Appendix C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6659

CHAZ ANTONIO EARP,

Petitioner - Appellant,

v.

HAROLD W. CLARKE, Director of the Virginia Department of Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:17-cv-00400-AWA-DEM)

Submitted: September 26, 2019 Decided: October 1, 2019

Before NIEMEYER and KEENAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Chaz Antonio Earp, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Chaz Antonio Earp seeks to appeal the district court's orders accepting the recommendation of the magistrate judge, denying relief on his 28 U.S.C. § 2254 (2012) petition, and denying his Fed. R. Civ. P. 60(b) motion. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Earp has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CHAZ ANTONIO EARP, #1379845,

Petitioner,

v. **ACTION NO. 2:17cv400**

HAROLD W. CLARKE, Director of the Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's 2013 convictions in the Circuit Court of Hampton for second-degree murder, use of a firearm in commission of a felony, discharging a firearm in public, and possession of a firearm by a convicted felon. As a result of the convictions, Petitioner was sentenced to serve 36 years in prison with 12 years suspended, leaving an active total time to serve of 24 years.

The matter was referred to a United States Magistrate Judge for report and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. The Report and Recommendation filed May 4, 2018, recommends dismissal of the petition with prejudice. Each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On July 20, 2018, the court received Petitioner's Objections to the Report and Recommendation. The Respondent filed no response to the objections and the time for responding has now expired.

The court, having reviewed the record and examined the objections filed by Petitioner to the Report and Recommendation, and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation filed May 4, 2018. It is, therefore, ORDERED that Respondent's Motion to Dismiss be GRANTED and the Petitioner's petition be DENIED and DISMISSED with prejudice.

Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment.

Petitioner has failed to demonstrate a substantial showing of the denial of a constitutional right, therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

The Clerk is directed to mail a copy of this Final Order to Petitioner and provide an electronic copy of the Final Order to counsel of record for Respondent.

ARENDA L. WRIGHT ALLEN
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
July 10th, 2018

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CHAZ ANTONIO EARP,

Petitioner,

v.

HAROLD W. CLARKE,
Director of the Virginia Department of Corrections

Respondent.

Civil No. 2:17cv400

ORDER

This matter comes before the Court on the Motion for Relief from Judgment filed by Petitioner Chaz Antonio Earp. ECF No. 28. For the reasons that follow, that Motion is **DENIED**.

Petitioner was convicted in 2013 in the Circuit Court for the City of Hampton of second-degree murder, use of a firearm in commission of a felony, discharging a firearm in public, and possession of a firearm by a convicted felon. As a result of his convictions, he was sentenced to serve 36 years in prison with 12 years suspended.

On July 28, 2014, a habeas petition was filed in Petitioner's name in the Supreme Court of Virginia which raised claims of prosecutorial misconduct. That petition was unsigned, but Petitioner later submitted a "verification" signed before a notary public on August 21, 2014 attesting that he filed that petition and that the facts contained therein were "true and accurate." Pet., *Earp v. Warden*, No. 141148 at 8 (ECF No. 12-4). The Supreme Court of Virginia dismissed these habeas claims as unsupported by factual contentions. *Earp v. Warden*, No. 141148 (November 25, 2014) (ECF No. 12-5). Petitioner then filed a habeas petition in the Circuit Court for the City of Hampton raising the same claims of prosecutorial misconduct. The Circuit Court

dismissed this petition as successive. *Earp v. Director of Dept. of Corr.*, No. CL16-105, Final Order, May 2, 2016 (ECF No. 12-8) (citing Va. Code § 8.01-654(B)(2)). Although the state court dismissed Petitioner's claims as successive, it still examined the individual claims and found no grounds for habeas relief. *Id.*

In 2017, Petitioner filed a habeas petition under 28 U.S.C. § 2254, alleging violations of federal rights. ECF No. 1. The Petition was referred to a United States Magistrate Judge, and the Court adopted the Magistrate Judge's Report and Recommendation that the Petition be dismissed. ECF No. 26. In doing so, the Court found that Petitioner's claims of prosecutorial misconduct were procedurally defaulted. ECF No. 20 at 9.

