BURTON, C.
1378567
APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 21st day of November, 2019.

Christopher Burton, No. 1378567, Petitioner,

against Record No. 190297

Harold W. Clarke, Director of the
Virginia Department of Corrections, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed March 7, 2019, the rule to show cause, the respondent's motion to dismiss, and petitioner's reply, the Court is of the opinion that the motion should be granted.

Petitioner was convicted in the Circuit Court of the City of Salem, pursuant to pleas of nolo contendere, of aggravated sexual battery and forcible sodomy. Petitioner was sentenced, in accordance with the terms of his written plea agreement, to seventy years' incarceration with fifty-seven years suspended. The victim of these offenses was petitioner's six-year-old daughter, A. B. Under the terms of the plea agreement, the Commonwealth agreed to move to nolle prosequi an additional charge of indecent liberties with a child by a parent, that petitioner's probation in fourteen prior cases would be terminated, and that petitioner would be placed on fifteen years of supervised probation for the new convictions. Petitioner did not appeal, and he now challenges the legality of his confinement pursuant to these convictions.

In portions of claims (1), (2), and (3), petitioner contends he was denied the effective assistance of counsel because counsel failed to conduct a pretrial investigation. As a result, counsel was unable to identify and develop potentially exculpatory evidence. Specifically, petitioner asserts counsel failed to investigate the Commonwealth's evidence and failed to interview any of petitioner's potential witnesses. Petitioner alleges he informed counsel that he believed A. B.'s mother, H. R., was fabricating A. B.'s accusations against petitioner to attain custody of the child. Petitioner alleges he told counsel his sister, aunt, and girlfriend could provide potentially exculpatory and impeachment evidence, including that H. R. had sent text messages indicating she was willing to do whatever it took to obtain visitation with or custody of

A. B., that she had made statements about kidnapping A. B. or having petitioner arrested on fabricated charges, that she had a history of "losing her children [and] making false reports," and that she had a history of mental health and substance abuse problems. Counsel advised petitioner "nothing could help" him and refused to communicate with any of these witnesses. Counsel refused to even meet with or return telephone calls from potential witnesses. Further, counsel refused to obtain records that would prove H. R.'s motive to make false allegations, to consult a child psychologist to ascertain if A. B. was coached into making a false statement, or to perform any other investigation. Counsel's failure resulted from laziness, carelessness, legal ineptitude, and preoccupation with counsel's personal problems.

The Court rejects these portions of claims (1), (2), and (3) because petitioner failed to offer a valid reason why he should not be bound by his representations at trial that there was nothing he wanted counsel to do that counsel had failed to do, that he had no complaint or criticism regarding any aspect of the legal services provided by counsel, and that he was completely satisfied with counsel's services. *Anderson v. Warden*, 222 Va. 511, 516 (1981).

In additional portions of claims (1), (2), and (3), petitioner contends he was denied the effective assistance of counsel because counsel gave petitioner incorrect legal advice. Petitioner asserts counsel advised him that, under certain statutory provisions, which petitioner does not identify, counsel was "prevented" from impeaching H. R., and that petitioner's information pertaining to H. R.'s veracity was useless. Petitioner argues that under the Sixth Amendment he was entitled to be confronted with the witnesses against him and to cross-examine those witnesses. A central component of effective cross-examination is the ability to impeach, counsel must ordinarily investigate methods for impeaching the Commonwealth's witnesses, and failure to do so may suffice to prove a claim of ineffective assistance. When counsel advised petitioner of the limitations on his ability to impeach H. R. and that petitioner could be impeached with his own criminal record, petitioner felt he had no choice but to agree to the proffered plea agreement. Petitioner does not identify the statutory provisions counsel purportedly told petitioner would prevent him from impeaching H. R., nor does he assert any change in circumstance subsequent to his guilty pleas that would permit him to repudiate his representations at trial as to the adequacy of trial counsel and the voluntariness of his pleas.

The Court rejects these portions of claims (1), (2), and (3) because petitioner failed to offer a valid reason why he should not be bound by his representations at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Id.*

In additional portions of claims (1), (2), and (3), petitioner contends he was denied the effective assistance of counsel because counsel failed to advise him of all of the elements of the offense of forcible sodomy.

The Court rejects these portions of claims (1), (2), and (3) because petitioner failed to offer a valid reason why he should not be bound by his representations at trial that he had no complaint or criticism regarding any aspect of the legal services provided by counsel, that he fully understood the charges against him, and that he was completely satisfied with counsel's services. *Id.*

In additional portions of claims (1), (2), and (3), petitioner contends he was denied the effective assistance of counsel because counsel failed to advise him he may be subject to civil commitment as a sexually violent predator as a result of these convictions.

The Court holds these portions of claims (1), (2), and (3) fail to satisfy the "performance" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Generally,

> counsel has a constitutional duty to inform his client of direct consequences of his guilty plea; but if a consequence is merely collateral to a plea of guilty—in other words, if it is an incidental or loosely related result of the plea—counsel has no duty to mention it.

United States v. Reeves, 695 F.3d 637, 640 (7th Cir. 2012). The threat of civil commitment is a collateral consequence that a defendant need not be advised of before entering a voluntary and knowing plea. *See Brown v. Commonwealth*, 297 Va. 295, 302 (2019) ("For a guilty plea to be constitutionally valid, a defendant must be made aware of all the direct, but not the collateral, consequences of his plea" (citation omitted)); *see also United States v. Youngs*, 687 F.3d 56, 61 (2nd Cir. 2012) (the possibility of civil commitment after serving criminal sentence is collateral consequence); *Steele v. Murphy*, 365 F.3d 14, 18 (1st Cir. 2004) (possible life commitment as a

sexually dangerous person is a collateral consequence); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1367 (4th Cir. 1973) (the possibility the defendant could be subject to civil commitment proceedings was collateral consequence); *Kim v. Dir., Va. Dep't of Corr.*, 103 F. Supp. 3d 749, 756-58 (E.D. Va. 2015) (counsel had no duty to inform client of threat of potential commitment as a sexually violent predator); *cf. Bauder v. Dep't of Corr. Fla.*, 619 F.3d 1272, 1274-75 (11th Cir. 2010) (holding counsel can be ineffective for affirmatively misadvising a client regarding the threat of civil commitment). Thus, petitioner has failed to demonstrate that counsel's performance was deficient.

In his reply to the motion to dismiss, petitioner raises several additional claims of ineffective assistance of counsel, including that counsel was ineffective for advising petitioner that he would be prevented from cross-examining H. R. under Code § 18.2-67.7, Virginia's Rape Shield statute, for advising petitioner he had filed a motion for discovery when he had not done so, and for moving for several continuances. Petitioner also asserts for the first time, in direct contradiction to the allegations made in his petition, that counsel falsely advised petitioner that he had contacted several of petitioner's potential witnesses.

The Court holds these new claims are not properly before the Court. The facts of these claims were known to petitioner at the time he filed his petition for a writ of habeas corpus, and petitioner did not request leave to amend his original petition, nor was he granted leave to do so. *See* Code § 8.01-654(B)(2) (a petition for a writ of habeas corpus "shall contain all allegations the facts of which are known to petitioner at the time of filing"); Rule 5:7(e) (a petitioner may not raise new claims unless, prior to the expiration of the statute of limitations and the entry of a ruling on the petition, he obtains permission from the Court to do so).

Accordingly, the petition is dismissed and the rule is discharged.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: 

Deputy Clerk

Additional material from this filing is available in the Clerk's Office.