209 F.3d 854, 879 (6th Cir. 2000) ("Allegations of jury bias must be viewed with skepticism when the challenged influence occurred before the jurors took their oath to be impartial."). Given Treakle's honest and forthright behavior, Porter has yet to forecast to the Court any evidence that plausibly suggests that Treakle did not remain impartial or follow the Circuit Court's instructions to decide the case on the law and evidence. *See* Williams, 529 U.S. at 440-41 (juror concealed prior legal relationship with the prosecutor and marriage to a prosecution witness); Conaway, 453 F.3d at 578 (juror concealed relationship to key prosecution witness and, prior to voir dire, expressed opinion that the defendant should die if he committed the crime). Accordingly, **[*40]** Porter's actual bias claim lacks merit and will be dismissed. The Court will deny a certificate of appealability.

An appropriate Final Order will accompany this Memorandum Opinion.

/s/ James R. Spencer

Senior U.S. District Judge

Date: 4-25-16

Richmond, Virginia

FINAL ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Porter's actual bias claim is DISMISSED.
2. The Court DENIES a certificate of appealability.
3. The *28 U.S.C. § 2254* Petition is DENIED.

The Clerk is DIRECTED to send a copy of the Memorandum Opinion and Order to counsel of record.

It is so ORDERED.

Date: 4-25-16

Richmond, Virginia

/s/ James R. Spencer

Senior U. S. District Judge

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Porter v. Warden of the Sussex I State Prison

Supreme Court of Virginia

March 2, 2012, Decided

Record No. 091615

Reporter
283 Va. 326 *; 722 S.E.2d 534 **; 2012 Va. LEXIS 55 ***; 2012 WL 686307

Thomas Alexander Porter, Petitioner, against Warden of the Sussex I State Prison, Respondent.

Prior History: *Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415, 2008 Va. LEXIS 78 (2008)*

Core Terms

Juror, alleges, contends, holds, counsel's failings, reasonable probability, demonstrates, enunciated, asserts, fail to demonstrate, two-part, effective assistance of counsel, counsel's performance, alleged error, deficient, satisfies, prong, inmate, trial transcript, sentencing, gun, prison, present evidence, investigate, witnesses, police officer, incidents, questions, shooting, teachers

Case Summary

Procedural Posture
Petitioner inmate was convicted of capital murder, use of a firearm in the commission of a felony, and grand larceny. The jury fixed the sentence at death for the capital murder conviction and 22 years for the non-capital offenses. The convictions and death sentence were affirmed on appeal. The inmate filed a petition for writ of habeas corpus. Respondent warden filed a motion to dismiss.

Overview
The inmate raised a constitutional claim that he was denied the right to a fair trial by an impartial jury because a juror failed to disclose during voir dire that his brother was a deputy sheriff. The claim was ripe for consideration because the jury did not disclose the information at any time prior to the conclusion of the inmate's direct appeal. However, the claim was without merit because the record demonstrated that the juror answered truthfully that he had a nephew who was a police officer and that he was not asked, nor did he have the opportunity to answer, if he had any additional relationships with law enforcement officers. Next, the inmate's claims that the Commonwealth failed to disclose exculpatory information, and presented false testimony, or allowed it to go uncorrected, were without merit. Finally, the inmate raised multiple claims of ineffective assistance of counsel. With regard to each claim raised, the inmate failed to demonstrate that counsel's performance was deficient or that there was a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Outcome
The court dismissed the petition.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Cognizable Issues > Threshold Requirements > Due Process

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

HN1[] **Threshold Requirements, Due Process**

To obtain a new trial based on an allegation that a juror was dishonest during voir dire, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

HN2[] **Brady Materials, Brady Claims**

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Whether evidence is material and exculpatory and, therefore, subject to disclosure under Brady is a decision left to the prosecution. Inherent in making this decision is the possibility that the prosecution will mischaracterize evidence, albeit in good faith, and withhold material exculpatory evidence which the defendant is entitled to have under the dictates of Brady. If the defendant does not receive such evidence, or if the defendant learns of the evidence at a point in the proceedings when he cannot effectively use it, his due process rights as enunciated in Brady are violated. Exculpatory evidence is material if there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the proceeding.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Use of False Testimony

HN3[] **Prosecutorial Misconduct, Use of False Testimony**

In order to find that the prosecution presented false testimony or allowed it to go uncorrected, a court must determine first that the testimony at issue was false, second that the prosecution knew of the falsity, and finally that the falsity affected the jury's judgment.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Exceptions to Disclosure

HN4[] **Brady Materials, Exceptions to Disclosure**

Pursuant to Brady, there is no obligation to produce information available to the defendant from other sources, including diligent investigation by the defense.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN5[] **Brady Materials, Brady Claims**

When considering materiality under Brady, a court considers suppressed evidence as a whole, not item by item. However, it does not reach the issue of materiality unless it first determines that the evidence was not available to petitioner, or is favorable to the accused because it is exculpatory or because it may be used for impeachment.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN6[] **Sentencing, Sentencing Guidelines**

Evidence regarding the general nature of prison life is not admissible even if used to rebut the aggravating factor of future dangerousness.

Judges: [*1]** PRESENT: KINSER, C.J., LEMONS, GOODWYN and MILLETTE, JJ., and CARRICO, LACY and KOONTZ, S.JJ.

Opinion

[538] [*326]** Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed August 10, 2009, the respondent's motion to dismiss, the petitioner's opposition to the motion to dismiss, the respondent's supplemental motion to dismiss, the petitioner's opposition to the supplemental motion to dismiss, and the respondent's reply to petitioner's opposition, as well as the criminal, appellate, and habeas records in this case, the Court is of the opinion that the motion to dismiss should be granted and the writ should not issue.

Thomas Alexander Porter was convicted in the Circuit Court of the City of Norfolk of capital murder, use of a firearm in the commission of a felony, and grand larceny. The jury found the aggravating factor of "future dangerousness" and fixed Porter's sentence at death for the capital murder conviction and 22 years' imprisonment for the non-capital offenses. The trial court imposed the sentences fixed by the jury. This Court affirmed petitioner's convictions and upheld the sentence of death in *Porter v. Commonwealth, 276 Va. 203, 215, 661 S.E.2d 415, 419 (2008)*, **[***2]** cert. denied, *556 U.S. 1189, 129 S. Ct. 1999, 173 L. Ed. 2d 1097 (2009)*.

CLAIM (I)

In Claim (I), petitioner alleges he was denied the right to a fair trial by an impartial jury because Juror T, who served as a juror during petitioner's trial, failed to disclose during voir

dire that Juror T's brother was employed as a deputy sheriff in Chesapeake, Virginia. When asked by defense counsel if he had any family members **[*327]** involved in law enforcement, Juror T stated only that he had a nephew who was a police officer in Arlington County, where the case was being tried after a change of venue from the City of **[**539]** Norfolk. Petitioner alleges that Juror T's service was affected because the victim was a law enforcement officer. Petitioner contends that Juror T found the victim's wife to be a powerful witness and that he found her testimony moving and emotional precisely because Juror T's brother is a deputy sheriff. Petitioner alleges that due to Juror T's concealment of his brother's service as a Chesapeake law enforcement officer, petitioner was unable to conduct meaningful voir dire as to the juror's potential prejudice.

The Court holds that it can consider Claim (I), but it is without merit. The record, including the trial transcript **[***3]** and the affidavits provided in support of the petition for a writ of habeas corpus, demonstrates that Juror T did not disclose his brother's service as a Chesapeake law enforcement officer during voir dire or at any time prior to the conclusion of petitioner's direct appeal. Thus, this constitutional claim could not have been raised at trial or on direct appeal and is ripe for consideration.

In determining whether to grant a new trial based on an allegation that a juror was dishonest during voir dire, this Court applies the two-part test enunciated in *McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)*, which states that

> ***HN1***[] to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556.

In this case, defense counsel, Joseph A. Migliozzi, Jr., asked the jurors, "But is anyone here, or a member of your close personal family, **[***4]** worked in law enforcement in any capacity as a volunteer or an employee?" Several prospective jurors, including Juror T, raised hands in response. The entirety of the exchange with Juror T was as follows:

> **[*328]** [JUROR T]: My nephew is an Arlington County police officer.
> MR. MIGLIOZZI: Your nephew?
> [JUROR T]: Yes.
> MR. MIGLIOZZI: In this county here?
> [JUROR T]: Yes.
> MR. MIGLIOZZI: Do you think, with that being the case, that that would impair your ability to sit on this jury and render a fair and impartial verdict in this case?
> [JUROR T]: No.

Upon receiving Juror T's negative response, counsel moved on to the next prospective juror. The record demonstrates that Juror T answered truthfully that he had a nephew who was an Arlington County Police Officer, Arlington County being the jurisdiction where the case was being tried following a change of venue, and that he was not asked, nor did he have the opportunity to answer, if he had any additional relationships with law enforcement officers. Thus, petitioner has failed to demonstrate that Juror T failed to answer honestly a material question during voir dire.

CLAIM (II)

In Claim (II), petitioner alleges the Commonwealth failed to disclose exculpatory information **[***5]** as required by *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, and presented false testimony or allowed it to go uncorrected in violation of *Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)*, and *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*.

As the Court has stated previously:

> In Brady[], the United States Supreme Court held that ***HN2***[] "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id. at 87*. Whether evidence is material and exculpatory and, therefore, subject to disclosure under Brady is a decision left to the prosecution. *Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)*. Inherent **[**540]** in making this decision is the possibility that the prosecution will mischaracterize evidence, albeit in good faith, and withhold material exculpatory evidence which the defendant is entitled to have under the dictates of Brady. If the defendant **[*329]** does not receive such evidence, or if the defendant learns of the evidence at a point in the proceedings when he cannot effectively use it, his due process rights as enunciated in Brady are violated. *United States v. Russell, 971 F.2d 1098 (4th Cir. 1992)*; **[***6]** *United States v. Shifflett, 798 F. Supp. 354 (1992)*; *Read v. Virginia State Bar, 233 Va. 560, 564-65, 357 S.E.2d 544, 546-47, 3 Va. Law Rep. 2839 (1987)*.
> . . . .

> Exculpatory evidence is material if there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. "A reasonable probability" is one which is sufficient to undermine confidence in the outcome of the proceeding. *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*; *Robinson v. Commonwealth, 231 Va. 142, 151, 341 S.E.2d 159, 164 (1986)*.

Muhammad v. Warden, 274 Va. 3, 4, 646 S.E.2d 182, 186 (2007) (quoting *Muhammad v. Commonwealth, 269 Va. 451, 510, 619 S.E.2d 16, 49-50 (2005)* (quoting *Bowman v. Commonwealth, 248 Va. 130, 133, 445 S.E.2d 110, 111-12, 10 Va. Law Rep. 1499 (1994))*, cert. denied, *552 U.S. 1319, 128 S. Ct. 1889, 170 L. Ed. 2d 760 (2008)*.

Furthermore, this Court has previously held that, ***HN3***[↑] "[i]n order to find that a violation of Napue occurred[,] . . . we must determine first that the testimony [at issue] was false, second that the prosecution knew of the falsity, and finally **[**541]** that the falsity affected the jury's judgment." *Teleguz v. Commonwealth, 273 Va. 458, 492, 643 S.E.2d 708, 729 (2007)*, cert. denied, *552 U.S. 1191, 128 S. Ct. 1228, 170 L. Ed. 2d 78 (2008)*.

(A)

In **[***7]** Claim (II)(A), petitioner alleges the Commonwealth was required to, but did not, disclose that a prosecution witness, Jim Downey, was under arrest for a probation violation that exposed him to a 17 year prison sentence at the time he testified at petitioner's trial. Petitioner contends that the Commonwealth failed to disclose that the prosecutor pursuing the probation violation charges against Downey was the same prosecutor who elicited Downey's testimony at petitioner's trial, and that Downey was arrested on the same day that he provided testimony in petitioner's trial, and then later released on his own recognizance.

[*330] Because the information regarding Downey's arrest was available to petitioner via public records in existence at the time of his direct appeal, the Court holds that Claim (II)(A) is barred because this non-jurisdictional issue could have been raised on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton v. Parrigan, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974)*, cert. denied, *419 U.S. 1108, 95 S. Ct. 780, 42 L. Ed. 2d 804 (1975)*.

(B)

In Claim (II)(B), petitioner alleges the Commonwealth failed to disclose to him that Simone Coleman, a prosecution witness, contradicted **[***8]** the claim of Selethia Anderson, another prosecution witness, of having seen the shooting occur. Relying on an affidavit by Coleman, petitioner argues that Anderson's testimony that she was sitting on her front porch when she saw the police vehicle arrive, watched as petitioner approached the officer and shot him, and observed petitioner run towards his parked vehicle and point his gun in her direction, causing her to flee inside with her baby, was subject to impeachment by Coleman's statement that she lived in the same apartment and did not see anyone sitting on the porch during the same time frame.

The Court need not resolve questions related to whether this information was material because the Court holds that the evidence was not favorable to petitioner, as it did not contradict the testimony of Selethia Anderson and, therefore, failure to disclose was not a violation of *Brady*. In order to show a violation of *Napue*, petitioner must show that Anderson's testimony was false, that the prosecution knew of the falsity, and that the falsity affected the jury's judgment. *Napue, 360 U.S. at 269-71*. See *Teleguz, 273 Va. at 491-92, 643 S.E.2d at 729*.

The record, including the trial transcript **[***9]** and Coleman's affidavit, demonstrates that Anderson was sitting on her front porch and saw a police vehicle pull up and park across the street. Anderson witnessed petitioner shoot the officer, and then retreated to her home when she saw petitioner move toward his vehicle and point a gun in her direction. Coleman's trial testimony and affidavit demonstrate that she noticed the police vehicle pulling up the road as she was "coming out of [her] home and starting to cross 28th Street." After Coleman walked down the street, she glanced back and witnessed petitioner shoot the police officer. Coleman ran away from the shooting, but **[*331]** then returned to her apartment after she saw the petitioner flee. The witnesses' testimony supports the inference that Anderson entered and exited the porch in between the time that the porch would have been visible to Coleman as she exited her apartment and walked down the street. Furthermore, Coleman's affidavit states only that she "most likely" would have noticed if Anderson had been sitting on the porch when Coleman exited the building.

(C)

In Claim (II)(C), petitioner alleges the Commonwealth was required to, but did not, disclose information regarding previous **[***10]** incidents of the victim's unprofessional conduct as a Baltimore, Maryland police officer. Petitioner contends the Commonwealth did not provide exculpatory evidence regarding a 1994 incident in which Officer Reaves handcuffed a suspect on the ground and slashed the tires of the suspect's bicycle. During this incident, a bystander, George Hite, objected and was arrested for disorderly conduct. A fellow Baltimore police officer swept Hite's legs

out from under him, causing Hite to hit his head resulting in Hite's death. In a subsequent civil lawsuit, Officer Reaves stated he believed his fellow officer had acted appropriately, although eyewitnesses contradicted Reaves' version of events.

Another incident of Officer Reaves' alleged unprofessional conduct occurred in 2001, when he allegedly engaged in a pursuit of a dirt bike in contravention of police policy. When Officer Reaves caught up to the dirt bike, the driver lost control of the bike, was thrown into a utility pole and died of head injuries. Petitioner argues that evidence regarding these incidents would have undermined the Commonwealth's assertions that Officer Reaves was not aggressive, bolstered petitioner's defense that Officer **[***11]** Reaves drew his gun and pointed it at petitioner without provocation, and created a reasonable probability that at least one juror would have concluded the Commonwealth did not establish "future dangerousness" during the sentencing phase.

The Court need not resolve questions related to whether this information was material because the Court holds that the evidence was not known to the Commonwealth. The record, including a 2009 Freedom of Information Act response from the Assistant City Attorney for the City of Norfolk and the affidavit of Philip Evans II, Deputy Commonwealth's Attorney for the City of Norfolk, demonstrates **[*332]** that the Commonwealth did not possess any information concerning the 1994 or 2001 incidents. Furthermore, ***HN4***[↑] pursuant to *Brady*, there is no obligation to produce information available to the defendant from other sources, including diligent investigation by the defense. See *Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002)*; *Cherrix v. Commonwealth, 257 Va. 292, 302-03, 513 S.E.2d 642, 649*, cert. denied, *528 U.S. 873, 120 S. Ct. 177, 145 L. Ed. 2d 149 (1999)*.

(D)

In Claim (II)(D), petitioner contends that the Commonwealth failed to disclose that Juror T had a brother who was a deputy sheriff in the City **[***12]** of Chesapeake.

The Court finds that Claim (II)(D) is without merit. The record, including the affidavits of the Deputy Commonwealth's Attorney and petitioner's counsel, demonstrates that the Commonwealth received the venire list the day before petitioner's trial, and petitioner's **[**542]** counsel received it the day of trial. The venire list provided no indication that Juror T had a brother who was a deputy sheriff in another jurisdiction. Thus, petitioner has not established that the Commonwealth possessed any additional information that was not provided to petitioner. Moreover, the record does not show that the Commonwealth knew Juror T's brother was employed as a deputy sheriff.

Petitioner argues that all of the allegedly exculpatory evidence must be considered in its totality when determining the materiality of the evidence. Petitioner is correct that ***HN5***[↑] when considering materiality, we consider suppressed evidence as a whole, not item by item. See *Workman v. Commonwealth, 272 Va. 633, 645, 636 S.E.2d 368, 375 (2006)*; *Kyles v. Whitley, 514 U.S. 419, 436, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*. However, we do not reach the issue of materiality unless we first determine that the evidence was not available to petitioner, or is **[***13]** favorable to the accused because it is exculpatory or because it may be used for impeachment. *Workman, 272 Va. at 644-45, 636 S.E.2d at 374*; *Muhammad, 274 Va. at 13, 646 S.E.2d at 191*. The allegedly withheld evidence in Claim (II)(B) was not favorable to the accused. Furthermore, the evidence in Claims (II)(C) and (II)(D) was as available to the petitioner as it was to the Commonwealth. For these reasons, we will not address the issue of materiality, and we further hold that Claims (II)(B), (II)(C), and (II)(D) are without merit.

[*333] CLAIM (III)

In several portions of Claim (III), petitioner alleges counsel were ineffective for failing to investigate Porter's childhood and educational history. Counsel Joseph A. Migliozzi, Jr., executed an affidavit on September 8, 2009 recounting counsel's recollections that the investigation was conducted and that counsel made strategic choices concerning additional investigation based upon the information counsel had received. Counsel was unable, however, to provide much detail because counsel's notes had been retained by the Office of the Capital Defender, which would not allow counsel to review the files citing privilege on behalf of petitioner. This **[***14]** Court ruled that petitioner had waived his privilege with respect to counsel's notes and had waived the work product protection as to materials relating to petitioner's claims that counsel had failed to investigate petitioner's childhood and educational history. The circuit court subsequently reviewed the materials in camera and ordered that certain documents be turned over to the respondent for review by counsel.

In his supplemental motion to dismiss, the respondent relies on a second affidavit also executed by counsel on August 2, 2011 and reasserts the motion for production of counsel's files in their entirety and contends that although the files confirmed the existence of extended interviews with Bernice Porter and Cora Gaston and twelve separate interviews with school officials, counsel was unable to provide further details because of the redacted nature of the notes he received. Relying on counsel's assertion that the files confirm counsel's earlier recollection of his investigation and strategic choices

and noting that petitioner has provided no evidence that such recollection is inaccurate, the Court denies respondent's latest motion for the production of counsel's files and **[***15]** holds that the record is sufficient for the Court to address petitioner's claims.

(A)

In Claim (III)(A), petitioner alleges he was denied the effective assistance of counsel because counsel failed to request and obtain a jury instruction on the lesser-included offense of first-degree murder. Petitioner asserts that without proof of the gradation element that the killing was for the purpose of interfering with the law enforcement officer's official duties, the killing of an officer is no more than first-degree murder. Petitioner testified that Officer Reaves grabbed petitioner's arm and pointed a gun at petitioner without provocation. **[*334]** Petitioner contends that this testimony was corroborated in part by Reggie Copeland and Melvin Spruill, and established that petitioner believed Officer Reaves was not acting in his official capacity as a law enforcement officer at the time of the shooting. Petitioner argues counsel's **[**543]** failure to request the instruction was not strategic because counsel fought for instructions on other lesser offenses, and there was more than a scintilla of evidence to support granting the first-degree murder instruction.

The Court holds that Claim (III)(A) satisfies neither **[***16]** the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. The record, including the trial transcript and the September 8, 2009 affidavit of counsel, demonstrates that counsel made a strategic decision not to request a jury instruction that was not supported by the evidence. Porter testified that he knew there was a warrant out for his arrest, that he knew he was carrying a firearm although he was a convicted felon, and that he saw Officer Reaves in his police uniform. Although Porter also testified that he was not thinking about the warrant and that he thought Officer Reaves was "pulling a gun on him," accepting petitioner's testimony as true, and viewing the evidence in the light most favorable to him, nothing supports a finding that Porter reasonably believed the officer was not engaged in the execution of official duties at the time of the shooting. Furthermore, central to petitioner's defense was counsel's argument that petitioner did not premeditate his action. Therefore, a first-degree murder instruction, which would necessarily include the element of premeditation, would have been inconsistent with counsel's **[***17]** theory. Counsel's strategic decision to not request a first-degree murder instruction was reasonable under counsel's theory of the case. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(B)

In Claim (III)(B), petitioner alleges he was denied the effective assistance of counsel because counsel failed to emphasize Reggie Copeland's testimony that he saw petitioner exit the apartment building as Copeland ran up to Officer Reaves, who had parked in front of the apartment building. Petitioner asserts this testimony directly conflicted with the testimony of Latoria Arrington, and of other witnesses **[*335]** in the apartment, that petitioner did not leave the apartment until she said, "Why is Reggie talking to the police officer?" According to petitioner, Copeland's testimony, when viewed with the petitioner's testimony, was sufficient to cast doubt on the prosecution's argument that petitioner knew he would be confronting a police officer when he left the apartment. Petitioner continues that despite the fact that the timing sequence **[***18]** was critical, his counsel only argued to the jury that Arrington and the other apartment occupants could not have seen out of the window due to the positioning of the blinds. Petitioner contends that counsel failed to emphasize that Copeland's "far more powerful and credible" testimony undermined Arrington's credibility, and created reasonable doubt that Reaves was killed for the purpose of interfering with his official duties.

The Court holds that Claim (III)(B) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and the September 8, 2009 affidavit of counsel, demonstrates that counsel reasonably chose to pursue a trial strategy of attacking the credibility of the Commonwealth's witnesses, Reggie Copeland and Latoria Arrington. Furthermore, petitioner's own statement established that he saw Officer Reaves on the sidewalk before the shooting, which would support the Commonwealth's argument that petitioner chose to confront Officer Reaves. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's **[***19]** alleged error, the result of the proceeding would have been different.

(C)

In Claim (III)(C), petitioner alleges he was denied the effective assistance of counsel because counsel failed to adequately challenge the authenticity of the third jailhouse letter that petitioner allegedly wrote to a fellow inmate indicating that he shot Officer Reaves because petitioner believed a **[**544]** warrant for his arrest existed, and he did not want to return to jail. Petitioner asserts that counsel should have obtained an expert in handwriting analysis to opine that

someone other than petitioner wrote the note.

The Court holds that Claim (III)(C) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates **[*336]** that petitioner's counsel objected to the admission of the third jailhouse letter based on a lack of foundation, and the court overruled the objection. Petitioner has failed to establish that a handwriting expert would have opined that petitioner did not write the letter. Henry Chatman, the recipient of the letter, testified that he understood the letter came from petitioner. No evidence, other than petitioner's **[***20]** testimony, suggested the letter was not authentic. The affidavit of Nancy McCann, a document and handwriting examiner, submitted by petitioner, does not support petitioner's contention that he did not write the letter. McCann states only that "it cannot be conclusively determined through the application of accepted methods and techniques" that petitioner wrote the disputed letter. In fact, petitioner's counsel had obtained the services of an expert handwriting examiner, and after reviewing the expert's possible testimony, counsel made a strategic decision to not call the expert. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(D)

In Claim (III)(D), petitioner alleges he was denied the effective assistance of counsel because counsel failed to conduct an adequate investigation into petitioner's childhood and present important mitigating evidence regarding the abuse petitioner received as a child. Petitioner asserts counsel should have presented evidence that he was physically beaten by his caregivers and grew up amidst **[***21]** neighborhood and family violence. Petitioner contends that counsel conducted only cursory interviews with petitioner's mother and other adults in his life as he grew up, and did not follow up on evidence of physical abuse. Petitioner further asserts counsel's failure resulted in depriving his mental health expert of information crucial to his evaluation, and undermined confidence in the jurors' sentencing phase decisions because they were not provided with a proper context for understanding petitioner's behavior.

The Court holds that Claim (III)(D) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that counsel presented mitigating evidence to the jury through testimony about the violent neighborhood in which petitioner was raised, the abuse he observed his mother receive, the loss of a younger sibling, **[*337]** the lack of parental involvement and supervision, and the learning and emotional difficulties petitioner experienced in school. Petitioner's mother, Bernice Porter, specifically denied that any incidents of physical or sexual abuse of petitioner were ever reported. The affidavits **[***22]** of counsel demonstrate that counsel investigated and interviewed numerous friends and family members, and made the strategic decision not to call one of petitioner's caregivers because she would not have made a good witness. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(E)

In Claim (III)(E), petitioner alleges he was denied the effective assistance of counsel because counsel failed to reasonably investigate the Commonwealth's evidence of some of petitioner's prior convictions and unadjudicated bad acts. Petitioner contends that counsel was unable to rebut this aggravating evidence because counsel did not investigate these incidents and merely whispered questions about the incidents to petitioner as the Commonwealth's witnesses were taking the stand. According to petitioner, a proper investigation would have **[**545]** uncovered valuable mitigating information that would have explained how petitioner was provoked prior to each incident and how petitioner was punished afterwards.

Regarding another incident, petitioner alleges **[***23]** he punched another inmate in 1998 because the other inmate had attacked petitioner for no reason. Petitioner alleges counsel failed to discover that Corrections Officer Adkins' testimony of an incident in which petitioner grabbed Adkins' shirt through the cell bars and banged Adkins against the bars did not match Adkins' contemporaneous report of the incident. In addition, contrary to Adkins' testimony, petitioner alleges that after the incident petitioner was mistreated and punished. Concerning another incident, petitioner alleges that an inmate attacked by petitioner in 1997 had provoked petitioner by bumping into him during a fight the inmate was having with two other men, and by uttering "fighting words."

Petitioner contends that counsel made petitioner's reaction appear less reasonable by characterizing the "fighting words" as a homosexual advance. Petitioner also alleges counsel further failed to ascertain that on February 15, 2007, petitioner did not "refuse to go to **[*338]** court, saying he was not going to court without a fight." Petitioner states that he had questioned deputies as to a change in the strip search procedure, and that deputies responded by rushing the cell, punching **[***24]** and kicking petitioner, shooting petitioner with "mace balls," and pushing petitioner into an elevator wall. Petitioner alleges that counsel refused to take any action

despite petitioner's complaints and "failed to confront witnesses about the unprovoked and unjustified quality of their actions." Finally, petitioner contends counsel failed to rebut the Commonwealth's argument that petitioner ran away from police into a "stranger's house" by establishing that petitioner lived in the townhouse with his mother.

The Court holds that Claim (III)(E) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner fails to allege how the punishment or response petitioner may have received following each event serves to mitigate petitioner's actions. The record, including the trial transcript and the September 8, 2009 affidavit of counsel, demonstrates that counsel had investigators review the nearly 100 convictions and unadjudicated bad acts the Commonwealth intended to rely on during the sentencing phase of trial and obtain as much information as possible about each incident. Counsel personally visited Wallens Ridge and Red Onion State **[***25]** Prisons to obtain information about the incidents that took place while petitioner was an inmate at these facilities. Counsel also cross-examined witnesses about the incidents. Counsel attempted to elicit testimony that a guard had overheard the victim in the 1998 incident say something to petitioner prior to the altercation, which the officer denied. Counsel further elicited testimony that petitioner required medical treatment after the 1998 incident.

[*339] As to the Adkins incident, counsel specifically questioned Adkins as to whether his testimony had changed from his initial report, and Adkins clarified his testimony. As to the 1997 incident, counsel attempted to present evidence that the victim verbally provoked petitioner, but the court sustained the Commonwealth's objection to such testimony on the grounds that "words never justify an assault." Counsel reasonably followed up with questions regarding whether the inmate ever made physical advances toward petitioner, in order to demonstrate that petitioner had been provoked. Counsel also pursued this line of questioning because petitioner had told counsel that the victim was "queer."

As to the February 15, 2007 incident, counsel questioned **[***26]** the testifying deputy as to whether the officers had changed the procedures by which petitioner was searched to find out "if there was any particular reason why this may have caused this event to take place." Further, the deputy testified that petitioner was physically handled, by stating officers "took him down," held him against a wall so he could not move, pushed him into his cell, and "forced him in there hard." Finally, petitioner cites no support in the record for his assertion that he resided in the townhouse to which he fled during a police chase. Thus, petitioner has failed to demonstrate **[**546]** that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(F)(1)

In Claim (III)(F)(1), petitioner alleges he was denied the effective assistance of counsel because counsel failed to present accurate evidence of petitioner's experience in juvenile detention and the conditions under which he resided. Petitioner alleges "the prosecution painted juvenile detention as offering Porter a wealth of benefits that he rejected," and contends that counsel should have established that **[***27]** the juvenile detention facilities were "violent, overcrowded, stressful, and unsanitary." Relying on a 1992 report, and affidavits from a former Norfolk Detention Center Supervisor and a fellow inmate, petitioner alleges that treatment and rehabilitation were impossible due to the conditions, and that the juveniles were in the facilities, "first and foremost, for punishment."

The Court holds that Claim (III)(F)(1) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that the Commonwealth argued that petitioner was committed to several juvenile detention centers, which included "all the services that can be offered." Further, petitioner does not allege that he was denied any specific support services. To the contrary, the affidavit submitted by petitioner from Lanett W. Brailey, a teacher at one of the juvenile correctional centers in which petitioner resided, indicates that petitioner was recommended for, and received, special education classes. Petitioner fails to allege how the sentencing outcome would have been different had counsel presented information concerning the **[***28]** general conditions of these facilities. Thus, petitioner has failed to **[*340]** demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(F)(2)

In Claim (III)(F)(2), petitioner alleges he was denied the effective assistance of counsel because counsel failed to present evidence of the conditions under which petitioner lived while in prison, which would have given a context to jurors for his prison behavior and shown that he acted in the interest of self-preservation. Petitioner contends that counsel should have presented evidence that petitioner lived for four years in stressful and inhumane conditions, and that inmates at Wallens Ridge and Red Onion State Prisons were subjected to being beaten, electrically shocked, and strapped to a bed. Petitioner argues that guards frequently called inmates,

including petitioner, by racial slurs. Specifically, petitioner claims that guards harassed him due to his religious beliefs and because he had a female friend of a different race. According to petitioner, prisoners were often punished severely for even minor infractions.

The **[***29]** Court holds that Claim (III)(F)(2) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Other than his claims that he was verbally abused because of his relationship with a woman of another race and his religious beliefs, petitioner does not allege that the evidence he contends counsel should have proffered was related to petitioner's individual experience. This Court has held that ***HN6***[↑] "evidence regarding the general nature of prison life" is not admissible even if used to rebut the aggravating factor of future dangerousness. *Bell v. Commonwealth, 264 Va. 172, 201, 563 S.E.2d 695, 714 (2002)*(internal quotation marks and alteration omitted), cert. denied, *537 U.S. 1123, 123 S. Ct. 860, 154 L. Ed. 2d 805 (2003)*. Furthermore, petitioner fails to allege how the sentencing outcome would have been different had the jury understood that petitioner's violent acts in prison were fueled by petitioner's alleged need to act in the interest of self-preservation given the general nature of prison life or petitioner's having been taunted. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, **[**547]** but for counsel's **[***30]** alleged error, the result of the proceeding would have been different.

[*341] (F)(3)

In Claim (III)(F)(3), petitioner alleges he was denied the effective assistance of counsel because counsel failed to present evidence of petitioner's successful adaptation to prison life. Petitioner asserts that he was well regarded by fellow inmates who considered him to be generous and able to avoid trouble. Petitioner received a report from a counselor at Red Onion that he was a satisfactory worker as a "Houseman," and was a respectful employee. Petitioner contends that this information, had it been presented to jurors, would have lessened his moral culpability and tended to show that he did not pose a future danger to society if sentenced to life imprisonment.

The Court holds that Claim (III)(F)(3) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. During the penalty phase, counsel argued that petitioner's incarceration for life was appropriate because petitioner had been in the penitentiary for seven years and had incurred only two infractions, and that in all of his previous convictions he had either pleaded guilty or cooperated against a co-defendant. **[***31]** Petitioner has not established that additional testimony from fellow inmates, who would be subject to cross-examination, or the admission of one prison record indicating that in an annual review petitioner received a satisfactory work report, but also stating that petitioner needed to "abstain from socially inappropriate behavior," would have increased the likelihood of the jury sentencing petitioner to life imprisonment. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(G)

In Claim (III)(G), petitioner alleges he was denied the effective assistance of counsel because counsel failed to adequately investigate petitioner's educational history and present the mitigating factors that would have been revealed by such investigation. In Claim (III)(G)(1), petitioner asserts counsel should have presented evidence that petitioner's previous teachers and social workers identified petitioner's mother and great aunt as disinterested and uninvolved. Petitioner contends that he had special needs in his early educational development **[***32]** and he did not receive stability and security from his home life. In Claim (III)(G)(2), petitioner asserts counsel should have presented **[*342]** evidence that his early educational experience was disrupted by his chaotic home life in which he was frequently transferred to different schools and different homes. Petitioner contends that his unstable situation resulted in his lack of a genuine chance to succeed in school, and that counsel was unable to effectively rebut the Commonwealth's assertions that petitioner was solely responsible for his shortcomings, because counsel presented some school records, but failed to call as witnesses, former educators who remembered petitioner's positive behavior and character. In Claim (III)(G)(3), petitioner asserts counsel should have presented evidence that petitioner was identified in his early school years as needing special education and psychological services. In Claim (III)(G)(4), petitioner asserts counsel failed to adequately investigate petitioner's disciplinary notices in school, and such investigation would have shown petitioner's conduct was a manifestation of his "handicapping condition," not malicious intent. Petitioner contends that had counsel **[***33]** accurately presented information regarding his educational experiences, the evidence would have rebutted the Commonwealth's contentions that petitioner rejected efforts to help him, and would have humanized him by showing that his difficulties were the predictable product of his disabilities, not evil or malice.

The Court holds that Claim (III)(G) satisfies neither the "performance" nor the "prejudice" prong of the two-part test

enunciated in *Strickland*. The record, including the affidavits of counsel, demonstrates that counsel thoroughly investigated petitioner's school record, including conducting twelve separate interviews with school officials in Norfolk and New Jersey. The trial transcript demonstrates **[**548]** that counsel presented an extensive amount of testimony and evidence relating to petitioner's educational challenges and emotional and behavioral difficulties in school. Counsel presented testimony from seven teachers and one school psychiatrist and submitted school records into evidence, including petitioner's individual education plans and psychological reports. The testimony showed that petitioner was classified in school at various times as learning disabled, emotionally disturbed, **[***34]** and neurologically impaired. Three teachers testified that petitioner did not pose a behavioral problem in school, but that he was immature, solitary, cried a lot, never smiled, and needed special services. One teacher, Katherine Towler, stated that petitioner was cooperative during school testing and was a willing student, but that his disabilities led to frustration. Another teacher, **[*343]** Grace Houchins, testified that petitioner had "no village" to support him, and "was in a world almost by himself." Furthermore, Houchins had opined that, at the time petitioner was in school, "necessary help now will help prevent much sorrow down the road."

Counsel introduced records of the school psychiatrist, which showed the psychiatrist believed petitioner's emotional problems were causing his academic issues. The affidavit of counsel demonstrates that counsel contacted "nearly all" of petitioner's living teachers in Norfolk, and traveled to New Jersey to interview additional teachers and principals. In closing argument, counsel noted petitioner's frequent school transfers and his long existing classification in school as emotionally disturbed. Counsel argued the choices petitioner made were derived **[***35]** from the circumstances he was exposed to throughout his life, and that petitioner had no model to guide him and no one to instruct him. Petitioner does not identify any additional non-cumulative mitigating evidence derived by his educational history that he contends counsel failed to present. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(H)

In Claim (III)(H), petitioner alleges he was denied the effective assistance of counsel because counsel failed to offer expert mental health evidence. Petitioner asserts that counsel should have presented testimony by Dr. Stejskal, petitioner's court appointed defense psychologist, to show that petitioner's experiences of childhood abandonment and abuse derailed his emotional and psychological development. Dr. Stejskal would have opined that petitioner's adjustment was compromised by neuro-developmental problems and his mother's unwillingness to provide him with proper supervision and structure. Petitioner contends that, had counsel provided Dr. Stejskal's testimony, it would **[***36]** have rebutted the Commonwealth's claim that petitioner's conduct was solely the result of his "choices" rather than the outcome of circumstances over which he had no control.

The Court holds that Claim (III)(H) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the September 8, 2009 affidavit of counsel, demonstrates that counsel made a strategic decision not to present Dr. Stejskal's testimony because the introduction of such evidence **[*344]** would have allowed the Commonwealth to present damaging testimony from its own expert, Dr. Leigh D. Hagan. Dr. Hagan's opinions would have contradicted and undercut Dr. Stejskal's testimony, as Dr. Hagan's report stated that "while certain factors of [petitioner's] childhood history were mitigating because they were beyond his control, the much larger portion of the defendant's life reflects his own independent decision making capacity," and that "[t]he way in which he used that capacity compromised his character." Counsel's decision to present evidence of petitioner's emotional and neurological issues through his school records and not present Dr. Stejskal's testimony prevented **[***37]** the Commonwealth from submitting Dr. Hagan's opinions as rebuttal evidence. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

[549]** (I)

In Claim (III)(I), petitioner alleges he was denied the effective assistance of counsel because counsel failed to discover and use evidence of Officer Reaves' history of unprofessional conduct while he was a Baltimore City police officer.[1] Petitioner contends that counsel should have requested Reaves' personnel file when Reaves' previous performance was obviously relevant because the main factual dispute at trial was whether Reaves approached petitioner forcefully and with his gun drawn. Petitioner contends that had the jury been presented with such evidence, there is a reasonable probability that he would not have been convicted of capital

[1] In support of this claim, petitioner attempts to incorporate "the availability, **[***38]** substance, and prejudice resulting from counsel's omissions" from Claim (II)(C). The Court declines to consider these allegations "by reference."

murder and at least one juror would have found that "an aggravating factor was not proven beyond a reasonable doubt or that death was not the most appropriate punishment."

The Court holds that Claim (III)(I) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner acknowledges that counsel was not on notice of Reaves' alleged prior employment history. Petitioner fails to articulate how personnel records relating to Officer Reaves' employment as a Baltimore police officer, which do not show any formal disciplinary proceedings and do not reference any instances of Officer **[*345]** Reaves inappropriately displaying or using his service weapon, would have been relevant in bolstering petitioner's testimony that Officer Reaves forcefully approached petitioner with his gun drawn. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(J)

In Claim (III)(J), petitioner alleges that, if this Court holds that the Brady claim raised in Claim (II)(D) is defaulted because counsel should have raised it at trial **[***39]** and on direct appeal, he was denied the effective assistance of counsel because counsel failed to raise the claim that Juror T was biased due to his brother's employment as a law enforcement officer at trial and on direct appeal. Petitioner further contends that participation of a biased juror is a "structural error" and prejudice is presumed. See, e.g., *Jackson v. Warden, 271 Va. 434, 436, 627 S.E.2d 776, 781 (2006)* (describing "structural error" as "defying harmless error review").

The Court holds that Claim (III)(J) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and the September 8, 2009 affidavit of counsel, demonstrates that counsel did not know that Juror T had a brother in law enforcement. More importantly, petitioner has provided no admissible evidence that Juror T was biased against petitioner as a result of his brother's employment. Petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(K)

In Claim (III)(K), petitioner **[***40]** alleges he was denied the effective assistance of counsel because counsel failed to request that Officer Reaves' gun holster be tested for fingerprints. Petitioner asserts such testing would have shown that petitioner's fingerprints were not on the snap and thumb break of the holster, which would have supported his testimony that Officer Reaves had already drawn his gun when petitioner shot him, and undermined the Commonwealth's assertion that petitioner took the gun from Officer Reaves' holster.

[*346] The Court holds that Claim (III)(K) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner has failed to proffer any evidence that, had fingerprint testing been done, it would have shown the absence of his fingerprints on Officer Reaves' holster, **[**550]** or that such evidence would have supported petitioner's version of the events. Although the testimony at trial demonstrated that the holster snap would have had to be released in order for the gun to be removed, there was no evidence that unsnapping the device required a maneuver that would leave a clear and identifiable fingerprint. Thus, petitioner has failed to demonstrate that counsel's **[***41]** performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

(L)

In Claim (III)(L), petitioner alleges he was denied the effective assistance of counsel because counsel failed to renew and expand the motion to recuse the trial judge. Petitioner also alleges that counsel failed to object every time the trial judge engaged in acts of bias against petitioner.[2]

The Court holds that Claim (III)(L) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and the pretrial motions, demonstrates that counsel did file a motion for the trial judge to recuse himself prior to trial based on the fact that the judge was a former prosecutor whose office had prosecuted petitioner for several offenses, including at least one that had been admitted into evidence. Counsel renewed **[***42]** the motion for recusal, on different grounds, at the end of trial. Petitioner has not alleged what further actions counsel should have taken to object to the trial judge's participation on this basis. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

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[2] In support of this claim, petitioner attempts to incorporate petitioner's allegations in Claim (IV) that the trial court deprived petitioner of his right to a fair trial. The Court declines to consider these allegations "by reference."

[*347] CLAIM (IV)

In Claim (IV), petitioner alleges he was deprived of his due process right to a fair trial because the trial judge had a preexisting bias against petitioner based on the judge's former career as a prosecutor.

The Court holds that Claim (IV) is barred because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton, 215 Va. at 29, 205 S.E.2d at 682*.

Upon consideration whereof, petitioner's motion to supplement the appendix, motions for production of documents and for appointment of experts, and prayer for a plenary hearing are denied.

Upon consideration of the respondent's "Motion to Strike Appendix Entries," the petitioner's opposition and the respondent's reply, **[***43]** the Court declines to strike the entries. The Court will, however, apply the appropriate evidentiary rules and the petitioner's assertions that certain statements are not being offered for the truth of the matters asserted when considering the admissibility of the exhibits and of any statements contained in the exhibits.

Upon consideration of the petitioner's "Motion to Strike the Warden's Evidence Proffered with the Motion to Dismiss," the respondent's opposition and the petitioner's reply, the Court denies petitioner's motion to strike all of the Warden's evidence, holding that the submission of affidavits is permissible pursuant to *Code § 8.01-660*. The Court will, however, apply the appropriate evidentiary rules and the respondent's assertions that certain statements are not being offered for the truth of the matters asserted when considering the admissibility of the exhibits and statements contained therein.

Accordingly, for the reasons stated, the petition is dismissed.

This order shall be published in the Virginia Reports.

End of Document

H

Supreme Court of Virginia.
Thomas Alexander PORTER
v.
COMMONWEALTH of Virginia.

Record Nos. 071928, 071929.
June 6, 2008.

Background: Defendant was convicted in the Circuit Court of the City of Norfolk, Charles D. Griffith, Jr., J., of capital murder, use of a firearm in the commission of a felony and grand larceny, and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, G. Steven Agee, J., held that:
(1) failure of trial court, when it granted defendant's motion for a change of venue, to obtain an order designating the judge to sit in the judicial circuit where the trial took place, did not implicate the court's subject matter jurisdiction, overruling *Gresham v. Ewell*, 85 Va. 1, 6 S.E. 700;
(2) defendant waived any defects in territorial jurisdiction;
(3) trial court did not abuse its discretion by finding that probative value of evidence showing defendant had previously been convicted of a violent felony outweighed the incidental prejudicial effect;
(4) instruction on the lesser-included offense of second-degree murder was not warranted;
(5) trial court did not abuse its discretion by denying motion by defendant to appoint an expert to assess the risk of future dangerousness posed by defendant if he was incarcerated for life:
(6) trial court did not abuse its discretion by denying defendant's motion for relief from allegedly excessive courtroom security; and
(7) death sentence was not excessive and/or disproportionate.

Affirmed.

Keenan, J., dissented and filed opinion.

Koontz, J., dissented and filed opinion.

West Headnotes

[1] Criminal Law 110 1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) k. Construction in favor of government, state, or prosecution. Most Cited Cases

In an appeal of a criminal conviction by a defendant, the Supreme Court considers the evidence presented at trial in the light most favorable to the Commonwealth, the prevailing party in the circuit court.

[2] Criminal Law 110 1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and authorities. Most Cited Cases

Defendant abandoned 12 of his 21 assignments of error, in his appeal of capital murder conviction and death sentence, where he only briefed and argued nine of those assignments of error. Sup.Ct.Rules, Rule 5:22(b).

[3] Criminal Law 110 142

110 Criminal Law
110IX Venue
110IX(B) Change of Venue

110k142 k. Jurisdiction and proceedings after change. Most Cited Cases

Failure of trial judge, in prosecution of defendant for capital murder, use of a firearm in the commission of a felony and grand larceny, when the judge granted defendant's change of venue motion, conducted trial in another judicial circuit and subsequently issued rulings on post-trial motions under the caption of the original judicial circuit, to obtain an order designating the judge to sit in the judicial circuit where the trial took place or an order transferring the record from the original judicial circuit, did not implicate subject matter jurisdiction and instead implicated territorial jurisdiction; both judicial circuits had subject matter jurisdiction for the trial of the charges against defendant, and statute stating the circuit courts had exclusive original jurisdiction for the trial of offenses committed within their respective circuits was only a grant of territorial jurisdiction, overruling *Gresham v. Ewell*, 85 Va. 1, 6 S.E. 700. West's V.C.A. §§ 17.1–105, 17.1–513, 19.2–239, 19.2–253.

[4] Courts 106 ⚿24

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k22 Consent of Parties as to Jurisdiction
106k24 k. Of cause of action or subject-matter. Most Cited Cases

Courts 106 ⚿37(1)

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k37 Waiver of Objections
106k37(1) k. In general. Most Cited Cases

Subject matter jurisdiction cannot be granted or waived by the parties.

[5] Courts 106 ⚿40

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k40 k. Acts and proceedings without jurisdiction. Most Cited Cases

Lack of subject matter jurisdiction renders an act of the court void.

[6] Courts 106 ⚿29

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k29 k. Exercise of jurisdiction beyond territorial limits. Most Cited Cases

Criminal Law 110 ⚿106

110 Criminal Law
110IX Venue
110IX(A) Place of Bringing Prosecution
110k106 k. Nature and necessity of venue in prosecution. Most Cited Cases

Criminal Law 110 ⚿145

110 Criminal Law
110IX Venue
110IX(C) Objections and Exceptions
110k145 k. In general. Most Cited Cases

"Territorial jurisdiction" or "venue" goes to the authority of the court to act in particular circumstances or places and is waived if not properly and timely raised.

[7] Criminal Law 110 ⚿979(1)

110 Criminal Law
110XXIII Judgment
110k979 Jurisdiction
110k979(1) k. In general. Most Cited Cases

Criminal Law 110 990.1

110 Criminal Law
110XXIII Judgment
110k990 Requisites and Sufficiency of Judgment
110k990.1 k. In general. Most Cited Cases

The judgment of a court which is defective in territorial jurisdiction or venue is only voidable and not void.

[8] Criminal Law 110 93

110 Criminal Law
110VIII Jurisdiction
110k91 Jurisdiction of Offense
110k93 k. Nature or grade of offense. Most Cited Cases

All circuit courts have jurisdiction over all felonies committed in the Commonwealth. West's V.C.A. § 17.1–513.

[9] Statutes 361 206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving effect to entire statute. Most Cited Cases

Legislative enactments should not be read in a manner that will make a portion of it useless, repetitious, or absurd; on the contrary, every act of the legislature should be read so as to give reasonable effect to every word.

[10] Statutes 361 206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving effect to entire statute. Most Cited Cases

Statutes 361 212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other matters. Most Cited Cases

Every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.

[11] Courts 106 4

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k3 Jurisdiction of Cause of Action
106k4 k. In general. Most Cited Cases

Criminal Law 110 106

110 Criminal Law
110IX Venue
110IX(A) Place of Bringing Prosecution
110k106 k. Nature and necessity of venue in prosecution. Most Cited Cases

Venue and jurisdiction, though sometimes confounded, are, accurately speaking, separate and distinct matters; jurisdiction is authority to hear and determine a cause, or the right to adjudicate concerning the subject matter in the given case, while venue is merely the place of trial.

[12] Criminal Law 110 105

110 Criminal Law
110VIII Jurisdiction
110k105 k. Waiver of objections. Most Cited Cases

Defendant waived any defects in the territorial jurisdiction of the judicial circuit in which his trial was conducted, in prosecution of defendant for capital murder, use of a firearm in the commission of a felony and grand larceny, where defendant asked

for a change of venue, when offered the chance to move from the judicial circuit when the trial began defendant declined, and, until raised by the Supreme Court during defendant's appeal, defendant never objected or questioned the exercise of the circuit court's authority or any potential defects in that authority by virtue of conducting proceedings in either the judicial circuit in which defendant was charged or the judicial circuit in which the trial was conducted. West's V.C.A. § 19.2–244.

[13] Courts 106 1

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106I(A) In General
106k1 k. In general; nature and source of judicial authority. Most Cited Cases

Subject matter jurisdiction comes only by constitutional or statutory provision.

[14] Sentencing and Punishment 350H 1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k. Mode of execution. Most Cited Cases

Neither execution by lethal injection nor execution by electrocution violate the prohibition against cruel and unusual punishment in the Eighth Amendment. U.S.C.A. Const.Amend. 8; West's V.C.A. § 53.1–234.

[15] Sentencing and Punishment 350H 1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k. Mode of execution. Most Cited Cases

When a condemned prisoner has a choice of method of execution, the inmate may not choose a method and then complain of its unconstitutionality, particularly when the constitutionality of the alternative method has been established. U.S.C.A. Const.Amend. 8; West's V.C.A. Code § 53.1–234.

[16] Prisons 310 270

310 Prisons
310II Prisoners and Inmates
310II(H) Proceedings
310k270 k. In general. Most Cited Cases
(Formerly 310k4(1))

Agency action by the Virginia Department of Corrections concerning inmates of prisons does not fall within the scope of the Virginia Administrative Process Act (APA). West's V.C.A. § 2.2–4002 (B)(9).

[17] Criminal Law 110 371.13

110 Criminal Law
110XVII Evidence
110XVII(F) Other Misconduct by Accused
110XVII(F)6 Other Misconduct Showing Motive
110k371.13 k. Homicide, mayhem, and assault with intent to kill. Most Cited Cases
(Formerly 110k371(12), 110k369.2(3.1))

Trial court did not abuse its discretion by finding that probative value of evidence showing that defendant had previously been convicted of a violent felony, admitted for the limited purposes of proving motive and an essential element of a crime, outweighed the incidental prejudicial effect, in trial of defendant for capital murder, use of a firearm in the commission of a felony and grand larceny following defendant's shooting of police officer; defendant testified that he knew when he shot the officer that he was subject to a five-year mandatory prison sentence if officer found handgun, Commonwealth did not specifically detail defendant's other past bad acts, and trial court instead instructed jury that defendant was a violent felon, that he was prohibited from possessing a firearm and that he would face a mandatory five-year prison sentence if found with a firearm. West's V.C.A. §§ 18.2–31(6), 18.2–308.2.

[18] Criminal Law 110 338(7)

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k338 Relevancy in General
110k338(7) k. Evidence calculated to create prejudice against or sympathy for accused. Most Cited Cases

Criminal Law 110 1153.3

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.3 k. Relevance. Most Cited Cases

The responsibility for balancing the competing considerations of probative value and prejudice rests in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal in the absence of a clear abuse.

[19] Homicide 203 1456

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1456 k. Degree or classification of homicide. Most Cited Cases

Instruction on the lesser-included offense of second-degree murder was not warranted, in trial of defendant for capital murder for shooting a police officer; defendant's only evidence that he shot officer without premeditation was defendant's own testimony claiming that he shot the officer because he thought the officer was going to kill him, but defendant shot the officer two more times after officer fell, defendant admitted that he shot directly into officer's forehead with his first shot, and defendant removed the officer's pistol from its holster after the officer was shot.

[20] Criminal Law 110 1144.14

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.14 k. Instructions. Most Cited Cases

In an appeal by defendant asserting that the trial court erred by not instructing the jury on a lesser included offense, the Supreme Court must view the evidence in the light most favorable to the defendant, the proponent of the instruction.

[21] Costs 102 302.2(2)

102 Costs
102XIV In Criminal Prosecutions
102k301.1 Security for Payment; Proceedings in Forma Pauperis
102k302.2 Production of Witnesses or Evidence
102k302.2(2) k. Expert witnesses or assistance in general. Most Cited Cases

Trial court did not abuse its discretion by denying motion by indigent defendant on trial for capital murder to appoint a prison risk assessment expert to assess, for purposes of the future dangerousness aggravating factor, the risk of future dangerousness posed by defendant if he was incarcerated for life, where defendant did not proffer that the expert's proposed statistical analysis would focus on the particular facts of defendant's history and background or the circumstances of his offense. West's V.C.A. §§ 19.2–264.2, 19.2–264.4(C).

[22] Sentencing and Punishment 350H 1737

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)1 In General
350Hk1737 k. Counsel. Most Cited Cases

Sentencing and Punishment 350H 1781

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1781 k. Remarks and conduct of judge. Most Cited Cases

Supreme Court would not address on appeal the merits of contentions by defendant convicted of capital murder that trial court violated his Sixth Amendment right to counsel during argument in penalty phase of trial by interrupting defendant's counsel to state, in response to counsel's assertion that society meant prison society, that society meant "everybody, anywhere, anyplace, anytime," where defendant did not timely object to the trial court's comments. U.S.C.A. Const.Amend. 6.

[23] Sentencing and Punishment 350H 1780(1)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(1) k. In general. Most Cited Cases

Trial court did not abuse its discretion by denying defendant's motions in capital murder trial asking for relief from allegedly excessive courtroom security, as the security measures endorsed by the trial court did not present a risk of inherent prejudice that negated the presumption of innocence and the measures were justified because defendant had previously disobeyed the instructions of security officers and had tampered with his concealed restraining device; two uniformed officers continuously stood directly behind defendant inside the bar of the court, but the well of the courtroom had a relatively cavernous size, officers were 12 feet behind defendant, officers' field of vision would have been obstructed had they been sitting instead of standing, and defendant did not demonstrate actual prejudice. U.S.C.A. Const.Amend. 6.

[24] Criminal Law 110 1147

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In general. Most Cited Cases

A circuit court by definition abuses its discretion when it makes an error of law.

[25] Criminal Law 110 1147

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In general. Most Cited Cases

The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

[26] Criminal Law 110 633.17

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.17 k. Security in general; guards in courtroom. Most Cited Cases

The trial judge has overall supervision of courtroom security.

[27] Criminal Law 110 633.10

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.10 k. Requisites of fair trial. Most Cited Cases

One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial, and, accordingly, courts are required to safeguard against the intrusion of factors into the trial process that tend to subvert its purpose by prejudicing the jury.

[28] Criminal Law 110 1166.6

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.6 k. In general. Most Cited Cases

The actual impact of a particular courtroom security practice on the judgment of jurors cannot always be fully determined, but the probability of deleterious effects on fundamental rights calls for close judicial scrutiny, which consists of looking at the scene presented to jurors and determining whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

[29] Criminal Law 110 633.17

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.17 k. Security in general; guards in courtroom. Most Cited Cases

Whenever a courtroom security arrangement is challenged as inherently prejudicial, the question must be whether an unacceptable risk is presented of impermissible factors coming into play.

[30] Criminal Law 110 637.4

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k637 Custody and Restraint of Accused
110k637.4 k. Grounds and circumstances affecting use of restraints in general. Most Cited Cases
(Formerly 110k637)

While a defendant may not, under ordinary conditions, be forced to wear visible physical restraints because of the possibility of prejudice, such restraints may be constitutionally justified and not violate the right to a fair trial in the presence of a valid state interest, such as that of ensuring the security of the courtroom and those present in it, or even that of maintaining the dignity, order, and decorum of court proceedings. U.S.C.A. Const.Amend. 6.

[31] Sentencing and Punishment 350H 1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases

Jury instruction on the future dangerousness aggravating factor, in penalty phase of capital murder trial, was not unconstitutionally vague because it did not define “probability” and “reasonable likelihood;” future dangerousness aggravating factor was not unconstitutionally vague, and no additional instructions were needed in order for the jury to properly understand and determine such factor. U.S.C.A. Const.Amend. 6; West's V.C.A. § 19.2–264.2.

[32] Sentencing and Punishment 350H 1720

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1720 k. Dangerousness. Most Cited Cases

Sentencing and Punishment 350H 1731

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(F) Factors Related to Status of Victim
350Hk1729 Public Official or Employee

350Hk1731 k. Law enforcement officer. Most Cited Cases

Death sentence for defendant convicted of capital murder was not excessive and/or disproportionate to the penalty imposed in similar cases; defendant had shot and killed a police officer while the officer was performing his official duties, and sentence was imposed after the future dangerousness aggravating factor was found by the jury. West's V.C.A. § 17.1–313(C)(2).

[33] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

The proportionality review in death penalty cases is not designed to insure complete symmetry among all death penalty cases; rather, the goal of the review is to determine if a sentence of death is aberrant. West's V.C.A. § 17.1–313(C)(2).

[34] Sentencing and Punishment 350H 1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases

The proportionality review in death penalty cases allows the Supreme Court to determine whether the death sentence has been imposed by other courts or juries for similar crimes, considering both the crime and the defendant. West's V.C.A. § 17.1–313(C)(2), (E).

****419** Mary M. Calkins (Joseph A. Migliozzi, Jr., Capital Defender; David Bruck; Foley & Lardner, on briefs), for appellant.

Matthew P. Dullaghan, Senior Assistant Attorney General (Robert F. McDonnell, Attorney General; Jerry P. Slonaker, Senior Assistant Attorney General, on briefs), for appellee.

Present: All the Justices.

OPINION BY Justice G. STEVEN AGEE.

***215** In this appeal, we review the capital murder conviction and sentence of death imposed upon Thomas Alexander Porter in the Circuit Court of the City of Norfolk. In the first stage of a bifurcated trial conducted under Code § 19.2–264.3, a jury convicted Porter of capital murder, use of a firearm in the commission of a felony, and grand larceny.[FN1] In the penalty phase of the trial, the jury found the aggravating factor of future dangerousness and fixed Porter's sentence at death for the capital murder charge and a combined twenty-two years for the two other charges. The circuit court sentenced Porter in accordance with the jury's verdicts and entered final judgment.

FN1. Porter was also charged with one count of possessing a firearm as a previously convicted felon in violation of Code § 18.2–308.2. An order of nolle prosequi as to that charge was entered on July 16, 2007.

We review the circuit court's judgment and death sentence pursuant to Code § 17.1–313(A).[FN2] After mature consideration of Porter's assignments of error, the record, and the arguments of counsel, we find no error in the judgment of the circuit court and will affirm that judgment, including the sentence of death.

FN2. Porter has not assigned error to his convictions on the non-capital offenses. Accordingly, those convictions are final

and are not before us in this appeal.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

[1] Under well-settled principles of appellate review, we consider the evidence presented at trial in the light most favorable to the ***216** Commonwealth, the prevailing party in the circuit court. *Gray v. Commonwealth*, 274 Va. 290, 295, 645 S.E.2d 448, 452 (2007), *cert. denied*, 552 U.S. 1151, 128 S.Ct. 1111, 169 L.Ed.2d 826 (2008); *Juniper v. Commonwealth*, 271 Va. 362, 376, 626 S.E.2d 383, 393, *cert. denied*, 549 U.S. 960, 127 S.Ct. 397, 166 L.Ed.2d 282 (2006).

A. FACTS ADDUCED AT TRIAL [FN3]

FN3. Certain facts relating to the specific assignments of error will be stated or more fully described in the later discussion of a particular assignment of error.

At approximately 3:30 p.m. on October 28, 2005, Porter and Reginald Copeland traveled in Porter's Jeep to the Park Place apartment complex located at 2715 DeBree Avenue in the City of Norfolk to inquire about purchasing marijuana. Porter was carrying a concealed, nine-millimeter Jennings semi-automatic pistol. The two men entered the apartment of Valorie Arrington, where several people were present, including Valorie and her daughters, Latoria and Latifa; Valorie's cousins, Monica Dickens and April Phillips; Valorie's sister, Monique Arrington, also known as Monika; and Monique's daughter, Lamia.

Once inside, Porter began arguing with the women, brandishing his gun, and threatening that he might shoot one of them if provoked. ****420** Copeland left the residence, but Porter remained behind, locking the door so Copeland could not reenter. After being locked out of Valorie's apartment, Copeland walked away from the apartment complex and happened upon three uniformed police officers a block away, including Norfolk Police Officer Stanley Reaves. Copeland reported Porter's behavior to Officer Reaves and directed him to Valorie's apartment.

Officer Reaves drove his police cruiser to the front curb of the apartment building, parked the car, and walked across the grass towards the sidewalk leading from the street to the apartment door. As Officer Reaves approached the apartment, Porter left Valorie's apartment and began walking away. Officer Reaves confronted Porter, grabbed Porter's left arm, and instructed him to take his hands out of his pockets. Porter then drew his concealed weapon from his pocket and fired three times, killing Officer Reaves. Porter took Officer Reaves' service pistol and then fled in his Jeep.

Several eyewitnesses, along with Porter, testified at trial and provided various descriptions of the events leading up to and immediately***217** following Officer Reaves' death. Copeland testified that he was standing in a parking lot on the afternoon of Officer Reaves' death when Porter approached him. They decided to get into a Jeep Grand Cherokee that Porter was driving and go to Valorie's apartment to purchase marijuana.

Copeland testified that he and Porter entered Valorie's apartment because she was Copeland's friend and because he had smoked marijuana with her before. Once inside, they met Valorie and the other women who informed Copeland and Porter that they did not have any marijuana. The group then talked about various subjects, including a child's birthday party, but at some point in the conversation Porter began arguing with one of the women.

Copeland "didn't know what to do" but left the apartment and "ran down [to the next block] and told [Officer Reaves, ']Look, there is a man up in the house with some girls, and he shouldn't be in there.' " Copeland described the apartment building to Officer Reaves, and Officer Reaves drove his patrol car to the building with Copeland "running behind" the vehicle. Officer Reaves arrived at the building before Copeland, and as Copeland ap-

proached he saw "Officer Reaves in the car and Porter was coming out [of] the building." Copeland identified Porter to Officer Reaves, and Officer Reaves instructed Copeland to stay back and then approached Porter. Moments later, Porter and Officer Reaves disappeared from Copeland's viewpoint behind a parked van, but Copeland "heard gunshots and started running," and he "ran and told the [other] officers what happened."

Melvin Spruill, Jr., owner of the apartment complex, testified that he was picking up trash in the yard, when he "noticed a police car sitting on the corner" parked directly behind his van. Spruill entered his van and was preparing to leave when he noticed Officer Reaves talking with Porter. "[O]ut of the corner of [his] eye" Spruill saw Porter's hands drop down, raise up again with a gun, and then he heard a gunshot. Spruill ducked and "heard another shot ... [, m]aybe two shots," and then saw Porter run away. Spruill testified that he never saw Officer Reaves holding a gun, nor did he hear arguing between the two men before Porter shot Officer Reaves.

Simone Coleman testified that she was walking on the sidewalk near the apartment complex when she saw Officer Reaves' patrol car arrive. Coleman watched as Officer Reaves stepped out of his patrol car, and she saw Porter walking across the grass from the apartment, ***218** coming to "within a few feet" of her. She testified that Porter's hands were "[i]n his pockets" as Coleman passed by, and she "was looking back" to watch the confrontation between Officer Reaves and Porter. Coleman heard Officer Reaves instruct Porter to "take his hands out of his pockets," and then Officer Reaves " grabbed Mr. Porter's left arm." Coleman testified that Officer Reaves "didn't have a gun out," and that Porter, in response to Officer Reaves grabbing his arm, pulled a gun out of his pocket, pointed the gun at Officer Reaves' head, and pulled the trigger. Coleman watched Officer Reaves collapse to the ground, and she testified that Porter then shot Officer Reaves two ****421** more times. Coleman identified Porter in court as the man who killed Officer Reaves.

Selethia Anderson, who lived across the street from the apartment complex, was sitting on her front porch when she saw Officer Reaves arrive. Anderson testified that she watched Officer Reaves exit his vehicle and walk towards Porter as Porter was leaving the apartment complex. She described how Officer Reaves confronted Porter and "used his right hand to grab [Porter's] left hand," and then Porter immediately reached into his hoodie pocket with his right hand, pulled out a gun, and shot Officer Reaves in the head. Anderson testified that after Officer Reaves fell, Porter shot him twice more "between the back of the head and neck." According to Anderson, Porter knelt over Officer Reaves' body after the shooting, and when Porter left the scene, he was carrying a "bigger gun" than the one he had used to shoot Officer Reaves. Anderson identified Porter in court as the man who shot Officer Reaves.

Valorie testified that she was in her apartment that afternoon when Copeland arrived with Porter. According to Valorie, the two men "came for some marijuana" but the women did not have any, and asked the men to leave. Copeland agreed to leave, but Porter stayed inside, locked the door and kept Copeland outside. Valorie testified that she felt scared because Porter had "locked us in our own house." Valorie asked Porter why his hands were in his sweatshirt pocket, and Porter responded by pulling out his gun and asking, "[s]o are you going to give me the bag of weed or what?" Valorie testified that she uttered a prayer, and when Porter realized she was a Muslim, he told the women that they were "lucky" and he put away the gun. When Porter realized a police car had arrived, he left the apartment and ran "like some horses going down the stairs." Moments later, Valorie heard gunshots.

***219** Latoria's testimony confirmed that Porter entered Valorie's apartment along with Copeland, and that Copeland left the apartment but Porter remained inside, locking the door. Latoria testified

that Porter threatened that he would "get to clapping" if any of the women made a sudden move, and she explained that "clapping" was a term for "shooting." She testified that she looked out the window, noticed Officer Reaves arrive in his patrol car, and asked, "Why is Reggie [Copeland] talking to the police officer?" Latoria testified that Porter then immediately exited the apartment, and she watched through the window as Officer Reaves approached Porter, grabbed Porter's arm, and then Porter "reach[ed] into his right pocket and he pull[ed] out his gun and he shot him." Latoria testified that Officer Reaves did not have a weapon drawn when Porter shot him.

Dickens' testimony confirmed Valorie's and Latoria's accounts of the confrontation in Valorie's apartment between Porter and the women. Dickens testified that Porter threatened to "get to clapping" if any of the women began "talking smack." Dickens explained that she "was just real afraid right then for my whole family." Dickens testified that Porter left the apartment immediately when he learned that a police car had arrived, and she went to the window to watch what was happening. Dickens watched Officer Reaves approach Porter, grab Porter's arm, and then Porter "put the gun to his head" and shot Officer Reaves.[FN4]

> FN4. Dickens was never questioned as to whether she saw Officer Reaves draw his weapon.

Monika also testified that Porter entered Valorie's apartment with Copeland but stayed inside and locked the door after Copeland left. Monika confirmed that Porter threatened to "get it clapping in here with all y'all" and explained that " '[c]lapping' means you shoot somebody." Monika testified that when Porter learned that a police vehicle had arrived outside, he left the apartment immediately and began walking away. Monika testified that she watched out the window as "[t]he police officer grabbed Porter's arm," and Porter "pulled the gun out of his pocket and put it to [Officer Reaves'] forehead," and pulled the trigger. Monika testified that Officer Reaves "never drew his weapon. He got out of his car and walked over to Porter as if he just wanted to talk to him and that was it."

Robert Vontoure, a Navy seaman who lived across the street from where the shooting****422** occurred, testified that he arrived home from work and noticed a Jeep which he did not recognize parked outside ***220** his home. Vontoure explained that he was in his home, "sitting there watching TV and ... heard gunshots." Vontoure looked outside the window "and saw a gentleman coming running across our lawn, jump into the Jeep and leave." Vontoure identified Porter in court as the man who fled the scene in the Jeep vehicle.

After killing Officer Reaves, Porter traveled to New York City where he was apprehended one month later in White Plains, New York. The murder weapon was found in his possession at the time of his arrest. Officer Reaves' gun was eventually located in Yonkers, New York.

The autopsy report revealed that Officer Reaves suffered three close-range wounds to his head: one to the forehead, one to the left back of the head, and a flesh wound near the right ear. "The cause of death was two separate close range gunshot wounds to the head."

Porter did not dispute that he shot Officer Reaves, but his version of the events differed from that of the eyewitnesses. Porter testified in his own defense that he drove to Valorie's apartment with Copeland "[t]o get a bag of marijuana" because Copeland was his "means of getting marijuana." Porter parked the vehicle outside the apartment, and he "grabbed the gun out of the glove compartment box" before leaving the vehicle "[b]ecause the area ... is a bad area." Porter testified that he gave Copeland $10 to purchase marijuana, and that he waited outside while Copeland went inside to make the purchase.

Porter testified that after a few minutes had passed, Copeland emerged from an upstairs apart-

ment and invited him inside. Porter confirmed that Copeland left the apartment, but Porter denied locking the door and keeping Copeland outside. Porter also denied brandishing his gun inside the apartment or making a statement about shooting any of the women. Porter claimed that he left the apartment when he learned from the women that Copeland had not paid them for marijuana, and he denied that any of the women knew about Officer Reaves' arrival because "[w]asn't nobody even looking out the window."

Porter testified that he left the apartment and was walking to his vehicle "when Officer Reaves stepped in front of me and grabbed me." Porter and his counsel then had the following exchange:

Q. Did anything else happen when he did that?

A. Yes. I seen him pulling his gun.

***221** Q. What do you mean, you saw him pulling his gun?

A. Well, when he grabbed me with his left arm on my left arm, we were still standing face to face. I seen him pulling his gun. That's when I put my hands up in the air and backed up, looking at him, like, "What [are] you doing?"

Q. You just described that you put your hands up in the air?

A. Yes.

Q. And at that point, what happened?

A. Well, I got my hands in the air when he finally gets the gun out and point it at me. I take my hands down and pull my gun and started shooting.

Q. Why did you do that, Mr. Porter?

A. Because I was scared. I thought he was going to kill me because he looked angry at the time, so I was just worried for my safety.

Porter testified on direct examination that he could not remember how many times he pulled the trigger, but after he shot Officer Reaves, he bent down, picked up Officer Reaves' gun and ran. Porter explained that he left the scene because he "was scared" because he realized he "just killed an officer."

Porter testified repeatedly on cross-examination that he "never wanted to kill anybody" but he also admitted that he "pulled out the gun" and "shot [Officer Reaves] in the forehead." Porter and opposing counsel had this exchange on cross-examination:

Q. You meant to hit Stanley Reaves with a bullet, didn't you?

A. Yes, sir.

****423** Q. All right. And you took aim—therefore, you took aim at him, correct?

A. Yes, sir.

Q. You took aim at a part of his body, correct?

A. Yes, sir.

Q. And the part of his body that you took aim at and then before pulling the trigger from less than six inches away was directly into his forehead, correct?

A. Yes, sir.

....

***222** Q. And you agree that you knew you were aiming at his head, correct?

A. Yes, sir.

Porter also had this exchange on cross-examination:
Q. You admit that you ... pulled your gun out?

A. Yes, sir.

Q. And that you shot him in the head?

A. Yes, sir.

Q. You admit that you stole his gun?

A. Yes, sir.

Q. So according to your version of events, you claim that Officer Reaves pulled his gun, correct?

A. Yes.

Q. And the only thing about the crime that's alleged you committed, the capital murder of Officer Stanley Reaves, using a gun to commit that murder and stealing Officer Reaves' gun, the only part of the crime that we're here that you're on trial for that you dispute, really, is the reason why you shot Officer Reaves; is that correct?

A. Yes.

B. PROCEEDINGS BEFORE AND DURING TRIAL

Porter filed a motion before trial for a change of venue, to which the Commonwealth consented. The circuit court, Judge Charles D. Griffith presiding, entered an order granting the motion and a subsequent order "that the trial of the above referenced case be transferred to the Circuit Court of the Fourth Judicial Circuit located in Arlington, Virginia." The circuit court also granted Porter's motion to appoint William J. Stejskal, Ph.D., as a mitigation expert "to evaluate the Defendant and to assist the defense in accordance with the provisions of Code § 19.2–264.3:1." Similarly, the circuit court granted Porter's motion and appointed Bernice Anne Marcopulos, Ph.D., ABPP–Cn, as a clinical neuropsychologist expert to assist the defense.

***223** The Commonwealth filed a motion in limine requesting that evidence of Porter's prior felony convictions be admissible during the guilt stage of the trial. The Commonwealth requested to present the evidence that Porter "knew he [Porter] was a convicted felon who faced the prospect of being sent to prison for five (5) years should Officer Stanley Reaves ... have discovered the defendant to have been in possession of a firearm while a felon." Over Porter's objection, the circuit court granted the Commonwealth's motion permitting the introduction of evidence during the trial that Porter was a "convicted violent felon."

On January 5, 2007, Porter filed a "Motion for Appointment of Expert on Prison Risk Assessment and to Introduce Evidence on Prison Violence and Security" ("Prison Expert Motion"), requesting that the circuit court appoint Dr. Mark Cunningham as "an expert on the assessment of the risk of violence by prison inmates and, in particular, the risk of future dangerousness posed by the Defendant if incarcerated in a Virginia penitentiary for life." The court heard arguments on the motion and determined that the other experts already appointed "are going to be able to talk about [Porter's] background, his social history and things relating to that." The circuit court noted that this Court "has consistently upheld the denial of use of public funds for such an expert, as it's not considered to be ... proper mitigation evidence; therefore not relevant to capital sentencing" and denied the motion. Porter also filed a motion challenging the constitutionality of Virginia's execution protocols for lethal injection and electrocution, which the court denied.

****424** Porter's trial, with Judge Griffith presiding, commenced in Arlington County on February 26, 2007, and continued through March 14, 2007. On the afternoon of March 2, 2007, Porter objected to the position of two deputies who had been standing about four feet behind him, arguing that their presence standing, as opposed to sitting, prejudiced the jury. Porter subsequently filed a written motion and memorandum in support challenging the courtroom security arrangement. After hearing Porter's motion, the circuit court noted that Porter had previously resisted deputies' instructions while in custody and had tampered with his restraints. The court found that sitting would reduce the deputies' field of vision, and declined to order them to

be seated. Porter later raised the issue for a third time and moved for a mistrial, which the court denied.

***224** Upon presentation of all the evidence at the guilt stage, the parties argued jury instructions. Porter proposed a "second-degree murder instruction directly out of the model jury instructions" based on evidence that Porter shot Officer Reaves "in rapid succession, boom, boom, boom," and "that this act was not premeditated." The Commonwealth argued that the court should refuse the second-degree murder instruction because Porter's "own testimony is that he willfully and purposely and with deliberation pulled the gun out and aimed it at Officer Reaves and fired it." The court denied Porter's requested instruction.

C. PENALTY PHASE

During the penalty stage of the proceedings, the Commonwealth presented evidence in aggravation, which included Porter's prior convictions of misdemeanor carrying a concealed weapon in 1994, felony robbery and use of a firearm during the commission of a felony in 1994, misdemeanor disturbing the peace, misdemeanor assault and battery and misdemeanor threatening a police officer and resisting arrest in 1996, felony possession of heroin, felony possession of a firearm with drugs, and felony possession of a firearm by a convicted felon in 1997, misdemeanor assault and battery in 1997, and misdemeanor obstruction of justice in 2005. The Commonwealth presented evidence of several incidents while Porter was incarcerated, including altercations between Porter, fellow inmates, and prison guards. The Commonwealth also introduced audiotapes of portions of two telephone conversations between Porter and an unidentified female recorded during Porter's incarceration, which the Commonwealth introduced because they "are directly relevant to the issue of the defendant's lack of remorse" and included Porter bragging that he was a "good shot."

The Commonwealth also introduced the testimony of Officer Reaves' wife and sister, and each described the devastating impact of Officer Reaves' death upon his extended family. Porter presented mitigation evidence which included testimony of his mother and sister as to his childhood, family life and educational background.

The jury's verdict found "unanimously and beyond a reasonable doubt, after consideration of his history and background, that there is a probability that he ... would commit criminal acts of violence that would constitute a continuing serious threat to society," and sentenced Porter to death. After receipt of the presentence report, the ***225** circuit court confirmed the jury's verdict and sentenced Porter to death for the capital murder of Officer Reaves.

II. ANALYSIS

A. ABANDONED ASSIGNMENTS OF ERROR

[2] Prior to filing his opening brief, Porter submitted a list of twenty-one assignments of error in accord with Rule 5:22(b). However, only nine of those assignments of error have been briefed and argued by Porter.[FN5] Accordingly, the other twelve assignments of error have been abandoned and will not be considered in this opinion. Rule 5:17(c); *see also Teleguz v. Commonwealth*, 273 Va. 458, 471, 643 S.E.2d 708, 717 (2007). In this opinion, we will refer to the nine assignments ****425** of error as numbered in Porter's Brief of Appellant.

FN5. As numbered in Porter's initial assignments of error, Porter has failed to present any brief or argument with respect to assignments of error 1, 2, 3, 4, 10, 11, 12, 14, 15, 18, 19, and 20.

B. JURISDICTION UPON TRANSFER

Before addressing Porter's assignments of error, we first consider an issue raised sua sponte by this Court and addressed by the parties in supplemental briefs and argument. Based on our review of the record, we inquired whether the transfer of Porter's trial to Arlington (and the subsequent transfer back to Norfolk after the jury's verdicts) created issues of either subject matter or territorial jurisdic-

tion that would affect the judgments rendered by the circuit court.

Well in advance of trial, Porter filed a motion in the Circuit Court of the City of Norfolk requesting a change of venue and to which the Commonwealth agreed. The circuit court then entered an order on September 13, 2006, which granted a "change of venue" but did not specify a new location for trial. On October 2, 2006, the circuit court entered another order which "orders that the trial of the above-referenced case be transferred to the circuit court of the Fourth Judicial Circuit located in Arlington, Virginia." The Circuit Court of the County of Arlington ("Arlington") is the Seventeenth Judicial Circuit. The Fourth Judicial Circuit is limited to the City of Norfolk ("Norfolk"). It is unclear from the circuit court's order whether it was transferring the place of trial with the Norfolk Circuit Court sitting in Arlington or whether it was intended that the trial be conducted in Arlington as a trial in that circuit. Subsequent to these orders, a number of additional orders were entered in Norfolk under ***226** the caption of the Norfolk Circuit Court; [FN6] none of these orders related to the change of venue.

FN6. These comprise 11 orders, including: an order entered October 23, 2006, denying Porter's motion to quash a subpoena duces tecum and granting a motion in limine by the Commonwealth; an order for scientific investigation also entered October 23, 2006; an order entered November 3, 2006, granting funding for defense counsel's and Porter's witnesses' hotel accommodations in Arlington; an order entered January 8, 2007, appointing Porter's neuropsychologist; an order entered January 16, 2007, granting Porter's motion for additional neuropsychological evaluation but denying his motions to distribute a jury questionnaire, to suppress, and to allow cameras in the courtroom; an order denying Porter's motion to prohibit law enforcement spectators from wearing their uniforms in the gallery also entered January 16, 2007; three orders for the transportation of witnesses in custody entered January 18 and February 22, 2007; an order entered February 13, 2007, granting Porter's motion for the appointment of a qualified mental health expert; and an order entered February 16, 2007, denying Porter's motion to declare the death penalty unconstitutional, taking under advisement his motion to enjoin the Commonwealth from conducting lethal injections, and granting his proposed voir dire questions.

Porter's trial began in Arlington, with Judge Griffith sitting as the trial judge, on February 26, 2007. A series of "felony trial orders" were entered, all with the caption "In the Circuit Court of the County of Arlington," and reflecting the trial proceedings from February 26 to March 14. However, all these orders were entered on the same date, July 13, 2007, on stationery of the Clerk of the Circuit Court of Norfolk. [FN7]

FN7. These comprise 13 orders, dated February 26 through 28; March 1 and 2; March 5 through 9; and March 12 through 14, 2007. Each order summarizes that day's trial proceedings and all but four are unremarkable. The order dated February 26 recounts Porter's arraignment and the voir dire and empanelling of the jury. The order dated March 7 recounts the jury's verdict of guilty on the charges of capital murder, use of a firearm in the commission of a felony, and grand larceny. The order dated March 8 recounts the jury's sentencing recommendation on the charges of use of a firearm in the commission of a felony and grand larceny. The order dated March 14 recounts the jury's recommendation of the death sentence on the charge of capital murder and continues proceedings to the Circuit Court of Norfolk on July 16.

The felony trial orders recited the trial proceedings on the respective dates and none were endorsed by counsel. These orders included an order of March 7, 2007, which set out the jury's verdict of guilty on the charge of capital murder as well as a March 14, 2007, order reciting the jury's sentence of death. In that same March 14, 2007, order, the circuit court confirmed the jury verdict and found Porter guilty of capital murder, but also granted his motion "to refer this matter to the Probation Office for the Circuit Court of Norfolk, Virginia" and continued the case to July 16, 2007 "in the Circuit Court of ****426** the City of Norfolk." All remaining orders in the record reflect ***227** the caption of the Circuit Court of the City of Norfolk including the July 18, 2007 order sentencing Porter to death.

At no place does the record reflect that Porter questioned or inquired into the circuit court's authority to sit in Arlington, to try the case in Arlington, or to undertake any of the later proceedings in Norfolk. More importantly, Porter has never objected to any defect, real or imagined, relating to the circuit court's jurisdiction or authority to act in either Arlington or Norfolk. In fact, during the course of the trial in Arlington, Porter filed five motions captioned "In the Circuit Court of Norfolk County [sic] (sitting in Arlington County)." FN8 There can be no question that Porter was fully cognizant of, and actively participated in, a trial in Arlington pursuant to his motion to change venue, which he knew was being conducted by the same circuit court judge who began (and concluded) the case in Norfolk.

> FN8. These comprise Porter's motion for relief from excessive in-court security, with accompanying memorandum in support, and four memoranda in support of his motions requesting jury instructions.

The record does not contain an order under Code § 17.1–105, or otherwise, designating Judge Griffith to sit in the Circuit Court of Arlington County. The record also does not contain an order, as would appear to be required by Code § 19.2–253, whereby the Clerk of the Circuit Court of the City of Norfolk transmitted the record in Porter's case to the Clerk of the Circuit Court of Arlington County so that "such court shall proceed with the case as if the prosecution had been originally therein."

With this factual background in mind, Porter now argues in response to our inquiry that the judgments of conviction and sentence are void because "the provisions of § 17.1–105 are mandatory and limit a court's otherwise rightful exercise of its subject matter jurisdiction." Porter cites our decision in *Moore v. Commonwealth*, 259 Va. 431, 527 S.E.2d 406 (2000) to support his argument. The Commonwealth responds by noting that Code § 17.1–513 grants subject matter jurisdiction in felony cases to all circuit courts and argues the Norfolk Circuit Court was never divested of that authority. Consequently, the Commonwealth concludes the orders of the circuit court could not be void, but at most voidable, and that Porter has waived any objections to voidable orders.

[3] Upon consideration of the arguments, briefs and our precedent, we conclude that a lack of subject matter jurisdiction is not implicated in this case and that any irregularities as to the circuit court's ***228** authority raised at most an issue of territorial jurisdiction, which was waived by Porter's failure to timely object to any such defect.

Jurisdiction is a term which can engender much confusion because it encompasses a variety of separate and distinct legal concepts. We addressed this topic and differentiated the categories of jurisdiction in *Morrison v. Bestler*, 239 Va. 166, 387 S.E.2d 753 (1990).

> A court may lack the requisite "jurisdiction" to proceed to an adjudication on the merits for a variety of reasons.
>
> The term jurisdiction embraces several concepts including subject matter jurisdiction, which is the authority granted through constitution or statute to adjudicate a class of cases or controver-

sies; territorial jurisdiction, that is, authority over persons, things, or occurrences located in a defined geographic area; notice jurisdiction, or effective notice to a party or if the proceeding is *in rem* seizure of a *res;* and "the other conditions of fact must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or decree." *Farant Inv. Corp. v. Francis,* 138 Va. 417, 427–28, 122 S.E. 141, 144 (1924).

While these elements are necessary to enable a court to proceed to a valid judgment, there is a significant difference between subject matter jurisdiction and the other "jurisdictional" elements. Subject matter jurisdiction alone cannot be waived or conferred on the court by agreement of the parties. ****427***Lucas v. Biller,* 204 Va. 309, 313, 130 S.E.2d 582, 585 (1963). A defect in subject matter jurisdiction cannot be cured by reissuance of process, passage of time, or pleading amendment. While a court always has jurisdiction to determine whether it has subject matter jurisdiction, a judgment on the merits made without subject matter jurisdiction is null and void. *Barnes v. American Fert. Co.,* 144 Va. 692, 705, 130 S.E. 902, 906 (1925). Likewise, any subsequent proceeding based on such a defective judgment is void or a nullity. *Ferry Co. v. Commonwealth,* 196 Va. 428, 432, 83 S.E.2d 782, 784 (1954).

Even more significant, the lack of subject matter jurisdiction can be raised at any time in the proceedings, even for the first time on appeal by the court *sua sponte*. *Thacker v. Hubard,* 122 Va. 379, 386, 94 S.E. 929, 930 (1918). In contrast, ***229** defects in the other jurisdictional elements generally will be considered waived unless raised in the pleadings filed with the trial court and properly preserved on appeal. Rule 5:25.

One consequence of the non-waivable nature of the requirement of subject matter jurisdiction is that attempts are sometimes made to mischaracterize other serious procedural errors as defects in subject matter jurisdiction to gain an opportunity for review of matters not otherwise preserved. *See* Restatement (Second) of Judgments, § 11 (1980).

Id. at 169–70, 387 S.E.2d at 755–56.

[4][5][6][7] Our recitation in *Morrison* reflects the long-standing distinction between subject matter jurisdiction, which cannot be granted or waived by the parties and the lack of which renders an act of the court void, and territorial jurisdiction or venue. The latter goes to the authority of the court to act in particular circumstances or places and is waived if not properly and timely raised. The judgment of a court which is defective in territorial jurisdiction or venue is thus only voidable and not void. *Id.*; *Southern Sand and Gravel Company, Inc. v. Massaponax Sand and Gravel Corporation,* 145 Va. 317, 326, 133 S.E. 812, 814 (1926).

[8] All the circuit courts of the Commonwealth "have original jurisdiction of all indictments for felonies and of presentments, informations and indictments for misdemeanors." Code § 17.1–513. As we recognized in *Garza v. Commonwealth,* 228 Va. 559, 323 S.E.2d 127 (1984), this statute means what it says. "[A]ll circuit courts have jurisdiction over all felonies committed in the Commonwealth." *Id.* at 566, 323 S.E.2d at 130. Thus, both the Norfolk Circuit Court and the Arlington Circuit Court had subject matter jurisdiction for the trial of the charges against Porter.

Even though Porter did not raise the argument, we note that the grant of subject matter jurisdiction under Code § 17.1–513 is not limited by Code § 19.2–239, which sets forth that "[t]he circuit courts, *except where otherwise provided,* shall have exclusive original jurisdiction for the trial of all presentments, indictments and informations for offenses committed within their respective circuits." (Emphasis added.) The jurisdiction referenced in Code § 19.2–239 is a grant of territorial jurisdiction, not the subject matter jurisdiction conferred under Code § 17.1–513.

[9][10] ***230** We reach this conclusion for at least two reasons. First, if Code § 19.2–239 dealt with subject matter jurisdiction, such a construction would render the Code § 17.1–513 grant of "original jurisdiction of all ... felonies" to all circuit courts to be meaningless and superfluous. Such a statutory construction is to be avoided. "The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word...." *Jones v. Conwell,* 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984). "[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Hubbard v. Henrico Ltd. P'ship,* 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998).

[11] In addition, Code § 19.2–239 contains the clear proviso "except where otherwise provided." The change of venue statute, Code § 19.2–251, "otherwise provide[s]," and venue was changed in this case. As a ****428** matter of law, venue cannot be an issue of subject matter jurisdiction, and that "otherwise provided" example confirms Code § 19.2–239 could not encompass subject matter jurisdiction. "Venue and jurisdiction, though sometimes confounded, are, accurately speaking, separate and distinct matters. Jurisdiction is authority to hear and determine a cause, or it may be defined to be the right to adjudicate concerning the subject matter in the given case.... Venue is merely the place of trial...." *Texaco, Inc. v. Runyon,* 207 Va. 367, 370, 150 S.E.2d 132, 135 (1966) (internal quotation marks omitted).

Thus, while both the Arlington and Norfolk circuit courts had subject matter jurisdiction over Porter's charges under Code § 17.1–513, the authority to conduct that trial, that is, the territorial jurisdiction authorizing the court to adjudicate among the parties at a particular place, was initially in the Norfolk Circuit Court, as the place of the offense, under Code § 19.2–239. Nonetheless, if trial was had in Arlington, so that a violation of Code § 19.2–239 occurred, that defect went solely to the circuit court's lack of authority to exercise territorial jurisdiction and is waived if not timely raised. *See Morrison,* 239 Va. at 169–70, 387 S.E.2d at 755–56; ***231***Southern Sand and Gravel,* 145 Va. at 326, 133 S.E. at 814; *Gordon v. Commonwealth,* 38 Va.App. 818, 822–23, 568 S.E.2d 452, 453–54 (2002).[FN9]

FN9. We also note the language in Code § 17.1–503(B) that "[n]o rule shall ... preclude the judge before whom an accused is arraigned in criminal cases from hearing all aspects of the case on its merits, or to avoid or preclude any judge in any case who has heard any part of the case on its merits from hearing the case to its conclusion." This statutory language reflects a policy preference of the General Assembly that the judge sitting when Porter's case commenced (in this case Judge Griffith), be the judge who concludes trial of the case even if venue of the trial is altered.

[12] Porter asked for the change of venue he duly received. When offered the opportunity to move from Arlington, when the trial began, Porter specifically declined to do so. After the jury's verdicts, Porter specifically requested the transfer back to Norfolk, which the circuit court duly granted. Until raised by this Court, Porter never objected to or questioned in any way the exercise of the circuit court's authority or any potential defects in that authority by virtue of conducting proceedings in either Arlington or Norfolk. Porter clearly failed to raise an objection under Code § 19.2–244, which requires "questions of venue to be raised before verdict." Code § 19.2–244. Porter received exactly what he requested in terms of a different venue for his trial. He cannot take a different position at this point without violating our rule prohibiting approbation and reprobation. *Cangiano v. LSH Bldg. Co.,* 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006) ("A party may not approbate and reprobate by taking

successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory"); *see also Powell v. Commonwealth*, 267 Va. 107, 144, 590 S.E.2d 537, 560 (2004); *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003); *Smith v. Settle*, 254 Va. 348, 354, 492 S.E.2d 427, 431 (1997); *Leech v. Beasley*, 203 Va. 955, 961–62, 128 S.E.2d 293, 297–98 (1962).

[13] Nonetheless, Porter contends the circuit court's judgment was void, thus requiring reversal and a new trial, based on his reading of Code § 17.1–105 as a mandatory limit on a circuit court's subject matter jurisdiction.[FN10] To support that position, Porter relies on ***232** *Moore* and *Gresham v. Ewell*, 85 Va. (10 Hans.) 1, 6 S.E. 700 (1888). Porter contends these cases establish precedent that a judicial act is void, not voidable, when a lack of proper designation of the trial judge occurs. We disagree.

FN10. Porter does not address and we do not reach the constitutional authority of the Chief Justice of Virginia to assign judges for the administration of justice. Va. Const. art. VI, § 4. We do note that there is no constitutional or statutory basis for the implication in the dissent that a designation by the Chief Justice of Virginia, or a circuit court judge, under Code § 17.1–105 could somehow convey subject matter jurisdiction, as is amply illustrated by the lack of any citation to precedent for that proposition in the dissenting opinions. Clearly, subject matter jurisdiction comes only by constitutional or statutory provision. *Morrison*, 239 Va. at 169, 387 S.E.2d at 755.

****429** We initially note some doubt that Code § 17.1–105 applies in the circumstance of a change of venue.[FN11] On its face, Code § 17.1–105(A) appears directed at those instances where illness, disability, or other similar disqualifying circumstance necessitates a judge from another circuit to sit in the affected jurisdiction. Code § 17.1–105(B) appears directed at conflicts of interest which require recusal of all the judges in the circuit and necessitates a judge from another jurisdiction to sit. None of the circumstances indicated in Code § 17.1–105 occurred in this case. Furthermore, nothing on the face of Code § 17.1–105 references a judicial designation when there is a change of venue.

FN11. Code § 17.1–105(A) and (B) state as follows:

> A. If a judge of any court of record is absent, sick or disabled or for any other reason unable to hold any regular or special term of the court, or any part thereof, or to perform or discharge any official duty or function authorized or required by law, a judge or retired judge of any court of record may be obtained by personal request of the disabled judge, or another judge of the circuit to hold the court for the whole or any part of such regular or special term and to discharge during vacation such duty or function, or, if the circumstances require, to perform all the duties and exercise all the powers and jurisdiction as judges of such circuit until the judge is again able to attend his duties. The designation of such judge shall be entered in the civil order book of the court, and a copy thereof sent to the Chief Justice of the Supreme Court. The Chief Justice shall be notified forthwith at the time any disabled judge is able to return to his duties.
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> B. If all the judges of any court of record are so situated in respect to any case, civil or criminal, pending in their court as to render it improper, in their opinion, for them to preside at the trial, unless the cause or proceeding is removed, as provided by law, they shall enter the fact of record and the clerk of the court shall at once certify the same to the Chief

> Justice of the Supreme Court, who shall designate a judge of some other court of record or a retired judge of any such court to preside at the trial of such case.

However, it is unnecessary for us to resolve whether Code § 17.1–105 may have applied in this case and a designation order should have been entered for Judge Griffith to sit in Arlington. We can assume, without deciding, that if Code § 17.1–105 was applicable when venue changed in this case, a missing order of designation would only have affected the circuit court judge's authority to act in the exercise of territorial jurisdiction. As noted earlier, that issue is ***233** waived if not timely raised. Porter made no objection to the circuit court judge's purported lack of authority under Code § 17.1–105 and he cannot now attack the circuit court's judgment on that basis. Rule 5:25.

Porter's citations to *Moore* and *Ewell* are similarly unpersuasive. In *Moore,* the defendant argued his prior juvenile court proceedings were void because the statutory directive to give notice to both his parents was absent from the record. 259 Va. at 434, 527 S.E.2d at 407. Porter contends that Code § 17.1–105 is like the juvenile notice statute at issue in *Moore,* which the majority of the court held was "mandatory in nature and limit[s] a court's rightful exercise of its subject matter jurisdiction." 259 Va. at 438, 527 S.E.2d at 409. The Court in *Moore* concluded the lower court "never acquired the authority to exercise its jurisdiction." *Id.* at 440, 527 S.E.2d at 411. Even though the juvenile court's subject matter jurisdiction was not at issue, the defendant was permitted to collaterally attack the underlying judgment because the majority found it void, not voidable. The dissenting opinion in *Moore,* foreshadowing our decision in *Nelson v. Warden,* 262 Va. 276, 552 S.E.2d 73 (2001), noted that "the majority incorrectly equates statutory provisions that are 'mandatory' with those that are prerequisites to a juvenile court's exercise of its subject matter jurisdiction.... The mandatory nature of a requirement, standing alone, does not always make that requirement jurisdictional." 259 Va. at 446, 527 S.E.2d at 414–15 (J. Kinser, dissenting).

However, Porter's reliance on *Moore* is misplaced because we specifically overruled that case in *Nelson.* The resolution of *Nelson* reflects the frailty of Porter's position because the defendant in *Nelson* lost on the same statutory notice defect Moore was allowed to raise, specifically because the view that the defect was an unwaivable jurisdictional defect (a premise in *Moore*) was overruled in *Nelson.* Thus the pertinent comparison is between the defendant Baker in the seminal parental notification decision in ****430***Commonwealth v. Baker,* 258 Va. 1, 516 S.E.2d 219 (1999) (per curiam), affirming *Baker v. Commonwealth,* 28 Va.App. 306, 504 S.E.2d 394 (1998), who made timely objection throughout the proceedings—making the defects cognizable on appeal—and the defendant in *Nelson,* who failed to timely raise the claim at trial. *Nelson* overruled *Moore* on the point that the failure to object was a waiver of the argument given the nonjurisdictional nature of the failure to adhere to the statutory requirement, thus vitiating Porter's reliance on this theory.

***234** In *Nelson,* we embraced the dissent in *Moore* and acknowledged that the majority's analysis in *Moore* "is flawed" and stated:

> After noting the Court's emphasis on the distinction between subject matter jurisdiction and the authority to exercise that jurisdiction, the Court's next step should have been to demonstrate the difference resulting from the distinction. Yet, we made a distinction without a difference for, with our very next step, we elevated the failure of a court to comply with the requirements for exercising its authority to the same level of gravity as a lack of subject matter jurisdiction.

262 Va. at 281, 552 S.E.2d at 75. We then stated:

> We indicated *supra* that we thought a different outcome could have resulted in *David Moore* from the distinction we drew between subject

matter jurisdiction and the authority to exercise that jurisdiction. In our opinion, the different outcome should have consisted of a finding that the statutory requirement of notice to parents was not jurisdictional but procedural in nature, that a failure to notify parents could be waived by a failure to object, and, correspondingly, that a failure to comply with the requirement rendered subsequent convictions voidable and not void. To the extent *David Moore* conflicts with these views, it is overruled.

262 Va. at 284–85, 552 S.E.2d at 77.

Porter contends the failure to follow Code § 17.1–105 and obtain a designation order for the conduct of his case in Arlington and the return to Norfolk caused the circuit court's judgments to be void because the court lacked the authority to exercise its otherwise valid subject matter jurisdiction. As just illustrated, we specifically rejected that argument in *Nelson* when we overruled *Moore.* Thus, the circuit court had subject matter jurisdiction over Porter's trial which was never affected by the transfer of venue and its judgments could not be void on that basis. If a defect in the circuit court's exercise of its authority occurred, it was subject to waiver, and that is what happened in the case at bar. While the circuit court's judgment may have been subject to a timely objection, and thus have been a voidable judgment, Porter's failure to object settles the issue.

***235** Porter's citation to *Ewell* is similarly unavailing. [FN12] *Ewell* involved a judgment our predecessors determined to be "null and void" because a judge from another jurisdiction rendered that judgment without a proper designation to conduct court in the jurisdiction where trial occurred. 85 Va. at 2, 6 S.E. at 701. However, as pointed out by the dissent in *Ewell,* the majority's underlying analysis suffers from the same fatal flaws that caused us to overrule *Moore. See* 85 Va. at 5–8, 6 S.E. at 701–03 (Lewis, C.J., dissenting).

FN12. At the time of the *Ewell* decision, the Supreme Court of Appeals consisted of only five members. Va. Const. art. VI, § 2 (1870). A bare quorum of the Court, three members, *id.,* sat in the *Ewell* case so the majority opinion was rendered by a plurality of only two members of the Court.

Ewell involved a collateral attack upon a circuit court judgment which had been rendered in Lancaster County by a visiting judge for whom no order of designation had been entered as required by a statutory predecessor to Code § 17.1–105. The plurality in Ewell held the visiting judge entering the order "exceeded his jurisdiction in acting as a judge without the authority of the law, and the said judgment is without authority, and null and void." 85 Va. at 3, 6 S.E. at 701.

In an analysis mirroring the majority in *Nelson* and the dissent in *Moore,* the dissent in *Ewell* correctly stated:

> The judgment is collaterally assailed, and being a judgment rendered by a court of general jurisdiction, acting within the ****431** scope of its powers, and proceeding according to the course of the common law, and held at the time by one of the county judges of the state, it must, I think, be held to be valid. For no principle is better established than that a judgment of such a court, when collaterally drawn in question, is not affected by errors or irregularities which do not show a want of jurisdiction, or an excess of jurisdiction.
>
> ....
>
> In short, my opinion is, that the provisions of the statute above referred to are directory merely, and that the county court having undisputed jurisdiction of the case in which the judgment was rendered, a failure to comply with the requirements of the statute could not affect the validity of the judgment in this collateral proceeding. The writ of prohibition cannot***236** be permitted in a case like this to take the place of a writ of error or of an appeal, though they are in some cases concurrent remedies.

85 Va. at 5–7, 6 S.E. at 701–02 (Lewis, C.J.,

dissenting).

The plurality in *Ewell* was incorrect in construing the trial court's judgment as void, instead of voidable, and permitting a collateral attack by virtue of a defect in the exercise of the court's authority under its territorial jurisdiction for the same reason as the majority erred in *Moore.* The trial courts in *Ewell* and *Moore* had subject matter jurisdiction over the respective cases and the resulting judgments could not therefore be void and subject to collateral attack in a later proceeding based on a defect other than subject matter jurisdiction. *Ewell* and *Moore* erroneously elevated a defect in something other than subject matter jurisdiction to the same level of consequence. The failure of the appellant in *Ewell* to timely object to the court's exercise of its jurisdiction should have ended that case and, as we noted in *Nelson,* the same should have occurred in *Moore* as well. After *Nelson, Ewell* can have no validity and to the extent it conflicts with our opinion in *Nelson,* it is overruled. FN13

FN13. In overruling *Ewell,* we note that case has only been cited six times by this Court since it was decided in 1888. *See Combs v. Commonwealth,* 90 Va. 88, 90, 17 S.E. 881, 881 (1893); *Prison Ass'n of Virginia v. Ashby,* 93 Va. 667, 671, 25 S.E. 893, 894 (1896) (citing *Ewell* for the proposition that "whatever jurisdiction this court exercises must be by virtue of some statute enacted in conformity to the Constitution"); *Price v. Smith,* 93 Va. 14, 15, 24 S.E. 474, 474 (1896) (stating that a court's jurisdiction "must be by virtue of statutory authority made in pursuance of the Constitution"); *Smith v. White,* 107 Va. 616, 619, 59 S.E. 480, 481 (1907); *Shelton v. Sydnor,* 126 Va. 625, 632, 102 S.E. 83, 86 (1920) (quoting from the dissenting opinion in *Ewell); Akers v. Commonwealth,* 155 Va. 1046, 1051, 156 S.E. 763, 765 (1931) (quoting from the dissenting opinion). Other than supporting the concept that a court's jurisdiction must derive from statutory authority made in pursuance of the Constitution, *Ewell* was otherwise distinguished or cited by reference to its dissenting opinion, which perhaps represents why we have never specifically relied upon it. In that context, *Ewell* has no application for purposes of stare decisis. Since the legal basis of *Ewell* is plainly wrong under *Nelson,* it is appropriate that *Ewell* be overruled. *See Harmon v. Sadjadi,* 273 Va. 184, 197, 639 S.E.2d 294, 301 (2007) ("[o]ur strong adherence to the doctrine of stare decisis does not ... compel us to perpetuate what we believe to be an incorrect application of the law") (citation omitted).

Whatever defects may have occurred with respect to the transfer of Porter's case to Arlington, and in returning to Norfolk, would only have affected the circuit court's exercise of its territorial jurisdiction and could only have rendered the resulting judgments voidable if subject to a proper and timely objection. Having failed to ***237** raise any objections, Porter has waived any such jurisdictional defects and the judgment of the circuit court is therefore unaffected. Additionally, as we have already stated, we will not permit Porter to approbate and reprobate in the absence of a valid challenge to subject matter jurisdiction.

C. METHODS OF EXECUTION

[14] In his initial assignment of error, Porter contends that the circuit court erred in denying his motion to declare the Commonwealth's lethal injection and electrocution methods for execution unconstitutional as being in violation of the prohibition against cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States and Article I, Section 9 of the Constitution of Virginia. Porter asserts that ****432** lethal injection, as it is administered in Virginia, is unconstitutional based upon the purportedly inadequate training of the staff administering the lethal injection, as well as the "deficiencies inherent in the

lethal injection drugs themselves." Porter further asserts that electrocution "violates contemporary standards of decency under the Eighth Amendment." We reject Porter's arguments because our clear precedent recognizes that electrocution is constitutionally permitted and the recent decision of the United States Supreme Court in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), does not undermine the constitutionality of lethal injection in Virginia.

This Court has previously held that execution by electrocution does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Bell v. Commonwealth*, 264 Va. 172, 202, 563 S.E.2d 695, 715 (2002), *cert. denied*, 537 U.S. 1123, 123 S.Ct. 860, 154 L.Ed.2d 805 (2003); *Martin v. Commonwealth*, 221 Va. 436, 439, 271 S.E.2d 123, 125 (1980). We find no reason to depart from our previous decisions.

[15] Pursuant to Code § 53.1–234, a defendant convicted of capital murder in Virginia has the right to elect whether to be executed by electrocution or lethal injection. "When a condemned prisoner has a choice of method of execution, the inmate may not choose a method and then complain of its unconstitutionality, particularly when the constitutionality of the alternative method has been established." *Orbe v. Johnson*, 267 Va. 568, 570, 601 S.E.2d 543, 546, *cert. denied*, 541 U.S. 970, 124 S.Ct. 1740, 158 L.Ed.2d 419 (2004). Our conclusion in *Bell* is similarly applicable in this case:

> ***238** Bell has the right to choose whether his execution will be by lethal injection or by electrocution. Because Bell has that choice and we have already ruled that execution by electrocution is permissible under the Eighth Amendment, it would be an unnecessary adjudication of a constitutional issue to decide whether lethal injection violates the Eighth Amendment. *See Bissell v. Commonwealth*, 199 Va. 397, 400, 100 S.E.2d 1, 3 (1957). We decline to do so, and likewise cannot say that the circuit court erred in denying Bell's motion for an evidentiary hearing to decide the constitutionality of lethal injection as a method of execution. Thus, we find no error in the court's denial of Bell's motion.
>
> 264 Va. at 203, 563 S.E.2d at 715–16.

Moreover, the Supreme Court in *Baze* rejected a challenge to Kentucky's lethal injection procedure similar to that raised by Porter. The Supreme Court held that a constitutional challenge fails unless "the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Baze*, 553 U.S. at ——, 128 S.Ct. at 1537. Porter concedes that the Virginia protocol is "materially similar" to the Kentucky protocol.

Accordingly, we hold the circuit court did not err in denying Porter's motion regarding the methods of execution.

D. APPLICABILITY OF THE VIRGINIA ADMINISTRATIVE PROCESS ACT

In a related assignment of error, Porter asserts that the circuit court erred by denying his motion to suspend all executions until regulations providing the necessary procedures to carry out Virginia's death penalty statutes are properly promulgated. Porter maintains that the particular procedures used for execution in Virginia are unlawful because the Department of Corrections has failed to comply with certain provisions of the Virginia Administrative Process Act ("APA"), Code §§ 2.2–4000 et seq. Porter's assertions are without merit.

[16] Agency action by the Virginia Department of Corrections concerning inmates of prisons does not fall within the scope of the ***239** APA. Though the APA exempts certain Virginia agencies from its mandates specifically by name, it also creates exemptions for agency action by subject matter as well. Accordingly, the Act exempts actions of agen-

cies****433** relating to "[i]nmates of prisons or other such facilities or parolees therefrom." Code § 2.2–4002(B)(9). In this context, the Virginia Department of Corrections is an agency whose sole purpose is related to inmates of prisons. It is thus exempt from the strictures of the APA. We therefore hold that the circuit court did not err in rejecting Porter's motion to invalidate the execution procedures under the APA.

E. ADMISSION OF EVIDENCE REGARDING PORTER'S STATUS AS A FELON

In his third assignment of error, Porter contends that the circuit court erred by admitting prejudicial evidence of his prior felony conviction during the Commonwealth's case-in-chief. During trial, the Commonwealth asserted that Porter's status as a convicted felon was admissible as evidence of Porter's possible motive for killing Officer Reaves. The Commonwealth maintained that Porter knew that it was illegal for him to carry a gun and, thus, shot the officer in order to escape arrest for possession of a firearm.

The Commonwealth similarly asserted that Porter's prior conviction proved an element of the offense charged under Code § 18.2–31(6). This was so, the Commonwealth contended, because Porter shot Officer Reaves "for the purpose of interfering with the performance of his official duties" as a law enforcement officer: to stop Officer Reaves from arresting him for possessing a gun while a convicted felon.

[17] The circuit court allowed the Commonwealth to introduce evidence that Porter had previously been convicted of a violent felony. The court reasoned that this evidence tended to prove Porter's motive for the killing as well as "an element of the offense; that is, the murder was to interfere with the performance of a law enforcement officer's duties."

[18] "The responsibility for balancing the competing considerations of probative value and prejudice rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal in the absence of a clear abuse." *Spencer v. Commonwealth*, 240 Va. 78, 90, 393 S.E.2d 609, 617 (1990).

***240** In *Guill v. Commonwealth*, 255 Va. 134, 138, 495 S.E.2d 489, 491 (1998), this Court held that, "[e]vidence of 'other crimes' is relevant and admissible if it tends to prove any element of the offense charged. Thus, evidence of other crimes is allowed when it tends to prove motive, intent, or knowledge of the defendant." (Internal citation omitted). In the case at bar, Porter admitted that he knew when he shot Officer Reaves that, as a previously convicted felon, he was subject to a five-year mandatory prison sentence if found in possession of a firearm. Such evidence is highly probative both of Porter's possible motivation for shooting Officer Reaves and to prove an essential element of the offense charged.

Furthermore, in a deliberate effort to lessen any inherent prejudice to Porter, the Commonwealth did not enter Porter's certified record of conviction or felony sentencing order for armed robbery, nor did the Commonwealth specifically detail the extent of Porter's other past bad acts. Rather, the jury was only informed that Porter was a "violent felon" as defined by Code § 18.2–308.2, that he was consequently prohibited by law from possessing a firearm, and that he would face a mandatory five-year prison sentence if found with a firearm in his possession. In this context, the probative value of this evidence outweighed any incidental prejudice to Porter. *See Scates v. Commonwealth*, 262 Va. 757, 761, 553 S.E.2d 756, 759 (2001). Accordingly, we hold that the circuit court did not abuse its discretion by allowing this evidence for the limited purpose of proving motive and an essential element of the crime of which Porter was charged under Code § 18.2–31(6). *Bell v. Commonwealth*, 264 Va. at 198–99, 563 S.E.2d at 713.

F. SECOND–DEGREE MURDER INSTRUCTION

[19] Porter also assigns as error the circuit court's refusal to instruct the jury on the lesser-included offense of second-degree murder. Porter

asserts that the evidence "that he shot Officer Reaves three times in ****434** rapid-fire succession in an impulsive, unplanned and spontaneous surge of panic after the officer unexpectedly grabbed [his] arm, pointed his service revolver at him, and appeared to be about to kill him" was "squarely presented through his own testimony and supported by several witnesses." Porter contends the second-degree murder instruction was appropriate because "[h]e insisted throughout his testimony that he did not intend to kill Officer Reaves," and "the jury could fairly have entertained a reasonable doubt as to ... ***241** whether his malicious killing of Officer Reaves was preceded by premeditation and deliberation."

The Commonwealth responds that Porter failed to offer more than a "scintilla of evidence" to support the second-degree murder instruction. Further, the Commonwealth insists that the circuit court did not err in refusing the instruction because "Porter admitted taking aim at Officer Reaves' [ ] head, standing within an arm's length, intending to shoot him and to putting a bullet into his head. After Officer Reaves fell onto the ground, Porter leaned over the officer and deliberately fired twice more."

The principles governing our review of a circuit court's refusal of a lesser included offense instruction regarding murder are well-settled.

> We have long recognized that evidence showing a murder "to have been deliberate, premeditated and wilful could be so clear and uncontroverted that a trial court could properly refuse to instruct on the lesser included offenses." *Painter [v. Commonwealth,* 210 Va. 360, 366, 171 S.E.2d 166, 171 (1969)]. It follows, therefore, that a criminal defendant "is not entitled to a lesser degree instruction solely because the case is one of murder." *Clark v. Commonwealth,* 220 Va. 201, 209, 257 S.E.2d 784, 789 (1979), *cert. denied,* 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).
>
> A second[-]degree murder instruction is only appropriate where it is supported by evidence. *Justus v. Commonwealth,* 222 Va. 667, 678, 283 S.E.2d 905, 911 (1981), *cert. denied,* 445 [455] U.S. 983[, 102 S.Ct. 1491, 71 L.Ed.2d 693] (1982); *Painter,* 210 Va. at 367, 171 S.E.2d at 171. Moreover, the evidence asserted in support of such an instruction "must amount to more than a scintilla." *Justus,* 222 Va. at 678, 283 S.E.2d at 911; *Hatcher v. Commonwealth,* 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978).
>
> *Buchanan v. Commonwealth,* 238 Va. 389, 409, 384 S.E.2d 757, 769 (1989).

[20] "Because the issue on appeal deals with the circuit court's refusal of the lesser-included offense instruction ..., and even though the Commonwealth prevailed at trial, we must view the evidence on this issue in the light most favorable to the defendant, the proponent of the instruction." ***242** *Commonwealth v. Leal,* 265 Va. 142, 145, 574 S.E.2d 285, 287 (2003). Applying the appropriate standard of review and viewing the evidence in the light most favorable to Porter, we hold that the circuit court did not err in refusing to offer the second-degree murder instruction.

Porter failed to offer evidence "in support of a particular instruction [that] 'must amount to more than a scintilla.' " *Schlimmer v. Poverty Hunt Club,* 268 Va. 74, 78, 597 S.E.2d 43, 45 (2004) (quoting *Justus v. Commonwealth,* 222 Va. 667, 678, 283 S.E.2d 905, 911 (1981)). Further, we hold the evidence in this case of Porter's "deliberate, premeditated and wilful" murder of Officer Reaves was " 'so clear and uncontroverted that a trial court could properly refuse to instruct on the lesser included offenses.' " *Buchanan,* 238 Va. at 409, 384 S.E.2d at 769 (citation omitted).

Porter's only evidence that he murdered Officer Reaves without premeditation is his own testimony that he acted because he "was scared" that Officer Reaves "was going to kill [him]." Porter contends that testimony along with other evidence the shots were fired "rapidly" and that it would have been

hard for him to remove Officer Reaves' pistol from its holster, are more than a scintilla of evidence negating premeditation. We disagree.

Other than Porter's claim that Officer Reaves pulled his gun first, there is no record evidence supporting that theory and ****435** thereby a second-degree murder instruction for lack of premeditation. Conversely, substantial and uncontroverted evidence demonstrated that, after Porter shot Officer Reaves the first time and Officer Reaves fell to the ground, Porter shot Officer Reaves twice more. This description of the shooting does not correspond with Porter's contention that he "was scared" but further establishes his deliberation and premeditation, which is "an intent to kill that needs to exist only for a moment." *Coles v. Commonwealth*, 270 Va. 585, 590, 621 S.E.2d 109, 112 (2005) (quoting *Green v. Commonwealth*, 266 Va. 81, 104, 580 S.E.2d 834, 847 (2003)).

Moreover, Porter's own testimony proves his act of shooting Officer Reaves was one of premeditation and deliberation as this exchange during cross-examination reflects:

> Q. You meant to hit Stanley Reaves with a bullet, didn't you?
>
> A. Yes, sir.
>
> Q. All right. And you took aim—therefore, you took aim at him, correct?
>
> ***243** A. Yes, sir.
>
> Q. You took aim at a part of his body, correct?
>
> A. Yes, sir.
>
> Q. And the part of his body that you took aim at and then before pulling the trigger from less than six inches away was directly into his forehead, correct?
>
> A. Yes, sir.
>
> ....
>
> Q. And you agree that you knew you were aiming at his head, correct?
>
> A. Yes, sir.

Thus, "[t]he evidence to which [Porter] points falls far short of proving provocation, anger, passion, or any other fact that might serve to convince a jury that [Porter] acted without premeditation." *Buchanan*, 238 Va. at 412, 384 S.E.2d at 771.

Not only does Porter's recited evidence fail to "amount to more than a scintilla" in support of a second-degree murder instruction, but this is a case where the evidence of premeditation is " 'so clear and uncontroverted that a trial court could properly refuse to instruct on the lesser included offenses.' " *Buchanan*, 238 Va. at 409, 384 S.E.2d at 769 (citation omitted). Accordingly, we hold that the circuit court did not err in refusing Porter's request for a second-degree murder instruction.

G. PRISON RISK ASSESSMENT EXPERT

After the circuit court had appointed a mental health expert and a neuropsychological expert to assist in Porter's defense, Porter filed the Prison Expert Motion requesting that Dr. Mark D. Cunningham be appointed "as an expert on the assessment of the risk of violence by prison inmates and, in particular, the risk of future dangerousness posed by the defendant if incarcerated in a Virginia penitentiary for life." The circuit court denied the motion and Porter assigns error to that ruling because it did not allow him "to rebut the Commonwealth's allegation that the defendant constitutes a continuing threat to society, and also to establish, as a mitigating factor, that the likelihood of further serious violence by the defendant was low."

Our decision in *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996), established the basis upon which a circuit ***244** court reviews the request of an indigent defendant for the appointment of an expert witness to assist in his defense. We described and applied the *Husske* analysis in

Commonwealth v. Sanchez, 268 Va. 161, 597 S.E.2d 197 (2004) which guides our review in the case at bar.

In *Husske v. Commonwealth,* 252 Va. 203, 476 S.E.2d 920 (1996), this Court noted that an indigent defendant is not constitutionally entitled, at the state's expense, to all the experts that a non-indigent defendant might afford. *Id.* at 211, 476 S.E.2d at 925. All that is required is that an indigent defendant have " 'an adequate opportunity to present [his] claims fairly within the adversary system.' " *Id.* (quoting *Ross v. Moffitt,* 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974)).

In *Husske* we held that

> an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate****436** that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance.

Id. at 211–12, 476 S.E.2d at 925 (citation omitted). In that context, we specified that a defendant seeking the assistance of an expert witness "must show a particularized need" for that assistance. *Id.*

It is the defendant's burden to demonstrate this "particularized need" by establishing that an expert's services would materially assist him in preparing his defense and that the lack of such assistance would result in a fundamentally unfair trial. *Id.; accord Green v. Commonwealth,* 266 Va. 81, 92, 580 S.E.2d 834, 840 (2003). We made clear in *Husske* and subsequent cases that "mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." 252 Va. at 212, 476 S.E.2d at 925 (internal quotation marks omitted). Whether a defendant has made the required showing of particularized need is a determination that lies within the sound discretion of the trial court.

***245** 268 Va. at 165, 597 S.E.2d at 199.

Porter attached several documents to the Prison Expert Motion including his curriculum vitae and a "Declaration" which had been filed in a separate capital murder case, *Gray v. Commonwealth,* 274 Va. 290, 645 S.E.2d 448 (2007), *cert. denied,* 552 U.S. 1151, 128 S.Ct. 1111, 169 L.Ed.2d 826 (2008) (the " *Gray* Declaration"). However, at no place in the Prison Expert Motion does Porter represent that Dr. Cunningham's evidence as to him would be of the same nature as in the Gray Declaration.

Porter acknowledges that he "must show a particularized need" under *Husske.* In his Prison Expert Motion, however, Porter primarily focused on criticizing prior decisions of this Court regarding prison risk assessment experts and lauding the virtues of various statistical modes of analysis to project rates of prison inmate violence. Porter cited a number of studies about statistical analysis of the rates of prison inmate violence at various times and settings and upon which Dr. Cunningham's evidence would be based. Porter represented that "context and statistical and actuarial data ... are indispensable to the determination of risk." Porter argued that the statistical evidence of conditions during life imprisonment in the penitentiary "must be admissible to rebut the Commonwealth's assertion that the defendant will probably commit criminal acts of violence in the future." Porter also contended that in examining the aggravating factor of future dangerousness under Code § 19.2–264.4(C) "the only 'society' to which the defendant can ever pose a 'continuing serious threat' is prison society." "[T]he future dangerousness inquiry is concerned only with that violence that is both 'criminal' and 'serious' and occurs behind prison walls during the natural life of the capital life inmate."

Porter indicated in the Prison Expert Motion that our prior decisions in *Burns v. Commonwealth,* 261 Va. 307, 541 S.E.2d 872, *cert. denied,* 534 U.S. 1043, 122 S.Ct. 621, 151 L.Ed.2d 542 (2001), and *Lovitt v. Commonwealth,* 260 Va. 497, 537 S.E.2d 866 (2000), *cert. denied,* 534 U.S. 815, 122 S.Ct.

41, 151 L.Ed.2d 14 (2001), were in error. Among other reasons, Porter contended that we incorrectly interpreted the term "society" as used in Code § 19.2–264.2 and 19.2–264.4(C). Porter argued "it is manifestly impossible for a defendant adequately to explain why he is not a continuing serious threat to society without introducing evidence of the conditions of prison incarceration, including prison security and the actual rates of serious criminal violence in prison."

***246** The Commonwealth responded to Porter's Expert Motion by citing our prior decisions in *Burns*, *Cherrix v. Commonwealth*, 257 Va. 292, 513 S.E.2d 642,*cert. denied*, 528 U.S. 873, 120 S.Ct. 177, 145 L.Ed.2d 149 (1999), *Juniper*, and *Walker v. Commonwealth*, 258 Va. 54, 515 S.E.2d 565 (1999),*cert. denied*, 528 U.S. 1125, 120 S.Ct. 955, 145 L.Ed.2d 829 (2000). The Commonwealth noted, consonant with that precedent, that "what a person may expect in the penal system is not relevant mitigation evidence," and that Porter's proffer failed to tender evidence that "concern[s] the history or experience of the ****437** defendant" (citing *Cherrix*, 257 Va. at 310, 513 S.E.2d at 653).

After hearing oral argument, the circuit court denied the motion and opined from the bench that Dr. Cunningham's proffered evidence "does not concern the history or experience of the defendant.... I have to venture to conclude an expert in his field could take any general claims he might make with respect to the prison framework and apply it to an individual. That doesn't make it particular." Further, the circuit court explained that because the Commonwealth was "simply going to be going into the defendant's personal history and acts" and offering nothing as to prison life, Dr. Cunningham was not a proper rebuttal witness.

On appeal, Porter contends that, in the circuit court, he made it "clear that Dr. Cunningham would provide an individualized assessment of the risk posed by Porter." Porter argues he could not rebut the Commonwealth's evidence of future dangerousness based on his prior criminal record and the facts of the crime without Dr. Cunningham's testimony. He contends that Dr. Cunningham's proffered evidence should have been admissible under *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and the failure to afford him that expert "prejudiced" Porter in two ways:

> First, it rendered unreliable the jury's finding in favor of the Commonwealth on the future threat predicate—a finding that provided the sole aggravating factor supporting the death penalty. And second, even if Dr. Cunningham's rebuttal testimony had not altogether prevented a dangerousness finding by the sentencing jury, it would at least have substantially reduced the weight that the jury would have accorded to the existence of that factor when making its ultimate sentencing decision.

***247** Porter thus concludes he met the required *Husske* showing of a "particularized need" and the circuit court's failure to appoint Dr. Cunningham as his expert requires that the court's judgment be reversed.

To resolve the issue before us, we begin with a review of the pertinent statutes, Code § 19.2–264.2 and Code § 19.2–264.4(C), and our decisions in which we considered prison-setting evidence a defendant sought to offer at a capital murder sentencing. We will then review Porter's actual proffer in this case and apply that precedent in evaluating whether the circuit court abused its discretion in denying the Prison Expert Motion.

Code § 19.2–264.2 provides in pertinent part as follows:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the *past criminal record of convictions of the defendant*, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continu-

ing serious threat to society.

(Emphasis added.) Code § 19.2–264.4(C) similarly provides that the penalty of death shall not be imposed unless the Commonwealth proves

> beyond a reasonable doubt that there is a probability based upon evidence of the *prior history of the defendant or of the circumstances surrounding the commission of the offense* of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society.
>
> (Emphasis added.)

The plain directive of these statutes is that the determination of future dangerousness is focused on the defendant's "past criminal record," "prior history" and "the circumstances surrounding the commission of the offense." These standards defining the future dangerousness aggravating factor are the basis of our earlier decisions which considered motions for appointment of prison risk experts or the proffer of prison risk evidence.

In *Cherrix,* the defendant "sought to introduce" evidence which "involved the general nature of prison life" as mitigating evidence***248** of his future dangerousness. 257 Va. at 309, 513 S.E.2d at 653. We noted that

> [a]lthough the United States Constitution guarantees the defendant in a capital case ****438** a right to present mitigating evidence to the sentencing authority, it does not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."

Id. (quoting *Lockett v. Ohio,* 438 U.S. 586, 605 n. 12, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). We held that the circuit court properly excluded Cherrix' prison setting evidence because "none of this evidence concerns the history or experience of the defendant. We agree with the conclusion of the trial court that what a person may expect in the penal system is not relevant mitigation evidence." *Id.* at 310, 513 S.E.2d at 653. We also noted that "none of the evidence proffered at trial addressed Cherrix's ability to conform or his experience in conforming to prison life." *Id.* at 310 n. 4, 513 S.E.2d at 653 n. 4 (internal quotation marks omitted).

We next addressed the issue in *Lovitt,* when the defendant argued that under Code § 19.2–264.2 "the only society that should be considered in this case for purposes of 'future dangerousness' is prison society." 260 Va. at 516, 537 S.E.2d at 878. We rejected this argument because "[t]he statute does not limit this consideration to 'prison society' when a defendant is ineligible for parole, and we decline Lovitt's effective request that we rewrite the statute to restrict its scope." *Id.* at 517, 537 S.E.2d at 879.

In *Burns,* the defendant "attempted to introduce evidence concerning the conditions [in prison] in rebuttal to the Commonwealth's evidence of Burns' future dangerousness." 261 Va. at 338, 541 S.E.2d at 892. Burns acknowledged that we had rejected a similar claim in *Cherrix* as improper mitigating evidence, but he proffered his evidence "in rebuttal to the Commonwealth's evidence of Burns' future dangerousness." *Id.* The Commonwealth's evidence "concerning Burns' future dangerousness consisted of his prior criminal record and unadjudicated criminal acts." *Id.* at 339, 541 S.E.2d at 893. Burns contended he should be allowed to rebut that evidence with witnesses echoing the rejected evidence in *Lovitt,* and similar to Porter's proffer, "that his opportunities to commit criminal acts of ***249** violence in the future would be severely limited in a maximum security prison." *Id.* We held the circuit court did not err in rejecting the proffered evidence because "Burns' evidence was not in rebuttal to any evidence concerning prison life" from the Commonwealth. *Id.*

We explained that our decision concerning the risks and consequences of prison life rested on the specific language of the controlling statutes, §§ 19.2–264.2 and 19.2–264.4(C):

> [T]he relevant inquiry is not whether Burns *could* commit criminal acts of violence in the future but whether he *would.* Indeed, Code §§ 19.2–264.2 and –264.4(C) use the phrase "would commit criminal acts of violence." Accordingly, the focus must be on the particular facts of Burns' history and background, and the circumstances of his offense. In other words, a determination of future dangerousness revolves around an individual defendant and a specific crime. Evidence regarding the general nature of prison life in a maximum security facility is not relevant to that inquiry, even when offered in rebuttal to evidence of future dangerousness.

261 Va. at 339–40, 541 S.E.2d at 893. We also analyzed Burns' claims based on his argument that the decisions of the United States Supreme Court in *Simmons* and *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), entitled him to present this evidence to the fact-finder. We found neither case applicable because the evidence of future prison conduct was not particularized and individualized to the defendant and guided by the statutory requirements of his criminal history and background. "Unlike the evidence proffered by Burns, the evidence in *Skipper* was peculiar to that defendant's history and background." *Id.* at 340, 541 S.E.2d at 894.

We again addressed this general issue in *Bell,* when the defendant requested the appointment of an expert

> to assess his likelihood of being a future danger in prison, and to testify concerning the correctional systems used in a maximum security prison to manage inmates and prevent acts of violence.
>
> ****439** ....
>
> Bell asserts that evidence concerning the prison conditions in which he would serve a life sentence is relevant not only in ***250** mitigation and in rebuttal to the Commonwealth's evidence of future dangerousness, but also to his "future adaptability" to prison life.

264 Va. at 199–200, 563 S.E.2d at 713. Echoing Porter's claims in the case at bar, Bell contended that our decisions in *Cherrix* and *Burns* were erroneous and cited the United States Supreme Court decisions in *Simmons*, *Skipper* and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) to support his argument. *Bell,* 264 Va. at 199, 563 S.E.2d at 713.

As in *Burns,* we noted that the evidence in *Skipper* and *Williams* was individualized specifically to those defendants' prior acts while incarcerated and were not statistical projections of future behavior. We then noted that in *Cherrix* and *Burns,*

> the "common thread" in these cases is that evidence peculiar to a defendant's character, history and background is relevant to the future dangerousness inquiry and should not be excluded from a jury's consideration. This includes evidence relating to a defendant's current adjustment to the conditions of confinement.... But, as we had already stated, "[e]vidence regarding the general nature of prison life in a maximum security facility is not relevant to that inquiry, even when offered in rebuttal to evidence of future dangerousness."

Id. at 201, 563 S.E.2d at 714 (citing *Burns,* 261 Va. at 340, 541 S.E.2d at 893). We then held that the circuit court had not abused its discretion in denying the appointment of Bell's prison risk expert because he had not met the requirements of *Husske*.

> While we do not dispute that Bell's "future adaptability" in terms of his disposition to adjust to prison life is relevant to the future dangerousness inquiry, Bell acknowledged on brief that the individual that he sought to have appointed has been qualified previously as an expert in prison operations and classification. The testimony that Bell sought to introduce through the expert concerned the conditions of prison life and the kind of security features utilized in a maximum security facility. That is the same kind of evidence that we have previously rejected as not relevant to the future dangerousness inquiry. *See Burns,* 261 Va. at

340, 541 S.E.2d at 893; ***251***Cherrix,* 257 Va. at 310, 513 S.E.2d at 653. Nor is such general evidence, not specific to Bell, relevant to his "future adaptability" or as a foundation for an expert opinion on that issue. Thus, we conclude that the circuit court did not err in denying Bell's motion. Bell failed to show a "particularized need" for this expert. *Lenz v. Commonwealth,* 261 Va. 451, 462, 544 S.E.2d 299, 305, *cert. denied,* 534 U.S. 1003 [122 S.Ct. 481, 151 L.Ed.2d 395] (2001). In light of the inadmissibility of the evidence that Bell sought to introduce through the expert, he also failed to establish how he would be prejudiced by the lack of the expert's assistance. *See id.*

264 Va. at 201, 563 S.E.2d at 714–15.

Lastly, we addressed this issue in *Juniper,* when the indigent defendant sought the appointment of a psychologist to make a "risk assessment for future dangerousness" showing that such risk "was different in a prison setting from that in an open community." 271 Va. at 424, 626 S.E.2d at 422. For the reasons previously stated in *Cherrix, Burns* and *Bell,* we determined that the circuit court properly exercised its discretion in denying appointment of the proposed expert because "what a person may expect in the penal system is not relevant mitigation evidence." *Id.* at 425, 626 S.E.2d at 423 (quoting *Cherrix,* 257 Va. at 310, 513 S.E.2d at 653).

Citing *Burns,* we re-emphasized that "the focus must be on the particular facts of [the defendant's] history and background, and the circumstances of his offense. In other words, a determination of future dangerousness revolves around an individual defendant and a specific crime." *Id.* at 426, 626 S.E.2d at 423 (quoting *Burns,* 261 Va. at 339–40, 541 S.E.2d at 893–94). We went on to state that

> evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future ****440** adaptability in that environment in order to be heard by the jury. It must be "evidence peculiar to a defendant's character, history and background" in order to be "relevant to the future dangerousness inquiry...."

Id. at 426, 626 S.E.2d at 424 (quoting *Bell,* 264 Va. at 201, 563 S.E.2d at 714). We concluded that the proffer of testimony in *Juniper* did not meet these tests because none of it tied the

> ***252** proposed opinion testimony on future dangerousness in a prison environment to Juniper's "history and background, and the circumstances of his offense," *Burns,* 261 Va. at 340, 541 S.E.2d at 893, to Juniper's " character, history and background" or was "specific to [Juniper], relevant to his 'future adaptability.' " *Bell,* 264 Va. at 201, 563 S.E.2d at 714.

Id. at 427, 626 S.E.2d at 424.

[21] With the statutory future dangerousness requirements and our precedent firmly in mind, we now turn to the actual proffer of Dr. Cunningham's proposed evidence so as to measure that proffer against those factors. Porter's Prison Expert Motion for appointment of Dr. Cunningham is notable for an essential, but missing, element. At no place in the motion does he proffer that Dr. Cunningham's statistical analysis of a projected prison environment will "focus ... on the particular facts of [his] history and background, and the circumstances of his offense." *Burns,* 261 Va. at 340, 541 S.E.2d at 893; *see* Code §§ 19.2–264.2 and Code § 19.2–264.4(C). Nothing in Porter's motion is a proffer of an "individualized" or "particularized" analysis of Porter's "prior criminal record," "prior history", his prior or current incarceration, or the circumstances of the crime for which he had been convicted. *See id.*, *Juniper,* 271 Va. at 427, 626 S.E.2d at 424, *Bell,* 264 Va. at 201, 563 S.E.2d at 714, *Burns,* 261 Va. at 339–40, 541 S.E.2d at 893.

Porter's proffer in the motion was that Dr. Cunningham would testify as to a statistical projection of how prison restrictions could control an inmate (situated similarly to what he would project Porter to face) in a likely prison setting. Nothing in this

proffer relates to the essential statutory elements in Code §§ 19.2–264.2 and 19.2–264.4 that focus the future dangerousness inquiry on the defendant's prior history, prior criminal record and/or the circumstances of the offense. Additionally, nothing in Porter's proffer analyzes our application of this statutory directive to the "defendant's character, history and background." Not only is the Prison Expert Motion devoid of any reference that the proffered evidence would be "individualized" or "particularized" to Porter, his post conviction Motion for a New Trial was similarly silent.

Porter's proffered evidence is not substantially different from the type we rejected in *Burns* and *Bell.* As in *Burns,* the Commonwealth in this case neither proposed nor introduced any evidence ***253** concerning Porter's prospective life in prison, but limited its evidence on the future dangerousness aggravating factor to the statutory requirements represented by Porter's "prior criminal record and unadjudicated criminal acts. Thus [Porter's] evidence was not in rebuttal to any evidence concerning prison life." 261 Va. at 339, 541 S.E.2d at 893.

Strikingly similar to Porter's argument in the case at bar was the defendant's argument in *Bell,* when the defendant also requested that an expert be appointed "to assess his likelihood of being a future danger in prison, and to testify concerning the correctional systems used in a maximum security prison to manage inmates and prevent acts of violence." 264 Va. at 199, 563 S.E.2d at 713. Porter's proposed statistical projection on future violent acts of an inmate who may be similarly situated to Porter is nearly identical to the rejected claim in *Bell.* "The testimony that Bell sought to introduce through the expert concerned the conditions of prison life and the kind of security features utilized in a maximum security facility. That is the same kind of evidence that we have previously rejected as not relevant to the future dangerousness inquiry." *Id.* at 201, 563 S.E.2d at 714. We rejected Bell's argument and found the circuit court committed no abuse of discretion in denying his motion for appointment of an expert because the proffered evidence was both (1) improper rebuttal evidence****441** for the same reasons as in *Burns*, and (2) not relevant for mitigation because the proffered evidence, like Porter's evidence, was not "peculiar to a defendant's character, history and background." *Id.* Thus, "Bell failed to show a 'particularized need' for this expert." *Id.* at 201, 563 S.E.2d at 715. So has Porter.

Our analysis in *Bell* also informs as to why Porter's reliance on the Supreme Court decisions in *Skipper*, *Simmons* and *Williams* is as unavailing here as it was in that case. In *Skipper* and *Williams,* individualized and particularized testimony about the defendant's past behavior during incarceration was available but not presented because in one case it was barred by the trial court, *see Skipper,* 476 U.S. at 3–4, 106 S.Ct. 1669, and in the other case defense counsel failed to offer the individualized material that was available. *Williams,* 529 U.S. at 368–71, 396, 120 S.Ct. 1495. This was error because each defendant was entitled to show these historical events which were particularized and individualized to that defendant. *Id.* Porter's evidence is simply not of the same character as that in *Skipper* and *Williams* because it is not individualized ***254** or particularized to Porter's past criminal acts or incarceration as required by the statutory factors on future dangerousness.[FN14]

> FN14. Similarly, Bell's and Porter's reliance on *Simmons* was misplaced because that case dealt solely with information regarding parole eligibility, an issue not before the Court in this case. *See Simmons,* 512 U.S. at 156, 114 S.Ct. 2187.

We also note that our use of the term "future adaptability" in *Bell* and *Juniper* must be read in proper context. That context is the statutory mandate for the findings in Code §§ 19.2–264.2 and 19.2–264.4(C) which is the guiding framework of our prior decisions relating to future dangerousness. As noted earlier, the future dangerousness finding is to be based on evidence of the "prior history of the defendant or of the circumstances surrounding

the commission of the offense." Code § 19.2–264.4 (C). Thus when we used the term "future adaptability", we meant that term only as future dangerousness can be derived from the context of the defendant's past acts, both as to his "criminal record" and "prior history" and including his past incarceration and the circumstances of the capital crime. *See Bell,* 264 Va. at 199, 563 S.E.2d at 713.

Porter's defective proffer is not saved by his claim on appeal that the *Gray* Declaration showed an individualized or particularized proffer as to Porter. At no place in the Prison Expert Motion, or in his oral argument before the circuit court, does Porter state that Dr. Cunningham intends to do in his case that which he purported to do in the *Gray* case. Even if we assume that the representation in the *Gray* Declaration would meet the test of our prior decisions, Porter never proffered that analysis was what he intended in this case.[FN15]

FN15. Even if we assumed Porter intended his proffer in the Prison Expert Motion to be that Dr. Cunningham would do for Porter what the *Gray* Declaration indicates for Mr. Gray, the tenor of the *Gray* Declaration raises the same issues already discussed with regard to our precedent in *Burns* and *Bell.* Even though Dr. Cunningham has adopted the use of key words like "individualized assessment," the analysis appears to be of the same genre of the rejected proffers of how security measures in a future incarceration may affect a defendant's ability to commit more violent acts. For example, he states in the *Gray* Declaration that "[b]ecause risk is always a function of context or preventative interventions, increased security measures can act to significantly reduce the likelihood of Mr. Gray engaging in serious violence in prison. Mr. Gray's risk of violence in the face of such increased security measures can also be projected." Our precedent is clear that such evidence is not relevant either in rebuttal or mitigation as to the future dangerousness factor.

Porter contends that he made a sufficiently individualized proffer when arguing the Prison Expert Motion before the circuit court. It is true that Porter used some key terms like "individualized ***255** testimony" but his entire argument on that point consisted of the following:

> This is individualized testimony with regard to Thomas Porter's future risk in a penitentiary setting.
>
> Dr. Cunningham, as stated in his affidavit ... will be able to opine in a scientific matter based on an individualized assessment of Mr. Porter, which includes prior behavior while he was incarcerated in the ****442** past, to include the 76 unadjudicated bad acts that the Commonwealth has noticed; appraisals of past security requirements while he was incarcerated; and his age; his level of education and comparative review of the statistical data regarding similarly-situated inmates.

The representation on oral argument is simply too vague to have any meaning.

Porter's proffer in the Prison Expert Motion fails to address the statutory factors under Code § 19.2–264.2 and 19.2–264.4(C) as being individualized and particularized as to Porter's prior history, conviction record and the circumstances of the crime. As our precedent would render inadmissible the statistical speculation he does offer, Porter has failed to show the "particularized need" necessary to meet the *Husske* test. "In light of the inadmissibility of the evidence that [Porter] sought to introduce through the expert, he also failed to establish how he would be prejudiced by the lack of the expert's assistance." *Bell,* 264 Va. at 201, 563 S.E.2d at 715. Accordingly, we conclude that the circuit court did not abuse its discretion in denying the Prison Expert Motion.

H. COMMENTS DURING CLOSING ARGUMENT ABOUT "SOCIETY"

[22] In a separate assignment of error partially related to his arguments on the Prison Expert Motion, Porter contends that the circuit court erred during the penalty phase of the trial when it made "prejudicial" comments and "intemperate" curative instructions. Specifically, Porter argues the circuit court "erred by making prejudicial comments concerning the definition of 'society' during defense counsel's closing argument; by stating prejudicial, intemperate, and one-sided 'curative' mid-argument instructions on this point; and by denying the defendant's motion for a mistrial following this incident."

***256** The record shows that the circuit court interrupted Porter's counsel during closing argument in order to instruct the jury that society meant "[e]verybody, anywhere, anyplace, anytime" in response to comments from counsel that "society" meant prison society. When Porter's counsel again made similar remarks, a discussion at the bench occurred which led the court to comment to the jury that "society" was a "definitional word" that was not "complex" and "pretty simple" to understand. At no point during either interruption did Porter's counsel object to the court's comments. At the conclusion of his closing arguments, Porter's counsel moved for a mistrial based on the court's comments, which motion the court denied. The next day, Porter filed a written mistrial motion, which the court also denied.

Porter contends that the court's comments violated his Sixth Amendment right to have counsel present a summation of the evidence to the jury and denied him a fair opportunity to rebut the Commonwealth's allegation that he would be a continuing threat to society. Porter maintains that the court's comments prejudiced him as the jury could have interpreted the comments as a form of rebuttal from the court in which the court appeared to agree with the Commonwealth's contention that Porter was a continuing threat to society.

We do not consider the merits of Porter's contentions because the record shows that he failed to timely object to any of the circuit court's comments. Rule 5:25. *See also Reid v. Baumgardner*, 217 Va. 769, 774, 232 S.E.2d 778, 781 (1977) (citing *Russo v. Commonwealth*, 207 Va. 251, 256–57, 148 S.E.2d 820, 824–25 (1966)) (finding that an objection must be made at the time words are spoken and the objection is waived if not timely made).

I. COURTROOM SECURITY

Porter also assigns as error the circuit court's ruling "denying the defendant's motion for relief from excessive, unjustified and prejudicial in-court security, which included the presence of two uniformed officers continuously standing over the seated defendant during the proceedings." Relevant to this assignment of error, the parties stipulated for the record that the bench was 21 feet in front of counsel table and the bar of the court was 12 feet behind that table. Six deputies provided courtroom security ****443** throughout Porter's trial. One deputy stood by the bench near the clerk, another stood near the witness stand, a third deputy stood at the witnesses' entrance, a fourth deputy ***257** stood at the entrance to the spectator's gallery, and two others stood directly behind Porter between counsel table and the bar. On the fifth day of his trial, Porter objected to the two deputies standing behind him instead of being seated.

Porter argued that these deputies should be seated just within the bar of the court in accordance with a security arrangement Porter alleged he made with the sheriff's office prior to trial. Porter maintained that standing so close to him was unnecessary because he wore a 50,000 volt stun belt for security purposes, and that the standing deputies prejudiced the jury by implying that Porter was "incredibly dangerous." The circuit court responded that:

> [O]ne, you have given me no Virginia statutory provisions that says [sic] that I have the authority to direct the sheriff's department as to how to conduct their security functions that they are re-

quired to conduct for the courts in Virginia.

Two, you haven't given me a single Virginia case that says that I have any authority in that regard.

....

I don't believe I have the authority to tell the sheriff's department how to conduct security in the courtrooms.

....

I don't believe you have given me enough information to make me believe that what they are doing is causing any undue prejudice in the course of this trial. So I'm not going to accept your invitation to go outside my authority to tell them how to do their job.

The court also noted that:

[I]n fact, we are on the fifth day of the trial. The procedures that you complain of, from my observations, have been in place the entire trial, every day of the trial.

I haven't noticed any difference in the way the bailiffs have operated or conducted themselves for the full five days of this trial. This is the first time that you have raised this issue with the [c]ourt.

***258** The following day, Porter's counsel filed and argued a written motion for relief from "excessive and prejudicial in-court security presence." Porter argued the "police display not only destroys the presumption of innocence to which every defendant is entitled, but also impermissibly telegraphs law enforcement's answer to the sentence-related determination of whether the defendant poses a continuing threat of future violence." Porter supplied the court with supplemental authority reflecting that the control of courtroom security was within the circuit court's discretion and renewed his request that the deputies be seated in chairs just inside the bar of the court instead of standing.

In response, the Commonwealth noted that on February 15, 2007, while in custody awaiting trial, Porter had refused to obey deputies' instructions to leave his holding cell to be brought into court. Consequently, the deputies had been obliged to adopt unusual measures on that occasion: "to actually handcuff him behind his back, to put a stun belt on, and had [him placed in] shackles in stocking feet." The Commonwealth stipulated that Porter had not misbehaved while in the courtroom but that the deputies "obviously ... have to be aware of the defendant's history and ... that's something they take into account when they decide what measures they need to take in regard to any particular defendant in a courtroom during trial. So ... that is something that cannot be ignored."

The Commonwealth also observed that the deputies had simply been standing behind Porter and had not interfered with the proceedings or attempted to influence the jury:

They are standing there still, quiet; they are not making any gestures towards Mr. Porter that would indicate their opinion of whether Mr. Porter presents a danger to the courtroom. They just appear to be stationed in a certain location within the courtroom as other deputies are stationed, and the place they are stationed has to do with what their duties are.

****444** ....

So I think the security measures being taken are reasonable. I don't think they are such that the jury would think anything of them at all or think they reflect any message that is being sent to them regarding the defendant.

***259** The circuit court declined to order the deputies to sit down and noted:

One additional fact, though, from the February 15th hearing has to be put on the record that the [c]ourt security is aware of and that is although—actually, two additional facts.

> Although there was no in-court, during-court-proceedings outbursts, the day began with him refusing to leave his cell and they had to physically dress him. So he wasn't cooperative from that point on that day. And that day also included clear evidence by the sheriff's department that he did attempt to tamper with the stun belt that he was wearing at the time.
>
> So he has demonstrated on prior occasions where the sheriffs have, in their efforts to provide their constitutional mandate under the Code of Virginia to provide courtroom security, to present him in a way in which he does not appear in any forms of shackles, he has demonstrated that he's not necessarily willing to comply.
>
> ....
>
> And the problem with [them] sitting down is the field of vision. It does affect their field of vision.

Later that day, Porter noted that, although the deputies had moved back to stand between 6 and 7 feet behind him during trial, they were moving to stand within 2 feet whenever Porter stood. On this basis, Porter moved for a mistrial, which the circuit court denied.

Porter testified in his own defense on the seventh day of the trial. Prior to testifying, however, Porter renewed his motion for relief from the positioning of deputies in the courtroom. The Commonwealth responded that additional deputies had similarly been present during the testimony of another witness, Henry Chatman, who was in custody at the time of his testimony. The Commonwealth argued that additional security measures were therefore not particularized to Porter. "It's [sic] looks like standard courtroom security measures in any case. I don't believe it conveys any prejudicial message to the jury as [Porter] suggested."

The circuit court agreed with the Commonwealth:

> [S]ecurity exists to the extent that it exists in this particular case not just because it's a responsibility of the sheriff to do ***260** so, but because Mr. Porter has throughout his confinement and court appearances demonstrated reasons why they need to be concerned. And I have articulated those for the record previously and those things have not changed.
>
> Other than that, though, I find that there is not a sense of overwhelming force; there are no guns drawn, they are casual, they are sitting. They are motionless. They are simply in a position to make sure that nothing happens.
>
> I think that's reasonable. I don't think that in the context of the entire trial that this is the type of—this reaches the level of concerns that you have addressed with your case law that you have submitted to the [c]ourt. And therefore, though you note it, I'm not going to direct them to change.

[23] After sentencing, Porter again alleged in a motion for a new trial that courtroom security had been excessive and prejudicial. He now assigns error to the adverse rulings of the circuit court, arguing that the courtroom security arrangement "negated [his] presumption of innocence" and, by implying that Porter was dangerous, prejudiced him at sentencing because the jury's decision "ultimately rested on the dangerousness predicate alone." On appeal, Porter contends that the decisions of the United States Supreme Court in *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), and *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) support his argument and ****445** require reversal of the circuit court's judgment. We disagree.

[24][25] We review Porter's claim for abuse of discretion by the circuit court. *Frye v. Commonwealth*, 231 Va. 370, 381, 345 S.E.2d 267, 276 (1986). However, "[a circuit] court by definition

abuses its discretion when it makes an error of law.... The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *see also Twine v. Commonwealth*, 48 Va.App. 224, 231, 629 S.E.2d 714, 718 (2006); *Auer v. Commonwealth*, 46 Va.App. 637, 643, 621 S.E.2d 140, 143 (2005).

[26] The circuit court misstated the law in response to Porter's initial motion on the fifth day of trial when he opined the control of courtroom security was outside the court's purview. However, the court quickly corrected its misinterpretation the next day when Porter responded to the circuit court's invitation to supply legal authority. "The trial judge has overall supervision of courtroom security." ***261** *Payne v. Commonwealth*, 233 Va. 460, 466, 357 S.E.2d 500, 504 (1987). Because of our resolution on the merits, the circuit court's initial ruling and mistake in determining the proper discretion over courtroom security is of no consequence.

[27] "[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). Accordingly, courts are required "to safeguard against 'the intrusion of factors into the trial process that tend to subvert its purpose' " by prejudicing the jury. *Woods v. Dugger*, 923 F.2d 1454, 1456 (11th Cir.1991) (quoting *Estes v. Texas*, 381 U.S. 532, 560, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Warren, C.J., concurring)).

[28] Naturally, "[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But ... the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle*, 425 U.S. at 504, 96 S.Ct. 1691. That close scrutiny consists of "look[ing] at the scene presented to jurors and determin[ing] whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Holbrook*, 475 U.S. at 572, 106 S.Ct. 1340. In the case at bar, Porter has demonstrated no actual prejudice. Accordingly, our review is limited to the question whether the courtroom security measures permitted by the circuit court over Porter's objection were inherently prejudicial.

The Supreme Court decisions in *Estelle* and *Deck* are fundamentally distinguishable from the circumstances of the case at bar. *Estelle* concerned a defendant being required to appear for trial in distinct prison garb. *Deck* dealt with a defendant compelled to appear at trial in visible shackles and other restraints. These circumstances are not present in Porter's case and we determine *Estelle* and *Deck* to be factually distinguishable. *Holbrook* is closer, factually, to the case at bar, but does not provide the support Porter envisions.

[29] "Whenever a courtroom arrangement is challenged as inherently prejudicial ... the question must be ... whether 'an unacceptable risk is presented of impermissible factors coming into play.' " *Holbrook*, 475 U.S. at 570, 106 S.Ct. 1340 (quoting ***262***Estelle*, 425 U.S. at 505, 96 S.Ct. 1691). The Supreme Court in *Holbrook* dealt with the prejudicial effect courtroom security officers may have on a jury. There, six defendants were tried jointly upon charges of robbery and four uniformed state troopers sat immediately behind them, albeit outside the bar of the court in the first row of the spectators' gallery. *Holbrook*, 475 U.S. at 562, 106 S.Ct. 1340. The Court held that, while "[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial ... we simply cannot find an unacceptable****446** risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section." *Holbrook*, 475 U.S. at 570–71, 106 S.Ct. 1340. "Even had the

jurors been aware that the deployment of troopers was not common practice ... we cannot believe that the use of the four troopers tended to brand respondent in their eyes 'with an unmistakable mark of guilt.' " *Id.* at 571, 106 S.Ct. 1340. Moreover, the Court expressly declined to create "a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate." *Id.* at 569, 106 S.Ct. 1340.

The Court clearly considered the practical reality that security presence in any courtroom is usually not inherently prejudicial:

> Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.
>
> *Id.*

Holbrook presents facts different from those of the case at bar. For example, in the case at bar, Porter was the only defendant tried; in *Holbrook*, there were six codefendants. Here, the deputies stood inside the bar of the court; in *Holbrook*, the troopers sat outside ***263** the bar of the court. On the other hand, Porter was directly guarded not by four deputies but by only two. Additionally, the bar of the court was some 12 feet behind Porter, certainly a considerable distance from the first row of the gallery and only insignificantly shortened by placing chairs just inside the bar. The circuit court also found that the deputies' field of vision would have been obstructed had they been seated instead of standing. Given the relatively cavernous size of the well of the courtroom described by the dimensions on the record, having two deputies stand instead of sit, or to be positioned around the courtroom to help secure it, was not unreasonable or excessive.

[30] Further, even if the deputies' positions in the courtroom and standing behind Porter were prejudicial, the security measures were justified. While a defendant may not, under ordinary conditions, be forced to wear visible physical restraints because of the possibility of prejudice, *Deck*, 544 U.S. at 629, 125 S.Ct. 2007, such restraints may be constitutionally justified in the presence of a valid state interest, such as that of ensuring the security of the courtroom and those present in it, *Id.* at 626–27, 125 S.Ct. 2007, or even that of maintaining the "dignity, order, and decorum" of court proceedings. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

The record in the case at bar shows Porter had both previously disobeyed the instructions of security officers and tampered with his concealed restraining device. On these facts, any prejudicial effect of the deputies standing behind Porter is overborne by their need to maintain an adequate field of vision of his hands, furthering the essential state interest in preserving the safety of the courtroom's occupants and ensuring Porter's continued detention. While Porter argues that the circuit court held no hearing and made no specific finding that the security measures were justified, neither was necessary. "A trial court may consider various factors in determining" what security measures may be necessary, and "[t]his determination need not be made upon a formal hearing." *Frye*, 231 Va. at 381–82, 345 S.E.2d at 276.

Therefore, "look[ing] at the scene presented to jurors," *Holbrook*, 475 U.S. at 572, 106 S.Ct. 1340, we find that the security measures endorsed by the circuit court presented no risk of inherent prejudice.

Accordingly, the circuit court did not abuse its discretion in denying Porter's motions.

***264 **447** J. PORTER'S REQUEST TO INSTRUCT THE JURY ON THE DEFINITION OF "PROBABILITY" WITH REGARD TO FUTURE DANGEROUSNESS

In his seventh assignment of error, Porter contends that the circuit court erred by not providing to the jury at the penalty phase of his trial an instruction he proffered which defined the term "probability" of future violent conduct based on language in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

In *Smith*, this Court held that the terms "probability," "criminal acts of violence," and "continuing serious threat to society," as those terms are used in the statutory definition of the future dangerousness aggravating factor FN16 are not unconstitutionally vague. *Id.* at 477, 248 S.E.2d at 148. We went on to say the following about those terms:

> FN16. With regard to "future dangerousness," Code § 19.2–264.2 states that a sentence of death can be imposed only if a court or jury finds "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society."

> In our view, [the statutory language] is designed to focus the fact-finder's attention on prior criminal conduct as the principal predicate for a prediction of future "dangerousness." If the defendant has been previously convicted of "criminal acts of violence", i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable "probability", i.e., a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a "continuing serious threat."
>
> *Id.* at 478, 248 S.E.2d at 149.

The circuit court refused Porter's proffered jury instruction which defined "probability" and "reasonable likelihood," as follows:

> A. A "probability" means a reasonable likelihood that the defendant will actually commit intentional acts of unprovoked violence in the future.
>
> ***265** B. "A reasonable likelihood," in turn, means a likelihood substantially greater than a mere possibility.

Porter argues that pursuant to *Ring v. Arizona*, 536 U.S. 584, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (finding that aggravating factors function as the equivalent of an offense element and need to be found by a jury) and *Bell v. Cone*, 543 U.S. 447, 454 n. 6, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005) (raising without deciding whether, in light of *Ring*, an appellate court could cure a vague aggravating factor by applying a narrower construction), the proffered instruction should have been given to the jury. Because the language in *Smith* affects the jury's determination of the future dangerousness aggravating factor, Porter contends that the instruction should have been given in order to ensure that the jury properly found that aggravating factor in his case.

[31] We find no error in the circuit court's refusal of Porter's proffered jury instruction. Initially, we note that this Court has previously determined that Virginia's statutes regarding the imposition of the death penalty do not suffer from the same issues that were addressed in *Ring* because the aggravating factors are submitted for the jury to determine. *Muhammad v. Commonwealth*, 269 Va. 451, 491, 619 S.E.2d 16, 39 (2005), *cert. denied*, 547 U.S. 1136, 126 S.Ct. 2035, 164 L.Ed.2d 794 (2006). Porter's contention that the language from *Smith* should have been given to the jury rests on his interpretation that the footnote from *Bell* implies that any narrowing of the language of a "*vague aggrav-*

ating " factor provided by a higher court should be given to the jury. *Bell v. Cone*, 543 U.S. at 454 n. 6, 125 S.Ct. 847 (emphasis added). While the Supreme Court has yet to elaborate upon its comment in the *Bell* footnote, Porter's argument appears to rest on the presumption that the aggravating factor in question is "vague." This Court has consistently held that the future dangerousness aggravating factor is not unconstitutionally vague. *Juniper*, 271 Va. at 388, 626 S.E.2d at 401; *Winston v. Commonwealth*, 268 Va. 564, 579, 604 S.E.2d 21, 29 (2004) , *cert. denied*, 546 U.S. 850, 126 S.Ct. 107, 163 L.Ed.2d 120 (2005); ****448***Jackson v. Commonwealth*, 267 Va. 178, 205–06, 590 S.E.2d 520, 535–36, *cert. denied*, 543 U.S. 891, 125 S.Ct. 168, 160 L.Ed.2d 155 (2004). Accordingly, no additional instructions were needed in order for the jury to properly understand and determine the future dangerousness aggravating factor under the other instructions given to the jury.

***266** K. STATUTORY REVIEW UNDER CODE § 17.1–313

In his final assignment of error, Porter contends the circuit court erred by "imposing the sentence of death under the influence of passion, prejudice and other arbitrary factors, and by imposing a sentence that is excessive and/or disproportionate to the penalty imposed in similar cases." This assignment of error closely parallels the language in Code § 17.1–313(C), which sets out the mandatory review of a death sentence this Court must undertake under that statute. Accordingly, we consider Porter's assignment of error and our statutory review together.

1. CODE § 17.1–313(C)(1): PASSION, PREJUDICE, OR OTHER ARBITRARY FACTORS

Porter argues that his sentence of death was imposed under the influence of four arbitrary factors, which are also four of the assignments of error in his appeal. These are the circuit court's denial of the Prison Expert Motion, comments made by the circuit court during the closing argument regarding the statutory term "society," the refusal of Porter's proffered jury instruction based on the language from *Smith*, 219 Va. at 477, 248 S.E.2d at 148, and the "prejudicial positioning of the courtroom deputies standing over the defendant throughout the trial." Earlier in this opinion we determined that the "errors" Porter recites here were not reversible error or were waived. *Waye v. Commonwealth*, 219 Va. 683, 704, 251 S.E.2d 202, 214 (1979) (stating, in the consideration of whether the jury acted under undue passion or prejudice in the conviction of a defendant for capital murder, "[i]n other parts of this opinion, we have considered each matter of which the defendant has complained. We have not found reversible error in any individual instance, and we do not now conclude that the cumulative effect of the alleged errors was to produce a sentence influenced by passion.")

Nonetheless, this Court is mandated, pursuant to Code § 17.1–313(C)(1), to review the record in order to determine whether Porter's sentence of death "was imposed under the influence of passion, prejudice or any other arbitrary factor." We have conducted that review and we find nothing which shows that the jury failed to fully consider the evidence presented both at trial and at sentencing or that the jury was otherwise improperly influenced to sentence Porter to death. Accordingly, we find that the imposition of the death sentence ***267** was not imposed as a result of passion, prejudice, or any other arbitrary factor.

2. EXCESSIVE AND DISPROPORTIONATE SENTENCE

[32] Porter's assignment of error states that the death sentence he received was "excessive and/or disproportionate to the penalty imposed in similar cases." Even though Porter has failed to present any argument in support of this assignment of error, this Court is required to consider the issue pursuant to Code § 17.1–313(C)(2). *Gray v. Commonwealth*, 274 Va. 290, 303, 645 S.E.2d 448, 456 (2007); *Juniper v. Commonwealth*, 271 Va. 362, 432, 626 S.E.2d 383, 427 (2006).

[33][34] The proportionality review this Court is required to undertake is not designed to "insure

complete symmetry among all death penalty cases." *Muhammad v. Commonwealth*, 269 Va. 451, 532, 619 S.E.2d 16, 63 (2005) (quoting *Orbe v. Commonwealth*, 258 Va. 390, 405, 519 S.E.2d 808, 817 (1999), *cert. denied*, 529 U.S. 1113, 120 S.Ct. 1970, 146 L.Ed.2d 800 (2000)). Rather, the goal of the review is to determine if a sentence of death is "aberrant." *Id.* This review also allows the Court to determine whether the death sentence has been imposed by other courts or juries for similar crimes, "considering both the crime and the defendant." *Lovitt v. Commonwealth*, 260 Va. 497, 518, 537 S.E.2d 866, 880 (2000).

In conducting such a review, we have focused on capital murder cases in which a law ****449** enforcement officer was killed while performing his official duties and a sentence of death was imposed after the future dangerousness aggravating factor was found. *See e.g. Bell v. Commonwealth* 264 Va. 172, 563 S.E.2d 695 (2002), *cert. denied*, 537 U.S. 1123, 123 S.Ct. 860, 154 L.Ed.2d 805 (2003); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991); *Delong v. Commonwealth*, 234 Va. 357, 362 S.E.2d 669 (1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988); *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984), *cert. denied*, 471 U.S. 1025, 105 S.Ct. 2037, 85 L.Ed.2d 319 (1985). In addition, this Court has also reviewed similar cases in which a life sentence was imposed pursuant to Code § 17.1–313(E). Based on this review, we find that Porter's sentence was not excessive or disproportionate to sentences imposed in capital murder cases for comparable crimes.

***268** CONCLUSION

For the foregoing reasons, we find no reversible error in the judgment of the circuit court. Furthermore, we find no reason to set aside the sentence of death. We will therefore affirm the judgment of the circuit court.

Affirmed.

Justice KEENAN, dissenting.

I respectfully dissent. I join in Justice Koontz's analysis and conclusion that this Court's holding permits a defendant to be executed under void judgments. In my view, in the absence of subject matter jurisdiction, Porter effectively was not tried for these offenses and, thus, ultimately will be executed based solely on the indictments that were returned against him. Because the conclusion I reach requires reversal of the void judgments, I would not address any other issue in the case and would remand the case for a new trial.

Justice KOONTZ, dissenting.

I respectfully dissent. Today, in my view, a majority of this Court permits a capital murder conviction and death sentence to be imposed on Thomas Alexander Porter pursuant to void judgments. I cannot join in that decision. I do not take issue with the majority's conclusion that the evidence adduced at Porter's trial was more than sufficient to establish that Porter committed the murder of Norfolk Police Officer Stanley Reaves. Nor do I take issue with the majority's conclusion that the death sentence in this case, properly obtained, would not be excessive or disproportionate to the penalty imposed in similar cases when reviewed under Code § 17.1–313.

The undisputed procedural facts in this case are no less than a Gordian knot of vague, conflicting, and contradictory orders entered with respect to the change of venue and the subsequent conduct of the trial and the sentencing proceeding. They are remarkable in that they apparently have not occurred in prior cases this Court has been called upon to review. It is unnecessary, however, to repeat in detail all of the procedural facts which are adequately recounted by the majority. The focus here is upon the dispositive procedural facts as they implicate the pertinent statutes within the applicable statutory scheme.

***269** Porter was indicted by a grand jury in the Circuit Court of the City of Norfolk (Norfolk Circuit Court) for the capital murder of Officer

Reaves. [FN1] Porter was subsequently brought to trial on that indictment in the Norfolk Circuit Court in accord with the mandate of Code § 19.2–244 which provides that "[e]xcept as otherwise provided by law, the prosecution of a criminal case shall be had in the county or city in which the offense was committed." On October 2, 2006, the Norfolk Circuit Court entered an order providing "that the trial of [Porter's case] be transferred to the Circuit Court of the Fourth Judicial Circuit located in Arlington, Virginia." This order is vague and conflicting. There is no Fourth Judicial Circuit ****450** Court located in Arlington County; the Fourth Judicial Circuit is limited to the City of Norfolk. Code §§ 17.1–500; –506(4). Thus, the majority is left to observe that "[i]t is unclear from the circuit court's order whether it was transferring the place of trial with the Norfolk Circuit Court sitting in Arlington [County] or whether it was intended that the trial be conducted in Arlington [County] as a trial in [the Circuit Court of Arlington County]."

> FN1. Porter was also indicted, tried, and convicted of use of a firearm in the commission of a felony and grand larceny. The views expressed in this dissent are equally applicable to those convictions in the context of the validity of the underlying judgments.

Code § 19.2–251, however, is quite clear. This statute which specifically addresses a change in venue, in pertinent part, provides that: "[a] circuit court may, on motion of the accused or of the Commonwealth, for good cause, order the venue for the trial of a criminal case in such court *to be changed to some other circuit court.*" (Emphasis added). This statute does not purport to permit the Norfolk Circuit Court to transfer itself to Arlington County; it plainly permits the Norfolk Circuit Court in this case to transfer the trial of the case to the Circuit Court of Arlington County (Arlington County Circuit Court). [FN2] Indeed, that is precisely what occurred in Porter's case as reflected by the subsequent and significant "felony trial orders" which were captioned, as the majority notes, "In the Circuit Court of the County of Arlington." Clearly, Porter was tried and convicted in the Arlington County Circuit Court. A March 7, 2007 ***270** order entered by the Arlington County Circuit Court reflects the Arlington County jury's guilty verdict on the charge of capital murder, and a March 14, 2007 order entered by that court reflects the jury's sentence of death.

> FN2. Code § 17.1–114 permits the circuit court under circumstances not applicable here to hold its sessions at locations other than at its designated courthouse within the geographical limits of its circuit. This statute, when applicable, further provides that "[e]xcept as provided in this section or as agreed by all parties to an action, no session of a circuit court shall be held outside the geographical limits of the county or city of which it is the court."

The March 14, 2007 order entered by the Arlington County Circuit Court also granted Porter's motion "to refer this matter to the Probation Office for the Circuit Court of Norfolk, Virginia" and continued the case to July 16, 2007 "in the Circuit Court of the City of Norfolk." Thereafter, by order entered on July 18, 2007 in the Norfolk Circuit Court, Porter was sentenced to death in accord with the Arlington County jury verdict.

Finally, it is undisputed that Judge Charles D. Griffith, Jr., a judge of the Norfolk Circuit Court, presided over all the proceedings conducted in the Norfolk Circuit Court as well as those in the Arlington County Circuit Court. Judge Griffith, however, was never designated, pursuant to Code § 17.1–105, to preside over Porter's trial in the Arlington County Circuit Court.

Considering these undisputed procedural facts, it becomes readily apparent that Porter was tried and convicted of capital murder in one circuit court and sentenced to death in another, separate circuit court. The resolution of the issue of the "subject

matter jurisdiction" of these courts perhaps is not so readily apparent and explains the considerable efforts exerted by the majority to resolve that issue.

The foundation upon which the majority builds its analysis is its interpretation and application of Code § 17.1–513. This statute generally provides the civil and criminal jurisdiction of circuit courts and, in pertinent part, provides that "[t]hey shall also have *original jurisdiction* of all indictments for felonies and of presentments, informations and indictments for misdemeanors." (Emphasis added). The majority interprets this provision to mean that in Porter's case "both the Norfolk Circuit Court and the Arlington Circuit Court had subject matter jurisdiction for the trial of the charges against Porter." Without this foundation, the balance of the majority's analysis simply unravels.

Code § 17.1–513 is the statute that indeed establishes the potential subject matter jurisdiction of all the circuit courts in this Commonwealth. This statute grants the authority to adjudicate certain classes of cases, including indictments for felonies. *See Morrison v. Bestler,* 239 Va. 166, 169, 387 S.E.2d 753, 755 (1990). Code § 17.1–513, however, does not resolve the issue whether a particular circuit court ***271** has subject matter jurisdiction over a particular criminal felony case. Surely, it would not be seriously contended ****451** that because all circuit courts are authorized by Code § 17.1–513 to try all indictments for felonies that an accused can be indicted for a felony committed in one jurisdiction in the Commonwealth and yet tried in another in the absence of additional statutory authority permitting that to occur. In this context, it should be evident that Code § 17.1–513 addresses only the potential jurisdiction of all circuit courts to try felony cases.

The statutory scheme implicated by the procedural facts in this case further undermines the foundation of the majority's analysis. Code § 19.2–244, in pertinent part, provides that "[e]xcept as otherwise provided by law, the prosecution of a criminal case shall be had in the county or city in which the offense was committed." Thus, in Porter's case the prosecution of the criminal charge against him was mandated to occur initially in the City of Norfolk. And, only the Norfolk Circuit Court initially had jurisdiction to try that case pursuant to Code § 19.2–239 which provides that circuit courts "shall have *exclusive original jurisdiction* for the trial of all presentments, indictments and informations *for offenses committed within their respective circuits.*" (Emphasis added).

Porter requested a change of venue in this case, and the Norfolk Circuit Court granted that request as it was authorized to do pursuant to Code § 19.2–251. However, as noted above, this statute expressly authorized the Norfolk Circuit Court to transfer venue "to some other circuit court." Code § 19.2–253 then provides that "[t]he clerk of the court which orders a change of venue shall certify copies ... of the record of the case to the clerk of the court to which the case is removed, ... and such court shall proceed with the case as if the prosecution had been originally therein." This statutory scheme makes clear that upon a change of venue the jurisdiction of the circuit court to which the case is transferred is statutorily invoked and that court then has the "exclusive original jurisdiction" to try criminal offenses "as if the prosecution had been originally therein." Thus, the Arlington County Circuit Court had subject matter jurisdiction to try Porter's case; the Norfolk Circuit Court no longer had such jurisdiction. In short, Code § 17.1–513 simply provides no basis to conclude, as the majority does in this case, that both circuit courts had subject matter jurisdiction for the trial of the felony charges against Porter.

***272** While the Arlington County Circuit Court exercised its jurisdiction to conduct the guilt determination phase of Porter's capital murder trial, it is undisputed that Porter was sentenced to death by the Norfolk Circuit Court. There is no statutory provision which permits one circuit court to try a capital murder case and for another circuit court to impose the sentence of death recommended by the

trial jury in the initial court. Code § 19.2–264.4 contemplates that only one circuit court conduct the trial and sentencing proceedings. Moreover, even under the majority's interpretation of Code § 17.1–513 that all circuit courts have jurisdiction to try a capital murder case, Code § 19.2–251 does not purport to authorize the circuit court that conducts the guilt phase of a capital murder trial to transfer the sentencing phase of the trial to another circuit court. Therefore, in Porter's case the sentence of death imposed by the Norfolk Circuit Court was void and would require that judgment to be reversed and further require a remand to the Arlington County Circuit Court for a new sentencing hearing. *See* Code § 19.2–264.3(C).

But then there remains the issue of the authority of Judge Griffith in this case to preside over the trial itself in the Arlington County Circuit Court. While the majority is ambivalent over whether a designation pursuant to Code § 17.1–105 was required in this case, it concludes that "a missing order of designation would only have affected the circuit court judge's authority to act in the exercise of territorial jurisdiction." Thus, the majority disposes of the issue by concluding that it is waived because Porter did not raise the issue at his trial.

To reach this conclusion the majority goes to some length to ultimately overrule our prior decision in *Gresham v. Ewell,* 85 Va. (10 Hans.) 1, 85 Va. 1, 6 S.E. 700 (1888), where this Court held that a judgment was "null and void" because a judge from another jurisdiction rendered a judgment without proper designation to conduct court in the ****452** jurisdiction where trial occurred. 85 Va. at 2, 6 S.E. at 701. Until today, *Ewell* has been the law of this Commonwealth and I am unpersuaded by the majority's analysis which appears to be premised on little more than a change of opinion by the present majority since *Ewell* was decided.

In my view, that analysis is not persuasive. In Porter's case, the judge who presided over his trial in the Arlington County Circuit Court had no authority to do so. It is not simply a matter, however, that the judge had no authority to try a case in a jurisdiction other than the jurisdiction for which he was commissioned to serve as a ***273** circuit judge. In this case, because Judge Griffith was not designated as a judge of the Arlington County Circuit Court, Porter was tried in a court without an authorized presiding judge; indeed, he was tried in a court presided over by a person who was in essence a stranger to that court. As a result, and consistent with the rationale of *Ewell,* the Arlington County Circuit Court, the trial court, was not authorized to exercise subject matter jurisdiction over the guilt phase of Porter's case and the court's conviction order was therefore void and not merely voidable. Executing a defendant in reliance upon a void order of conviction is, in my view, the ultimate denial of due process. Accordingly, I would not merely reverse Porter's sentence of death but I would reverse Porter's convictions and remand the case for a new trial if the Commonwealth be so advised.

Obviously, I need go no further in my analysis of Porter's case. Nevertheless, I also dissent from the majority's determination that Porter was not entitled to have the trial court appoint Dr. Cunningham as an expert to assist Porter in establishing that he would not present a serious threat to society if he were to be sentenced to life in prison without possibility of parole. The majority concludes that Porter did not establish a "particularized need" to have an expert assist him in presenting evidence to respond to the Commonwealth's contention that Porter was subject to the death penalty because he remained a continuing danger to society.

Under Virginia's statutory scheme, capital murder as defined in Code § 18.2–31 constitutes a Class 1 felony punishable under Code § 18.2–10, as pertinent here, only by either a sentence of death or life imprisonment. A defendant who commits a capital murder after January 1, 1995 and is sentenced to imprisonment for life is not eligible for parole, and the jury is so instructed. Code § 19.2–264.4(A); *Yarbrough v. Commonwealth,* 258 Va. 347, 374, 519 S.E.2d 602, 616 (1999). A defendant convicted

of capital murder in Virginia becomes eligible for the death penalty only if the Commonwealth proves beyond a reasonable doubt that

> there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or ***274** inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.
>
> Code § 19.2–264.4(C)

Significantly, under this statutory scheme a finding of one or both of these aggravating factors does not mandate the imposition of the death penalty. Rather, the jury is only "limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment." Code § 19.2–264.4(A). "In the event the jury cannot agree as to a penalty, the court shall ... impose a sentence of imprisonment for life." Code § 19.2–264.4(E).

Once a defendant has been convicted of capital murder, the obviously critical issue to be determined is whether that defendant shall be sentenced to death or life imprisonment without possibility of parole. Under Virginia's statutory scheme, the initial focus of that determination falls upon whether the Commonwealth proves beyond a reasonable doubt either of the aggravating factors that makes the defendant eligible for the death sentence. On such a critical issue, there can be no question but that the defendant has a fundamental right to introduce appropriate evidence to rebut the Commonwealth's evidence regarding these aggravating factors. ****453** *See, e.g., Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (holding that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of "information which he had no opportunity to deny or explain"); *see also, Skipper v. South Carolina*, 476 U.S. 1, 8, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)(death sentence overturned where defendant was denied right to introduce evidence regarding his good behavior in jail). Pertinent to Porter's case, the Supreme Court in *Skipper* noted that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule ... that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement." *Id.* at 5 n. 1, 106 S.Ct. 1669.

In this case, the jury did not find the vileness aggravating factor had been proven by the Commonwealth's evidence and, thus, the jury's decision to impose the death sentence rested solely on its determination that Porter presented a further danger to society sufficient to warrant that penalty. Accordingly, if Porter was denied due process by the trial court's refusal to appoint an expert who would have offered testimony to rebut the Commonwealth's assertions of ***275** future dangerousness, then unquestionably the sentence of death must be vacated. The Commonwealth does not contend that Porter was financially able to independently employ such an expert.

Recently, in *Juniper v. Commonwealth*, 271 Va. 362, 626 S.E.2d 383, *cert. denied*, 549 U.S. 960, 127 S.Ct. 397, 166 L.Ed.2d 282 (2006), this Court held that the jury's "determination of future dangerousness revolves around an individual defendant and a specific crime." *Id.* at 425, 626 S.E.2d at 423. The Court explained that in admitting expert testimony as pertinent in rebuttal of the Commonwealth's attempt to prove future dangerousness, "such evidence should 'concern the history or experience of the defendant.' " *Id.* at 425–26, 626 S.E.2d at 423. (quoting *Cherrix v. Commonwealth*, 257 Va. 292, 310, 513 S.E.2d 642, 653, *cert. denied*, 528 U.S. 873, 120 S.Ct. 177, 145 L.Ed.2d 149 (1999)). The Court has further explained that only "evidence peculiar to a defendant's character, history and background is relevant

to the future dangerousness inquiry." *Bell,* 264 Va. at 201, 563 S.E.2d at 714. In accordance with this reasoning, the Court has previously rejected expert testimony regarding generalized "daily inmate routine [and] general prison conditions." *Burns v. Commonwealth,* 261 Va. 307, 338, 541 S.E.2d 872, 892, *cert. denied,* 534 U.S. 1043, 122 S.Ct. 621, 151 L.Ed.2d 542 (2001).

Applying these principles, the Court has upheld a trial court's decision to deny the appointment of a risk assessment expert where the testimony proffered was not sufficiently specific and particularized to the defendant to rebut the Commonwealth's assertions that the defendant would pose a future danger to society. Accordingly, in *Juniper,* this Court upheld a trial court's rejection of expert testimony where

> [n]either the actual proffer, counsel's argument, nor [the expert's] explanations ... was "specific to [the defendant]".... [The expert] offered nothing to the trial court to support his opinion as being based on [the defendant's] individual characteristics that would affect his future adaptability in prison and thus relate to a defendant-specific assessment of future dangerousness.

Id. at 427, 626 S.E.2d at 424 (internal citations omitted). Similarly, in *Burns,* 261 Va. at 340, 541 S.E.2d at 893, the Court rejected the appointment of a risk assessment expert to rebut the Commonwealth's future dangerousness assertions where the expert's testimony ***276** failed to " focus ... on the particular facts of [the defendant's] history and background, and the circumstances of his offense."

In my view, Dr. Cunningham's proffered testimony regarding the question of Porter's future dangerousness is sufficiently specific and particularized with respect to Porter's individual characteristics, history and background, and past offenses. In the affidavit proffered by Porter in support of his motion for Dr. Cunningham's appointment, Dr. Cunningham explained that his "individualized assessment" evaluated a number of factors in determining whether a particular defendant ****454** posed a future danger to society. The affidavit detailed the typical scientific basis and methodology used by the doctor in assessing a particular defendant, including "his age, his level of educational attainment ... other features and characteristics regarding him [and] particularized to him based on demographic features, adjustment to prior incarceration, offense and sentence characteristics, and other factors." It also included information regarding how, if appointed, Dr. Cunningham would determine the setting and time span in which Porter's violent conduct would be likely to occur, the base rate of serious violence in that particular setting, and the individual characteristics and prior record of Porter in relation to the likelihood of serious violence in the prison setting.

Thus, I am persuaded that Dr. Cunningham's proffered testimony was relevant to the issue of Porter's future dangerousness because it was sufficiently "specific" to Porter based on Porter's individual characteristics, and focused "on the particular facts of [Porter's] history and background, and the circumstances of his offense." *Juniper,* 271 Va. at 426, 626 S.E.2d at 423; *see also Burns,* 261 Va. at 340, 541 S.E.2d at 893. Accordingly, even if I could agree with the majority that the failure to establish proper jurisdiction in this case was merely a failure of "territorial" jurisdiction and the objection thereto was waived by Porter's failure to raise the issue, I would nonetheless hold that Porter was denied due process because he was denied the opportunity to present competent, relevant expert testimony to rebut the Commonwealth's assertion that he posed a continuing danger to society. And on this ground, I would vacate the sentence of death imposed on Porter and remand the case for a new ***277** sentencing proceeding in which Porter would have the benefit of Dr. Cunningham's testimony. FN3

> FN3. I have not addressed the courtroom security issue raised by Porter, though I am troubled by the possibility that excessive

> security measures may have created prejudice against Porter in the sentencing phase of his trial. Accordingly, I do not join in the majority's decision to affirm on that issue.

Finally, I am compelled to warn that the various issues raised in this case may tend to exemplify certain aspects of the conduct of capital murder trials in this Commonwealth that slowly, but inexorably, will erode public confidence that the death penalty is being imposed in a fair and consistent manner. Surely, the citizens of Virginia expect, and have the right to expect, that the courts of the Commonwealth will conduct death penalty trials with due regard for the constitutional and statutory safeguards that are meant to ensure that the maximum penalty will be imposed only in those instances where it is truly necessary to advance the cause of justice and secure the lives and welfare of the people. Moreover, it should be expected, and justice demands, that even in cases where a sentence of death may be appropriate, its imposition will occur through a strict and faithful adherence to due process of law. If the courts empowered to sit in judgment over those accused of typically heinous crimes fail to take the greatest care in assuring the fairness of the proceedings that result in the imposition of the death penalty, then it must inevitably follow in time that the death penalty statutes of this Commonwealth will no longer pass constitutional muster. For now, however, I take some comfort in the conclusion that the manner in which Porter's case was conducted is atypical of the manner in which our trial courts conduct capital murder trials.

Va.,2008.
Porter v. Com.
276 Va. 203, 661 S.E.2d 415

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Lawlor v. Zook

United States Court of Appeals for the Fourth Circuit

September 25, 2018, Argued; November 27, 2018, Decided

No. 17-6

Reporter
909 F.3d 614 *; 2018 U.S. App. LEXIS 33240 **; 2018 WL 6174652

MARK ERIC LAWLOR, Petitioner - Appellant, v. DAVID W. ZOOK, Warden, Respondent - Appellee.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Lawlor v. Zook, 2018 U.S. App. LEXIS 36622 (4th Cir., Dec. 27, 2018)*

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. (2:15-cv-00113-MSD-LRL). Mark S. Davis, District Judge.

Lawlor v. Zook, 2017 U.S. Dist. LEXIS 92430 (E.D. Va., June 15, 2017)

Disposition: REVERSED AND REMANDED.

Core Terms

prison, sentencing, future dangerousness, violence, state court, mitigating, proffered, predictive, probability, district court, trial court, adaptability, incarcerated, aggravator, supplied, mitigating evidence, violent act, circumstances, quotation, factors, marks, clearly established federal law, court's decision, characteristics, defense counsel, commit, jury's, death sentence, particularized, inadmissible

Case Summary

Overview
HOLDINGS: [1]-The district court erred in denying petitioner habeas relief because it was constitutional error for the state court to exclude specialized and relevant testimony of a qualified witness who would have explained that petitioner represented a very low risk for committing acts of violence while incarcerated, where the jury's only choices were life in prison without parole or death, as it was well established that evidence that a defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating, and such evidence could not be excluded from the sentencer's consideration, and the state court's error in that regard had a substantial and injurious effect.

Outcome
Judgment reversed. Case remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN1[] **Review, Antiterrorism & Effective Death Penalty Act**

The appellate court reviews the district court's denial of a habeas petition de novo. The appellate court's review of the state court decision is constrained, however, by the amendments to *28 U.S.C.S. § 2254* enacted as part of the *Antiterrorism and Effective Death Penalty Act of 1996*. A federal habeas court may not grant relief on previously adjudicated state court claims unless it concludes that the state court's determination was contrary to, or involved an unreasonable application of, clearly established Federal law as set forth by the United States Supreme Court, *§ 2254(d)(1)*, or rested on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, *§ 2254(d)(2)*. In order for a state court's decision to be an unreasonable application of the court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice. In other words, a litigant must show that the state court's ruling was so lacking in

justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN2[] **Review, Scope of Review**

In assessing a state prisoner's habeas claims, the court looks to the last reasoned decision of a state court addressing the claim.

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN3[] **Standards of Review, Contrary & Unreasonable Standard**

Clearly established federal law refers to the holdings, as opposed to the dicta, of United States Supreme Court decisions as of the time of the relevant state-court decision. A state court determination is contrary to clearly established federal law where it 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. A state court unreasonably applies clearly established federal law if the state court identifies the correct governing legal principle from Supreme Court decisions but unreasonably applies that principle to the facts of the prisoner's case. It is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by the Supreme Court. Evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN4[] **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth* and *Fourteenth Amendments* require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN5[] **Capital Punishment, Mitigating Circumstances**

The sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN6[] **Capital Punishment, Mitigating Circumstances**

Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. Thus, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. It would contravene Eddings to preclude a defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN7[] **Capital Punishment, Mitigating Circumstances**

A capital defendant must be permitted to introduce in mitigation evidence of post-crime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life imprisonment rather than

death.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN8 **Capital Punishment, Mitigating Circumstances**

A defendant must be permitted to introduce evidence of past good behavior in prison to aid the sentencing body in predicting probable future behavior and conduct, where that defendant may be spared (but incarcerated).

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN9 **Capital Punishment, Mitigating Circumstances**

The sentencing body should be presented with all possible relevant information to enable it to make a prediction about a defendant's probable conduct in prison.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN10 **Capital Punishment, Mitigating Circumstances**

Expert testimony regarding probable conduct in prison is not per se inadmissible. The United States Supreme Court has rejected the contention that expert testimony on future dangerousness should be excluded from capital trials, explaining, the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN11 **Capital Punishment, Aggravating Circumstances**

To prove the future dangerousness aggravator in Virginia state court, the Commonwealth must demonstrate that there is a probability based upon evidence of the prior history of the defendant that he would commit criminal acts of violence that would constitute a continuing serious threat to society. *Va. Code Ann. § 19.2-264.4*.C. And it is true that Virginia courts have rejected the argument that a jury's determination on this factor is restricted to a consideration of only the prison society.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN12 **Capital Punishment, Mitigating Circumstances**

The relevance standard applicable to mitigating evidence in capital cases is a low threshold. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN13 **Capital Punishment, Mitigating Circumstances**

A State cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN14 **Capital Punishment, Mitigating Circumstances**

A State may not prevent the capital sentencing authority from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN15 **Capital Punishment, Mitigating Circumstances**

To be admissible, evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future adaptability in the prison environment.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN16[] **Capital Punishment, Mitigating Circumstances**

Under Virginia law, conditions of prison life and the security measures utilized in a maximum security facility are not relevant to the future dangerousness inquiry unless such evidence is specific to the defendant on trial and relevant to that specific defendant's ability to adjust to prison life.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN17[] **Capital Punishment, Mitigating Circumstances**

Evidence showing a defendant's good behavior in jail that is peculiar to the defendant's history and background is relevant under Skipper.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN18[] **Fundamental Rights, Cruel & Unusual Punishment**

The United States Supreme Court has long recognized that a capital sentencing body must be permitted to consider any admissible and relevant mitigating information in determining whether to assign the defendant a sentence less than death. A State cannot bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death. Once this threshold is met, the *Eighth Amendment* requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence.

Counsel: ARGUED: Timothy Patrick Kane, FEDERAL COMMUNITY DEFENDER OFFICE FOR EASTERN DISTRICT OF PENNSYLVANIA, Philadelphia, Pennsylvania, for Appellant.

Matthew P. Dullaghan, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

ON BRIEF: Aren Adjoian, FEDERAL COMMUNITY DEFENDER OFFICE FOR EASTERN DISTRICT OF PENNSYLVANIA, Philadelphia, Pennsylvania; Emily Munn, BISCHOFF MARTINGALE, P.C., Norfolk, Virginia, for Appellant.

Mark R. Herring, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Judges: Before MOTZ, DUNCAN, and THACKER, Circuit Judges. Judge Thacker wrote the opinion, in which Judge Motz and Judge Duncan joined.

Opinion by: THACKER

Opinion

[*618] THACKER, Circuit Judge:

A Virginia state court sentenced Mark Eric Lawlor to death after his conviction for the capital murder of Genevieve Orange. In recommending the death sentence, the sentencing jury found that there was a probability Lawlor "would commit criminal acts of violence that would constitute a continuing serious threat to society." **[**2]** *Va. Code Ann. § 19.2-264.4.C*. Lawlor exhausted state court direct appeal and post-conviction remedies. He then filed the instant federal petition for review of his death sentence pursuant to *28 U.S.C. § 2254*, raising 18 claims. The district court dismissed his petition, and Lawlor appealed.

We granted a certificate of appealability on three issues raised in the federal petition, including whether it was constitutional error for the trial court to exclude expert testimony about Lawlor's risk of future violence in prison. Specifically, the state court excluded specialized and relevant testimony of a qualified witness who would have explained that Lawlor "represents a very low risk for committing acts of violence while incarcerated," J.A. 1070,[1] where the jury's only choices were life in prison without parole ("LWOP") or death.

As more fully explained below, we conclude that the state court's exclusion of the expert's testimony was an unreasonable application of clearly established federal law. It is well established that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and "such evidence may not be excluded from the sentencer's consideration." *Skipper v. South Carolina, 476 U.S. 1, 5, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)*. Because **[**3]** we also conclude the state court's error in this regard had a substantial and injurious effect, we reverse the district court's decision and remand with instructions to grant relief.

I.

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

A.

Factual Background

In 2008, Lawlor worked as a leasing consultant at an apartment complex in Fairfax County, Virginia, and had access to keys to each apartment. On September 24, 2008, Lawlor consumed alcohol and a large amount of crack cocaine and sexually assaulted, bludgeoned, and killed a tenant in that complex, Genevieve Orange.

> Genevieve Orange[] was found on the floor of the living area of her studio apartment. She was naked from the waist down, her bra and t-shirt had been pushed up over her breasts, and semen was smeared on her abdomen and right thigh. Her soiled and bloodied shorts and underpants had been flung to the floor nearby. She had been struck 47 times with one or more blunt objects.
>
> A bent metal pot was found near Orange's body. Its wooden handle had **[*619]** broken off and was found in the kitchen sink, near a bloody metal frying pan that had been battered out of its original shape. Some of Orange's wounds were consistent with having been struck with the frying pan. Subsequent medical examination **[**4]** established that she had aspirated blood and sustained defensive wounds, together indicating that she had been alive and conscious during some part of the beating.

Lawlor v. Commonwealth, 285 Va. 187, 738 S.E.2d 847, 859 (Va. 2013).

Lawlor was indicted on March 16, 2009, in Virginia state court on two counts of capital murder: (1) premeditated murder in the commission of, or subsequent to, rape or attempted rape;[2] and (2) premeditated murder in the commission of abduction with the intent to defile.[3] On the eve of trial, Lawlor admitted "participation" in the murder. *Lawlor, 738 S.E.2d at 859*. In February 2011, Lawlor was convicted of both counts. He does not challenge any aspect of the conviction in this appeal.

After Lawlor's conviction at the guilt phase of his trial, the jury proceeded to the penalty phase. Virginia law provides, "The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that": (1) "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society" (the "future dangerousness aggravator"); or (2) "that **[**5]** his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim" (the "vileness aggravator"). *Va. Code Ann. § 19.2-264.4.C*.

The Commonwealth presented evidence of aggravating factors supporting a death sentence. Lawlor then presented his mitigation case, which included around 50 witnesses, in support of a LWOP sentence. He called witnesses who testified about his alcohol and drug abuse; family witnesses; social history witnesses; experts who testified about addiction; and as discussed in depth below, an expert on prison risk assessment and adaptation, Dr. Mark Cunningham.

The jury found that both the vileness aggravator and future dangerousness aggravator were present in Lawlor's case, and it returned a death sentence on each of the two murder counts. Thereafter, the trial court was charged with determining "whether the sentence of death is appropriate and just." *Va. Code Ann. § 19.2-264.5*. At sentencing on July 1, 2011, the trial court concluded there was "no reason to intercede and sentence [Lawlor] contrary to the recommendations of the jury in either count one or two," and imposed the death sentence. J.A. 1230.

B.

*Expert Witness **[**6]** Testimony*

Arguably the most contentious portion of the penalty phase was during the testimony of retained expert Mark Cunningham, **[*620]** Ph.D., a clinical psychologist and expert in prison risk assessment and adaptation. He evaluated Lawlor by interviewing him, his former probation officer, a friend, and a corrections supervisor; and by reviewing criminal records, prison records, mental health and rehabilitation records, school records, and employment records. Dr. Cunningham used Lawlor's past behavior, as well as statistical data and actuarial models, to analyze Lawlor's "potential to adjust to a life term in prison without serious violence." J.A. 552.

1.

[2] *See Va. Code Ann. § 18.2-31(5)* (capital murder defined as "willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration").

[3] *See Va. Code Ann. § 18.2-31(1)* (capital murder defined as "willful, deliberate, and premeditated killing of any person in the commission of abduction, . . . when such abduction was committed . . . with the intent to defile the victim of such abduction").

Dr. Cunningham is Permitted to Testify

The first issue was whether Dr. Cunningham would be able to testify at all. Defense counsel proffered:

> What he is going to be talking about is, and as set forth in his report, based upon the particular characteristics of Mr. Lawlor, the fact of his prior conduct while incarcerated in jails and prisons in the past, and the lack of write-ups for lack of violence; Mr. Lawlor's age; Mr. Lawlor's having connections with members of the community, and other factors as set forth in the report that, based upon specific **[**7]** factors that relate to Mr. Lawlor that are different than me and that are different than other Defendants.
> Based upon all that, Dr. Cunningham will opine that Mr. Lawlor is a low risk to commit serious acts of violence in prison and he can put some numbers on that as set forth in the report; a low risk, a very low risk.
> That is peculiar to him. That is unique to him.

J.A. 869-70. The trial court ultimately ruled:

> I don't dispute that what you have said so long as it is particularized to this Defendant and stays with in the guidelines of *Morva* [*v.* *Commonwealth, 278 Va. 329, 683 S.E.2d 553 (Va. 2009)]*, but I think that Dr. Cunningham's report appears to me to be far in excess of that.
> . . .
>
> [T]otal exclusion of Dr. Cunningham would be improper under [*Morva and Gray v. Commonwealth, 274 Va. 290, 645 S.E.2d 448 (Va. 2007)]* but it's going to have to be limited under the rules of evidence, in all respects, as well as limited to the particularized facts of this Defendant as set forth; his character, his prior record and the circumstances of his offense, not prison life and not the effect of prison life.

Id. at 872-73.

The Commonwealth objected: "It was mentioned in Counsel's argument about [Lawlor's] risk of future dangerousness in prison society. That's not the question, and the jury is not limited to considering prison society and **[**8]** that's another danger with this type of testimony." J.A. 873. The trial court explained, "The Supreme Court has been very clear; it is the society, it is not the prison society which he is maybe confined to -- it's society, period." *Id. at 874*. Defense counsel then stated, "I would not put [Dr. Cunningham] on to say [Lawlor is not a risk of future dangerousness, period]." *Id. at 875*. The trial court then allowed Dr. Cunningham to take the stand.

2.

The Trial Court's View of "Society"

On direct examination, Dr. Cunningham explained his methodology and the materials he reviewed. Defense counsel stated, "[S]pecifically regarding the facts and circumstances of Mr. Lawlor's prior history, and the circumstances of the offense, [I want to turn to] whether Mr. Lawlor would commit criminal acts of violence that **[*621]** would constitute a continuing serious threat to society in the future." J.A. 955. The Commonwealth objected, and the trial court reiterated that society "is not the prison. . . . I think [defense counsel] knows that he can't ask that question, limited to the prison." *Id.* at 957.

Defense counsel then asked Dr. Cunningham, "[W]hat is your opinion as to whether Mr. Lawlor would commit criminal acts of violence that would **[**9]** constitute a continuing serious threat to society if he were to be sentenced to life imprisonment rather than to death?" J.A. 960-61. Dr. Cunningham answered, "That likelihood is very low," to which the Commonwealth objected, and the trial court sustained the objection and struck the answer. *Id.* at 962. After several more attempts by defense counsel to elicit testimony about Lawlor's future dangerousness in prison, the trial court said, "[I]t's not limited to prison society, and it's misleading to the jury." *Id.* at 964.

The court repeatedly admonished defense counsel and Dr. Cunningham not to confine "society" to prison. *See, e.g.*, J.A. 979 ("We've already discussed that three times at the bench. The issue is not life in prison. It's an issue of risk of violence, period."); *id.* at 981 ("The issue in this case that you are here to testify about is the likelihood of future violence of Mr. Lawlor. It is not the likelihood of future violence in prison."); *id.* at 995 ("It's future dangerousness, period, not future dangerousness in prison . . . ."); *id.* at 1023 ("The issue is not violence in prison. . . . [I]f [Dr. Cunningham] continues to talk about violence in prison that's not the issue."); *id.* at 1027 ("I have told you over and over the issue is **[**10]** future dangerousness. It's not future dangerousness in prison . . . it's future dangerousness of this individual and you keep trying to back door in the capital sentence . . . .").

The trial court also relied on the Virginia Supreme Court decision of *Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415 (Va. 2008)*, explaining, "[I]n *Porter*, they . . . said the argument that . . . prison society, what you call prison life, is the only society which should be considered for future dangerousness has been rejected." J.A. 986. As a result of the

trial court's belief that Dr. Cunningham could not testify about future dangerousness in prison *only*, Dr. Cunningham was not able to sufficiently explain his prediction that Lawlor would present a very low risk of violence if incarcerated.

3.

Dr. Cunningham's Other Testimony

Dr. Cunningham was able to testify about some of the characteristics and history of Lawlor. He stated that there was an instance of Lawlor being "verbally abusive and profane towards jail staff," J.A. 1036, and being the "victim" of two fistfights, for which no disciplinary action was taken, *id.* at 1009. But Dr. Cunningham explained that, overall, Lawlor was not historically violent in a prison setting. He otherwise attempted to discuss risk factors such **[**11]** as age and education, both of which he found to weigh in favor of Lawlor being a low risk for prison violence. However, when Dr. Cunningham attempted to cabin his opinion in terms of "prison," the Commonwealth would object, and the trial court would admonish the expert or defense counsel. Dr. Cunningham eventually told the court it would "violate [his] oath" if he talked about risk of violence *outside* of prison because his "risk assessment is specific to prison," and the trial court responded, "Then you may not be able to testify." *Id.* at 1029-30.

In response to Lawlor's argument on this point, the Commonwealth contends **[*622]** "the jury actually heard the opinions that Lawlor[] [has] asserted in his petition were missing." Resp't's Br. 24 (citing J.A. 966, 967-72). But the passages cited in the Commonwealth's brief do not support this contention. In the first passage, Dr. Cunningham stated, "[T]here is a very low likelihood of serious violence from being in prison," which was vague and not at all particularized to Lawlor. J.A. 966. The other passage cited likewise contains no evidence specific to Lawlor; rather, it is a list of the factors Dr. Cunningham considered in his assessment, ending with yet another **[**12]** objection and bench conference. *See id.* at 967-72. In all, Dr. Cunningham's testimony, riddled with objections and bench conferences, could hardly have given the jury a firm and clear picture of his predictive expert opinion.

4.

Dr. Cunningham's Proffered Testimony

Later, defense counsel moved to recall Dr. Cunningham, proffering a list of questions and answers they would have elicited from him, had his earlier testimony not been circumscribed by the trial court:

> 1. Q: What is your expert opinion as to how Mark Lawlor's behavior pattern while in custody/incarceration, impacts his future prison adaptability?
>
> A: Because of Mark Lawlor's prior adaption in prison and jail, and particularly because of his lack of violent activity in these settings, Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.
>
> 2. Q: What is your expert opinion as to how Mark Lawlor's age impacts his future prison adaptability? Does that opinion take into account the fact that Mr. Lawlor committed his current crime at age 43?
>
> A: Because of Mark Lawlor's age of 45 years old, Mr. Lawlor represents a low likelihood of committing acts of violence while in prison. The fact that Mr. Lawlor committed his current **[**13]** offense at age 43 has been taken into account in forming this opinion, but it does not change my opinion about his future prison adaptability.
>
> 3. Q: What is your expert opinion as to how Mark Lawlor's education impacts his future prison adaptability? Is this risk factor predictive of violence in the free community as well?
>
> A: The fact that Mr. Lawlor has earned his G.E.D. is predictive of a low likelihood of committing acts of violence while in prison. This risk factor is far more predictive of violent conduct in the prison context than it is in the free community context.
>
> 4. Q: What is your expert opinion as to how Mark Lawlor's employment history impacts his future prison adaptability?
>
> A: Mark Lawlor's employment history in the community is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.
>
> 5. Q: What is your expert opinion as to how Mark Lawlor's continued contact with his family and friends in the community impacts his future prison adaptability?
>
> A: Mark Lawlor's continued contact with these individuals while in prison, is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.
>
> 6. Q: What **[**14]** is your expert opinion as to how Mark Lawlor's past correctional appraisal impacts his future prison adaptability?
>
> A: Mark Lawlor[]'s past correctional appraisal is predictive that Mr. Lawlor **[*623]** represents a low likelihood of committing acts of violence while in prison.

7. Q: What is your expert opinion as to how Mark Lawlor's lack of gang affiliation impacts his future prison adaptability?

A: Mark Lawlor[]'s lack of gang affiliation is predictive that Mr. Lawlor represents a low likelihood of committing acts of violence while in prison.

8. Q: Have you reached an opinion, to a reasonable degree of psychological certainty, based on all of the factors relevant to your studies of prison risk assessment, as to what Mark Lawlor's risk level is for committing acts of violence while incarcerated? And if so, what is your opinion?

A: Yes. It is my opinion based on my analysis of all of the relevant risk factors which are specific to Mr. Lawlor's prior history and background, that Mr. Lawlor represents a very low risk for committing acts of violence while incarcerated.

9. Q: Are all of your opinions concerning the above questions and answers about Mr. Lawlor, grounded in scientific research and peer-reviewed **[**15]** scientific literature?

A: Yes.

J.A. 1068-70. The trial court rejected this proffer and the request to recall Dr. Cunningham.

5.

The Jury's Confusion

During the two days of jury deliberation in the penalty phase, jurors sent notes to the court. First, they asked:

• "Re: Continuing threat to society" - "Society means prison society or society in general?" J.A. 1176.

It appears the trial court sent the following answer back to the jury: "Society is not limited to, quote, prison society, but includes all society, prison and general society. Your focus must be on the . . . particular history and background of the Defendant . . . and the circumstances of his offense." J.A. 1177-78. Then the jury asked two more questions:

• "[A]re we to consider . . . 'society in general' . . . is free society of Mark Lawlor as a prisoner in society and outside the wire?" J.A. 1183.

• "If imprisoned for life, what physical constraints would Mark Lawlor be under outside of his cell while exposed to other persons? . . . while exposed to other persons inside prison? [O]utside prison?" J.A. 1183.

The court responded:

• "[S]ociety means all of society. All of society includes prison society as well as non-prison, i.e., all **[**16]** society; [and] the relevant inquiry is not whether Mr. Lawlor *could* commit future criminal acts of violence, but *would* he commit future acts of violence that pose a serious threat to society" J.A. 1188 (emphases supplied).

• "The circumstances of Mr. Lawlor, once he is delivered to the Department of Corrections, is not a matter with which you should concern yourself." J.A. 1199.

One juror later explained in an affidavit:

I believe [Lawlor] would be a continuing threat if out in regular society, and that is why I voted for a death sentence for [Lawlor]. I do not believe that [Lawlor] would be a continuing threat in prison while serving a sentence of life without parole, but it was my understanding from the judge's instructions that this **[*624]** was irrelevant to the sentencing decision.

J.A. 1223.

C.

Post-Sentencing Procedural History

1.

State Court

Lawlor appealed to the Supreme Court of Virginia, which affirmed the convictions and death sentence. *See* Lawlor v. Commonwealth, 285 Va. 187, 738 S.E.2d 847 (Va. 2013) (hereinafter "*Lawlor I*"). The court upheld the trial court's rulings regarding Dr. Cunningham, explaining that, as used to rebut the future dangerousness aggravator, "evidence concerning [Lawlor's] probability of committing future violent acts, *limited* ***[**17]*** *to the penal environment*, is not relevant." *Id.* at 883 (emphasis supplied) (citing Lovitt v. Commonwealth, 260 Va. 497, 537 S.E.2d 866 (Va. 2000)).

And as used for mitigation, the state supreme court explained, "[g]eneral conditions of prison life . . . are inadmissible as mitigating evidence." *Lawlor I*, 738 S.E.2d at 883. It then cited the proper controlling Supreme Court law, explaining, "The sentencer must not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," and "future adaptability evidence is relevant character evidence." *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion)) (alterations omitted) (emphasis in original). The court continued, "In this context, a defendant's probability of committing violence, even when confined within a penal environment, is relevant *as mitigating evidence* of his character and is constitutionally mandated under *Lockett*,

provided the evidence establishing that probability arises specifically from his *character* and is sufficiently personalized to him." *Id.* (second emphasis supplied). But in applying this clearly established law, the state court reasoned:

> [C]haracteristics alone are not character. Merely **[**18]** extracting a set of objective attributes about the defendant and inserting them into a statistical model created by compiling comparable attributes from others, to attempt to predict the probability of the defendant's future behavior based on others' past behavior does not fulfill the requirement that evidence be "peculiar to the defendant's character, history, and background."

Id. at 884 (quoting *Morva, 683 S.E.2d at 565*). In the end, the state supreme court held, "[T]he proffered testimony is not probative of Lawlor's 'disposition to make a well-behaved and peaceful adjustment to life in prison.'" *Id.* (quoting *Skipper, 476 U.S. at 7*).

The United States Supreme Court denied certiorari. *See Lawlor v. Virginia, 571 U.S. 953, 134 S. Ct. 427, 187 L. Ed. 2d 282 (2013)*. On December 16, 2013, Lawlor filed a state habeas petition, which did not raise the expert testimony issue we are dealing with here. The state habeas court dismissed the petition on October 31, 2014. *See Lawlor v. Davis, 288 Va. 223, 764 S.E.2d 265 (Va. 2014)*.

2.

Federal Court

Lawlor then timely filed a federal habeas petition on June 8, 2015. The district court referred the petition and motion to a federal magistrate judge, and on August 26, 2016, that judge recommended denying the motion and dismissing the petition. On June 15, 2017, the district court adopted the magistrate's recommendation, dismissed the **[**19]** petition with prejudice, and **[*625]** declined to issue a certificate of appealability ("COA"). *See Lawlor v. Zook, No. 2:15-cv-113, 2017 U.S. Dist. LEXIS 92430, 2017 WL 2603521 (E.D. Va. June 15, 2017)* (hereinafter "*Lawlor II*").

As to Lawlor's claim that he was not able to sufficiently rebut the future dangerousness aggravator, the district court first reasoned that Dr. Cunningham "did in fact present a portion of his opinion regarding future dangerousness." *Lawlor II, 2017 U.S. Dist. LEXIS 92430, 2017 WL 2603521, at *24*. It then explained:

> [T]he Supreme Court of Virginia's interpretation of the definition of "society," as defined by Virginia statute, did not lead to an unreasonable application of clearly established Supreme Court precedent. To the contrary, Petitioner points to no Supreme Court case that clearly establishes that it is unconstitutional for a state to interpret a *state created statutory aggravating factor* of "future dangerousness" to focus only on the danger a defendant would pose in the future to society *as a whole*, rather than prison society.

Id. (emphases in original).

As to Lawlor's argument that he was prevented from presenting mitigation evidence, the district court explained:

> [T]he issue turns on the critical distinction between the impermissible exclusion of evidence regarding a defendant's *past behavior* ***[**20]*** *in jail*, which supports the claim that he "would not pose a danger if spared (but incarcerated)," *Skipper v. South Carolina, 476 U.S. 1, 5, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)*, from what the Supreme Court of Virginia concluded was the permissible exclusion of evidence that seeks to demonstrate the absence of dangerousness to the prison community *based on statistical models* considering, among other factors, a defendant's age, education, and gang affiliation.

*Lawlor II, 2017 U.S. Dist. LEXIS 92430, 2017 WL 2603521, at *25* (emphases in original). The district court then relied on our recent opinion in *Morva v. Zook, 821 F.3d 517 (4th Cir. 2016)*, which, according to the district court, classified *Skipper* as a "narrow" decision that is "limited to evidence regarding the defendant's past behavior while incarcerated." *Lawlor II, 2017 U.S. Dist. LEXIS 92430, 2017 WL 2603521, at *25*. Finally, the district court rejected Lawlor's challenge to the state court's characterization of the excluded evidence as "not being based on Lawlor's personal character." *Id.* It explained, "While a reasonable argument can be made that certain factors, such as Lawlor's employment history or ongoing contact with his family, were evidence documenting Lawlor's personal character," there is "also a reasonable argument" that "because Dr. Cunningham sought to testify about these factors only to compare such facts to statistical models categorizing the behavior **[**21]** of *other unrelated inmates*, . . . such factors were merely statistical data points and not facts peculiar to Lawlor's character." *Id.* Thus, the district court found no reversible error.

On August 16, 2017, the district court denied Lawlor's motion to alter or amend the judgment, and Lawlor timely noted this appeal and filed a motion for COA. We granted the motion for COA on three issues, including the following:

> Where the parties focused much of their penalty phase presentation on, and the jury repeatedly asked about, the issue of Mr. Lawlor's future dangerousness, was it

constitutional error to exclude proffered expert evidence that Mr. Lawlor, based on his personal background and characteristics, presented a "very low risk" of future violence in prison?

Order, *Lawlor v. Zook*, No. 17-6 (4th Cir. **[*626]** filed Feb. 22, 2018), ECF No. 35.[4] As explained below, we reverse the district court's decision on this ground and need not reach the other two issues set forth in the COA. Because the error was not harmless, we remand with instructions that the district court grant relief.

II.

HN1[↑] We review the district court's denial of a habeas petition de novo. Our review of the state court decision is constrained, **[**22]** however, by the amendments to *28 U.S.C. § 2254* enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Grueninger v. Dir., Virginia Dep't of Corr., 813 F.3d 517, 523 (4th Cir. 2016)*. A federal habeas court may not grant relief on previously adjudicated state court claims unless it concludes that the state court's determination "was contrary to, or involved an unreasonable application of, clearly established Federal law" as set forth by the Supreme Court, *§ 2254(d)(1)*, or rested on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *§ 2254(d)(2)*. "In order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc, 137 S. Ct. 1726, 1728, 198 L. Ed. 2d 186 (2017)* (per curiam) (internal quotation marks omitted). In other words, "a litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (alterations and internal quotation marks omitted).

HN2[↑] In assessing a state prisoner's habeas claims, we look to "the last reasoned decision of a state court addressing the claim." *Woodfolk v. Maynard, 857 F.3d 531, 544 (4th Cir. 2017)* (internal quotation **[**23]** marks omitted). Thus, we look to *Lawlor I*, the Virginia Supreme Court's decision on direct appeal.

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[4] We also granted the COA on these two issues: "Was it constitutional error to exclude hearsay evidence of Mr. Lawlor's history of childhood sexual abuse, where the crime was of a sexual nature and the proffered evidence was highly relevant and reliable?" and "Did the trial court violate the ***Fifth*** and ***Sixth Amendments*** in sentencing Mr. Lawlor to death based in substantial part on his purported failure to express remorse and his counsel's pre-trial strategy to contest guilt?"

III.

Lawlor contends, "[C]learly established federal law dictates that Dr. Cunningham's excluded testimony was admissible under both the *Eighth* and *Fourteenth Amendments*." Pet'r's Br. 24. Further, Lawlor asserts, "There is a substantial likelihood that Mr. Lawlor would not have been sentenced to death if 'the jury could have drawn favorable inferences from [Dr. Cunningham's] testimony regarding [Mr. Lawlor's] character and his probable future conduct if sentenced to life in prison.'" *Id.* at 25 (quoting *Skipper v. South Carolina, 476 U.S. 1, 4, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)*). We agree.

A.

The Clearly Established Federal Law

1.

HN3[↑] Clearly established federal law "refers to the holdings, as opposed to the dicta, of [Supreme Court] decisions as of the time of the relevant state-court decision." *Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. A state court determination is "contrary **[*627]** to" clearly established federal law where it "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." *Id. at 412-13*. A state court "unreasonabl[y] appli[es]" clearly established federal law "if the state court identifies the **[**24]** correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id. at 413*. "It is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by th[e] [Supreme] Court." *Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* (alterations and internal quotation marks omitted). "Evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* (alterations and internal quotation marks omitted).

2.

Having set forth the standard, we proceed to discuss the clearly established law at issue. The United States Supreme Court has held, ***HN4***[↑] "[T]he *Eighth* and *Fourteenth Amendments* require that the sentencer not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1*

(1981) (alteration omitted) (emphasis in original) (quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion)).

In *Skipper v. South Carolina*, the Supreme Court applied this rule in considering a capital defendant's **[**25]** right to present mitigating evidence regarding future dangerousness when that aggravator is alleged. *See* Skipper, 476 U.S. at 1-4. Ronald Skipper was convicted of capital murder and rape in state court. His capital jury had to decide whether Skipper would receive the death penalty or life in prison. Therefore, Skipper "sought to introduce testimony of two jailers and one regular visitor to the jail to the effect that [Skipper] had made a good adjustment during his time spent in jail." Id. at 3 (internal quotation marks omitted). The state trial court, however, concluded that such evidence "would be irrelevant and hence inadmissible" because state law dictated that "whether petitioner can adjust or not adjust [in prison] was not an issue in th[e] case." *Id.* (alteration and internal quotation marks omitted). During closing arguments, the prosecutor argued that Skipper would "likely rape other prisoners" and "pose disciplinary problems" if incarcerated. *Id.* The jury returned the death penalty, and the state supreme court upheld the sentence. *See id.*

The United States Supreme Court reversed, holding that Skipper should have been able to introduce the testimony of the jailers and the regular visitor to the jail. It explained: **[**26]**

> HN5[] "[T]he sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence."

[*628] Skipper, 476 U.S. at 4 (alterations and citations omitted) (emphasis in original) (quoting Eddings, 455 U.S. at 110, 114). The Supreme Court called these rules "now well established." *Id.*

The *Skipper* Court then concluded that "the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial" violated Skipper's right to "place before the sentencer relevant evidence in mitigation of punishment." 476 U.S. at 4. It reasoned, HN6[] "Consideration of a defendant's past conduct *as indicative of his probable future behavior* is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority *must predict* a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.'" Id. at 5 (emphases supplied) (quoting **[**27]** Jurek v. Texas, 428 U.S. 262, 275, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976)). Thus, "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Id.* Indeed, the Court reasoned that it would contravene *Eddings* to "preclud[e] the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment." Id. at 7; *see* Simmons v. South Carolina, 512 U.S. 154, 171, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) ("An instruction directing the jury not to consider the defendant's likely conduct in prison would not have satisfied due process in *Skipper v. South Carolina*." (citation omitted)); Boyde v. California, 494 U.S. 370, 382 n.5, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) ("In *Skipper*, we held that HN7[] a capital defendant must be permitted to introduce in mitigation evidence of postcrime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life imprisonment rather than death."). Therefore, *Eddings*, *Lockett*, and *Skipper* together stand for the proposition that HN8[] a defendant must be permitted to introduce evidence of past good behavior in prison to aid the sentencing body in predicting probable future behavior and conduct, **[**28]** where that defendant may be "spared (but incarcerated)." Skipper, 476 U.S. at 5.

It is likewise clearly established that HN9[] the sentencing body should be presented with all possible relevant information to enable it to make a prediction about a defendant's probable conduct in prison. The Supreme Court, in considering the constitutionality of Texas's capital sentencing statute that contained a future dangerousness aggravator materially indistinguishable from Virginia's, has recognized that "[i]t is . . . not easy to predict future behavior." Jurek, 428 U.S. at 274 (opinion of Stewart, Powell, Stevens, J.J.). Nonetheless, "[t]he fact that such a determination is difficult . . . does not mean that it cannot be made." Id. at 274-75. Indeed, "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." Id. at 275; *see* Estelle v. Smith, 451 U.S. 454, 473, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (quoting this passage with approval). "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." California v. Ramos, 463 U.S. 992, 1003, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983) (quoting Jurek, 428 U.S. at 276).

[*629] Finally, it is well established that HN10[] expert

testimony regarding probable conduct in prison is not per se inadmissible. The Supreme Court has "reject[ed] the contention that **[**29]** expert testimony on future dangerousness should be excluded from capital trials," explaining, "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Payne v. Tennessee, 501 U.S. 808, 823, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)* (quoting *Barefoot v. Estelle, 463 U.S. 880, 898, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)*).

B.

The State Court Decision

The Supreme Court of Virginia did not ignore these precepts. To the contrary, it identified some of them. *See Lawlor I, 738 S.E.2d at 883* (recognizing that "future adaptability evidence is relevant character evidence," and "a defendant's probability of committing violence, even when confined within a penal environment, is relevant *as mitigating evidence* of his character," provided that the evidence "is sufficiently particularized to [the defendant]" (emphasis in original) (citing *Lockett, 438 U.S. at 604*) (plurality opinion)). However, the state court rejected Lawlor's appeal on three grounds: (1) Irrelevance of Prison Society: "[E]vidence concerning a defendant's probability of committing future acts, *limited to the penal environment*, is not relevant to consideration of the future dangerousness aggravat[or]," *id.* (emphasis supplied); (2) **[**30]** Inadmissibility of Prison Conditions: "Evidence of general prison conditions . . . may properly be excluded even as mitigating evidence," *id.* (citing *Lockett, 438 U.S. at 605 n.12*); and (3) Inadmissibility of Characteristics, Not Character: because "characteristics alone are not character," and "evidence [must] be 'peculiar to the defendant's character, history, and background,'" the proffered testimony of Dr. Cunningham was "not probative of Lawlor's 'disposition to make a well-behaved and peaceful adjustment to life in prison,'" *id. at 884-85* (quoting *Skipper, 476 U.S. at 7*; *Morva, 683 S.E.2d at 565*.).

We explain in turn how none of the above rationales removes Lawlor's case from the control of the Supreme Court's clearly established law set forth in *Skipper*, *Eddings*, *Lockett*, and *Jurek*. In fact, these rationales are contrary to both state law and clearly established Supreme Court law.

1.

Irrelevance of Prison Society

In upholding Lawlor's death sentence, the Virginia Supreme Court found no fault with the exclusion of Dr. Cunningham's testimony predicting Lawlor's future conduct in prison because "evidence concerning a defendant's probability of committing future acts, *limited to the penal environment*, is not relevant" to consideration of the future dangerousness aggravator. **[**31]** *Lawlor I, 738 S.E.2d at 883* (emphasis supplied). ***HN11***[↑] To prove the future dangerousness aggravator in Virginia state court, the Commonwealth must demonstrate that "there is a probability based upon evidence of the prior history of the defendant . . . that he would commit criminal acts of violence that would constitute a continuing serious threat *to society*." *Va. Code Ann. § 19.2-264.4.C* (emphasis supplied). And it is true that Virginia courts have "rejected the argument that a jury's determination [on this factor] is restricted to a consideration **[*630]** of *only* the prison society." *Burns v. Com., 261 Va. 307, 541 S.E.2d 872, 893 (Va. 2001)* (emphasis supplied).

Crucially, however, in this case Lawlor conceded that he would be a future danger in society outside of prison, *see* J.A. 1142-43 (defense closing argument: "[T]here is no denying that when [Lawlor] is on drugs and alcohol and he is in the free community he is a danger to others[.]"), and the jury was able to consider that concession along with any evidence of dangerousness in prison. Furthermore, the jury had only two options: LWOP or death, *see Va. Code Ann. § 19.2-264.4.A*. Therefore, the only issue the jury had to consider was whether Lawlor would also be a future danger to prison society, which is precisely why defense counsel sought to admit Dr. Cunningham's testimony.

In this **[**32]** context, deeming predictive evidence of Lawlor's risk of violence in prison society irrelevant to the sentencer's consideration, and then excluding such evidence completely, contravenes clearly established Supreme Court law because it could prove or disprove a fact the jury could deem to have mitigating value, that is, whether Lawlor would "pose a danger if spared (but incarcerated)." *Skipper, 476 U.S. at 5*. ***HN12***[↑] The "relevance standard applicable to mitigating evidence in capital cases" is a "low threshold." *Tennard v. Dretke, 542 U.S. 274, 284-85, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004)* (citing *McKoy v. North Carolina, 494 U.S. 433, 440-441, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990)*). "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Id. at 284* (quoting *McKoy, 494 U.S. at 440*); *see also Payne, 501 U.S. at 822* ("We have held that ***HN13***[↑] a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death." (quoting *Eddings, 455 U.S. at 114*)).

In any event, contrary to the trial court's belief, Virginia courts have *not* held that evidence of prison dangerousness, particularized to the defendant, is irrelevant to a consideration of "society as a whole." Nor could it, without running headlong into *Skipper* and other Supreme Court decisions. *See, e.g.,* ***[**33]*** *Abdul-Kabir v. Quarterman, 550 U.S. 233, 251 n.13, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007)* ("*Lockett* . . . established that ***HN14***[⬆] a State may not prevent the capital sentencing authority from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation. We reaffirmed this conclusion in *Eddings* . . . ." (citations, emphasis, and internal quotation marks omitted)).

In fact, both parties have now come to a meeting of the minds on this issue. Defense counsel has argued throughout these proceedings that evidence of future dangerousness in prison is *part of* the society inquiry, but nonetheless, "society" cannot be limited to prison life only. *See* J.A. 982 ("[I]t's risk of future dangerousness . . . not just in prison. It's risk of future dangerousness in society, and society includes *more than* prison." (emphasis supplied)). And at oral argument, counsel for the Commonwealth ultimately conceded that prison society is a relevant part of the "society" mentioned in *Va. Code Ann. § 19.2-264.4.C*. *See* Oral Arg. at 23:55-24:10, *Lawlor v. Zook*, No. 17-6 (4th Cir. Sept. 25, 2018) (agreeing that "part of future dangerousness is dangerousness in prison"); *see also id.* at 38:15-35 (acknowledging that "future dangerousness in society and in prison both **[**34]** are relevant"). The **[*631]** trial court, however, effectively held that evidence of Lawlor's dangerousness in prison was per se irrelevant.

At base, the Virginia Supreme Court has held, ***HN15***[⬆] "To be admissible, evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future adaptability in the prison environment," and that is precisely what Dr. Cunningham sought to do here. *Morva v. Commonwealth, 278 Va. 329, 683 S.E.2d 553, 565 (Va. 2009)*. Because the state court misconstrued Virginia law and contravened clearly established federal law, the Commonwealth cannot escape *Skipper*'s directive by relying on its erroneous classification of "society."

2.

Inadmissibility of Prison Conditions

The red herring infecting all stages of this case is the idea that prisoners may not present evidence of prison conditions or security measures as mitigating evidence in the face of a jury's choice between LWOP and the death penalty. This issue has surfaced in the trial court's rulings, *see, e.g.,* J.A. 985-86; in the trial court's answer to the jury's questions, *see id.* at 1188, 1199 (answering the jury's questions about the scope of "society" with information concerning Lawlor's *ability* to commit acts of dangerousness and the circumstances **[**35]** of his confinement); and it even reemerged in the district court's opinion, *see Lawlor II, 2017 U.S. Dist. LEXIS 92430, 2017 WL 2603521, at *24* (Lawlor "was denied the opportunity to 'recast' the relevant question to ask whether Lawlor, if at all times confined in a Virginia prison *with its concomitant security conditions*, would likely pose a future danger to *prison society*." (first emphasis supplied)). Even at oral argument, the Commonwealth let this idea creep into the discussion. *See* Oral Arg. at 18:45-19:10 (framing the issue as regarding Lawlor's "prison conditions").

To be sure, ***HN16***[⬆] under Virginia law, "Conditions of prison life and the security measures utilized in a maximum security facility are not relevant to the future dangerousness inquiry unless such evidence is specific to the defendant on trial and relevant to that specific defendant's ability to adjust to prison life." *Morva, 683 S.E.2d at 565*; *see also Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415, 440 (Va. 2008)*. But this is simply not applicable in this case. Lawlor has never attempted to introduce generalized evidence of "conditions of prison life" as the Virginia courts have defined them. We therefore reject this rationale in the Virginia Supreme Court's decision.[5]

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[5] This court's *§ 2254* decisions in *Porter v. Zook, 898 F.3d 408 (4th Cir. 2018)*, and *Morva v. Zook, 821 F.3d 517 (4th Cir. 2016)*, do not control this issue. For example, in *Porter*, we concluded the state court's determination that Porter's "proffer [of risk assessment testimony] was not individualized or particularized to Appellant [was] not unreasonable." *898 F.3d at 433* (internal quotation marks omitted). There, the petitioner sought to introduce a "statistical projection of how prison restrictions could control an inmate . . . in a likely prison setting." *661 S.E.2d at 440*. Indeed, "[a]t no place in the motion [to appoint the risk assessment expert Dr. Cunningham] d[id] [Porter] proffer that Dr. Cunningham's statistical analysis of a projected prison environment will focus on the particular facts of his history and background." *Id.* (alterations and internal quotation marks omitted). Similarly, in *Morva*, we held the state court's determination that Morva failed to "show a particularized need for [his requested risk assessment] expert" did not contravene clearly established law, explaining, "[the state] court's classification of *prison-environment evidence* as irrelevant and therefore inadmissible is not unreasonable under U.S. Supreme Court precedent." *821 F.3d at 526* (emphasis supplied). Such "prison-environment evidence" was "evidence regarding general prison life and security offered to show that Morva's opportunities to commit criminal acts of violence in the future would be severely limited in a maximum security prison." *Id. at 527* (internal quotation marks omitted).

[*632] 3.

Inadmissibility of Characteristics, Not Character

Finally, the Virginia **[**36]** Supreme Court reasoned that because "characteristics alone are not character," and "evidence [must] be 'peculiar to the defendant's character, history, and background,'" Dr. Cunningham's proffered testimony "[wa]s not probative of Lawlor's 'disposition to make a well-behaved and peaceful adjustment to life in prison." *Lawlor I, 738 S.E.2d at 884-85* (quoting *Skipper, 476 U.S. at 7*; *Morva, 683 S.E.2d at 565*). The court then concluded that only one proffered question -- "What is your expert opinion as to how Mark Lawlor's behavior pattern while [previously] in custody/incarceration, impacts his future prison adaptability?" -- "meets the standard for admissibility," and in any event, "that fact was already known to the jury through other evidence." *Id. at 885*. And as to the other questions, "[w]hile each datum is extracted from Lawlor's personal history, it sheds no light on his character." *Id.* This analysis is contrary to clearly established Supreme Court law and finds no home in Virginia law.

First, the state supreme court's distinction between "character" and "characteristics" contravenes Supreme Court decisions discussing the admissibility of mitigation evidence in a capital case. *Jurek*, interpreting a materially indistinguishable future aggravator provision in Texas, **[**37]** held that the statute "authoriz[ed] the defense to bring before the jury at the separate sentencing hearing whatever *mitigating circumstances* relating to the individual defendant can be adduced." *428 U.S. at 276* (emphasis supplied). The Court explained that under that statute, "[i]n determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant . . . ." *Id. at 272-73*; *see also Smith, 451 U.S. at 472* ("As to the jury question on future dangerousness, [*Jurek]* emphasized that a defendant is free to present whatever mitigating factors he may be able to show, *e.g.*, the range and severity of his past criminal conduct, his age, and the circumstances surrounding the crime for which he is being sentenced."). Dr. Cunningham's proffer includes not only evidence of prior prison behavior (which even the state court admitted was relevant and admissible under *Skipper*), but also age, educational background, and family connections. Considering the Supreme Court's expansive view of relevancy of mitigating evidence, the state **[**38]** court's restriction thereof is contrary to law.

Second, the distinction between characteristics and character that the Virginia Supreme Court creates does not even comport with state law. It appears to be based on the edict in Virginia law that only evidence "peculiar to the defendant's character, history, and background," can be considered relevant mitigating evidence, *Morva, 683 S.E.2d at 565*, and "statistical projection" that is not "individualized and particularized as to [a defendant's] prior history" is inadmissible, *Porter, 661 S.E.2d at 440, 442*. But Virginia has recognized that ***HN17***[↑] evidence "showing [the defendant's] good behavior in jail" that is "peculiar to th[e] defendant's history **[*633]** and background" is relevant under *Skipper*. *Burns, 541 S.E.2d at 894*. It makes no distinction between character and characteristics, but rather, focuses on the particularity of the "history and background" evidence itself.

On this point, the Virginia Supreme Court found that Dr. Cunningham "[m]erely extract[ed] a set of objective attributes about the defendant and insert[ed] them into a statistical model created by compiling comparable attributes from others, to attempt to predict the probability of the defendant's future behavior based on others' past behavior." *Lawlor I, 738 S.E.2d at 883*. But *Morva* and *Porter* ***[**39]*** do not prohibit this type of testimony; rather, they require that the testimony be tailored to the individual defendant. *See Morva, 683 S.E.2d at 571* ("With regard to expert prison risk assessments, this Court has not held in our prior decisions that all such expert evidence is *per se* inadmissible. Rather, the Court has taken a case-by-case approach . . . to consider the specific motions for the appointment of a prison risk assessment expert and the proffers of the expert's evidence to determine whether the particular expert would provide evidence sufficiently 'particularized' to the defendant.").

Therefore, the Virginia Supreme Court's decision not only contravenes clearly established federal law, it is not supported by state law.

4.

Conclusion

HN18[↑] The Supreme Court has long recognized that a capital sentencing body must be permitted to consider any admissible and relevant mitigating information in determining whether to assign the defendant a sentence less than death. Although the Virginia Supreme Court recognized this clearly established law, it attempted to circumvent it by relying on baseless interpretations of state law that themselves contravened longstanding Supreme Court law. "[A] State cannot bar 'the consideration **[**40]** of evidence if the sentencer could reasonably find that it warrants a sentence

less than death.'" *Tennard, 542 U.S. at 285* (quoting *McKoy, 494 U.S. at 441*) (alteration omitted). Once this threshold is met, "the *Eighth Amendment requires* that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* (internal quotation marks omitted) (emphasis supplied).[6]

C.

The District Court Decision

The district court erred in its analysis for many of the reasons mentioned above. In addition, however, the district court mischaracterized the Supreme Court's *Skipper* decision. The district court explained that our *Morva* decision confined *Skipper* to "evidence regarding the defendant's past behavior while incarcerated." *Lawlor II, 2017 U.S. Dist. LEXIS 92430, 2017 WL 2603521, at *25*. This is an erroneous reading of *Skipper* and *Morva*. *Skipper* not only discussed the prisoner's past conduct, but also explained that "evidence of *probable future conduct* in prison as a factor in aggravation or mitigation of an offense" is relevant in capital mitigation cases. *Skipper, 476 U.S. at 5 n.1* (emphasis supplied). And *Morva*, although it characterized **[*634]** *Skipper* as narrow, simply did not confine it in the manner the district court sets forth.

For these reasons, and those noted above, the district court erred in concluding **[**41]** that the state court did not unreasonably apply clearly established federal law.

D.

Substantial and Injurious Effect

Even though we conclude the state court's adjudication was an unreasonable application of clearly established federal law, "our inquiry is not over." *Barnes v. Joyner, 751 F.3d 229, 239 (4th Cir. 2014)*. "[W]e are not permitted to grant habeas relief unless we are convinced that the error had a substantial and injurious effect or influence in determining the jury's verdict," which means that we "must conclude that the state court's constitutional error actually prejudiced the habeas petitioner." *Id.* (internal quotation marks omitted). "[I]f the federal court is 'in grave doubt' about whether the trial error had a 'substantial and injurious effect or influence' on the verdict and therefore finds itself 'in virtual equipoise' about the issue, the error is not harmless." *Cooper v. Taylor, 103 F.3d 366, 370 (4th Cir. 1996)* (quoting *O'Neal v. McAninch, 513 U.S. 432, 435, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)*). We must make this determination "based on [our] review of the record . . . as a whole." *Id.*

During the penalty phase of the trial, the evidence presented revealed that Lawlor could be helpful, kind, and considerate when he was not under the influence of drugs or alcohol. And the trial court's error prevented the jury from hearing Dr. Cunningham predict **[**42]** that Lawlor, based on his history and characteristics, would be a very low risk for violence in a prison setting, where he would not have access to alcohol and drugs. It was clear the jury struggled with how to characterize "society," as they asked the court whether society meant "prison society or society in general"; whether they could consider "society" as "free society of Mark Lawlor as a prisoner . . . and outside the wire"; and "if imprisoned for life, what physical constraints [Lawlor] would . . . be under outside of his cell [and] outside prison." J.A. 1176, 1183. The trial court's answers were that the jury should not consider whether Lawlor "*could* commit future criminal acts of violence," but rather, "whether [he] *would*," and "the circumstances of Mr. Lawlor, once he is [in prison] is not a matter with which you should concern yourself." *Id.* at 1188, 1199 (emphases supplied).

But these answers did not go far enough to alleviate the prior errors made in the trial court's statements at the penalty phase that prison, as part of society, is not relevant. *See Shafer v. South Carolina, 532 U.S. 36, 53, 121 S. Ct. 1263, 149 L. Ed. 2d 178 (2001)* (finding that a jury's questions "left no doubt about its failure to gain . . . any clear understanding" of the disputed issue); *see also* ***[**43]*** *Tuggle v. Netherland, 516 U.S. 10, 13-14, 116 S. Ct. 283, 133 L. Ed. 2d 251 (1995)* (per curiam) (finding an error that "prevented petitioner from developing his own psychiatric [future dangerousness] evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation" may well have "affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment"). And although we cannot properly consider a juror affidavit to impeach a jury's verdict, *see Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002)*, the affidavit stating that a juror did not "believe that [Lawlor] would be a continuing threat in prison while serving a [LWOP] sentence," **[*635]** but also believed "that this was irrelevant to the sentencing decision," J.A. 1223, is evidence of confusion that resulted from the trial court's explanation of the scope of society.

The trial court's exclusion of Dr. Cunningham's evidence,

[6] Because we conclude that the state court unreasonably applied clearly established federal law in excluding relevant *mitigation* evidence at Lawlor's trial, we need not reach the issue of whether Dr. Cunningham's testimony was improperly excluded *rebuttal* evidence challenging the future dangerousness factor.

constant declaration that society in prison is irrelevant, and failure to fully and correctly answer the jury's questions, leaves this court with "grave doubt" that the error was harmless. *Cooper, 103 F.3d at 370*. Therefore, granting relief is appropriate in this case.

IV.

For the foregoing reasons, we reverse the district court's decision and remand for proceedings consistent with this **[**44]** opinion. "When the choice is between life and death, th[e] risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the *Eighth* and *Fourteenth Amendments*." *Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)* (plurality opinion).

REVERSED AND REMANDED

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