Petitioner has now filed a Motion for Relief from that Final Order pursuant to Rule 60(B) of the Federal Rules of Civil Procedure. Petitioner asserts that the July 28, 2014 habeas petition was filed by another inmate pretending to be Petitioner without Petitioner's knowledge. Petitioner has submitted a notarized affidavit wherein Minyard C. Davis states that in 2014, he "inadvertently by accident mailed to the Virginia Supreme Court, a Habeas Corpus petition in the name of Chaz Antonio Earp without his permission or knowledge thereof." ECF No. 28 at 10. Mr. Davis also states that he did not intend for the petition to be filed in the Virginia Supreme Court. *Id.* Accordingly, Petitioner argues that the state court should not have dismissed his second habeas petition as successive, and this Court should not have held his arguments to have been procedurally defaulted. Petitioner made these same arguments in his objections to the Report and Recommendation, which this Court has already overruled.

Federal Rule of Civil Procedure 60(B) provides that the Court may relieve a party from a final judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

This Court did not specifically address Petitioner's argument when he raised it in his objections to the Report and Recommendation. However, the Court did consider Petitioner's argument and rejected that argument when it approved and adopted the Report and Recommendation. Petitioner's argument does not entitle him to relief under Rule 60(B). Petitioner's assertion that another inmate impersonated him in order to submit a habeas petition on his behalf strains credulity, especially because Petitioner has not offered any motive for the other inmate to do so.[1] Mr. Davis then states that he "inadvertently by accident" caused a habeas petition to be filed in the Supreme Court of Virginia. There is no explanation whatsoever for the "verification" submitted at a later time by Petitioner. Petitioner apparently signed that verification in the presence of a notary public indicating that he had filed the petition and that it was true and accurate. Nothing in Mr. Davis' affidavit begins to explain how that document came before the Virginia Supreme Court, and Mr. Davis does not admit in his affidavit to forging Petitioner's signature on such a document. Petitioner has not met his burden under Rule 60(B) to show a

[1] Petitioner refers to Minyard Davis as the jailhouse lawyer. Petitioner asserts, however, that another inmate named Minyard Cass impersonated him and forged his signature. This claim of forgery by another inmate is inconsistent with Mr. Davis' affidavit, which states that he was assisting Petitioner with his habeas claim when he "inadvertently" sent the habeas petition.

reason the Court should disturb the Final Order because there are simply too many inconsistencies in his asserted facts.

Finally, the Court notes that the circuit court adequately addressed the merits of Petitioner's claim and found that they did not allow for relief. This Court has reviewed the circuit court's analysis on the merits and agrees that Petitioner's habeas petition was properly dismissed, whether successive or not.

Accordingly, Petitioner's Motion for Relief from Judgment is **DENIED**.

Petitioner has failed to demonstrate a substantial showing of the denial of a constitutional right, therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. *See Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). The Clerk shall forward a copy of this Order to Petitioner and to counsel of record for Respondent.

IT IS SO ORDERED.

/s/

Arenda L. Wright Allen
United States District Judge

April 22nd, 2019
Norfolk, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CHAZ ANTONIO EARP (#1379845),

Petitioner,

v. **ACTION NO. 2:17cv400**

HAROLD W. CLARKE,
Director of the Virginia Department of Corrections,

Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Chaz Antonio Earp ("Earp") is a Virginia inmate currently serving a twenty four-year active sentence following convictions in 2013 for second-degree murder, use of a firearm in commission of a felony, discharging a firearm in public, and possession of a firearm by a convicted felon. His convictions arose from the shooting death of Aaron Archer during a confrontation involving a stolen vehicle. Earp's federal habeas petition alleges three claims for relief, each of which has various subparts. Respondent moved to dismiss the petition, and the matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. For the reasons outlined below, the undersigned RECOMMENDS that the court deny Earp's claims, GRANT Respondent's motion (ECF No. 10), and DISMISS the petition.

I. STATEMENT OF THE CASE

On December 11, 2012, following a bench trial, a judge sitting in the Circuit Court for the City of Hampton found Earp guilty of second-degree murder, use of a firearm in commission of a felony, discharging a firearm in public, and possession of a firearm by a convicted felon.

See Sentencing Order, Commonwealth v. Earp, Nos. CR12-736-00 to 03 (Va. Cir. Ct. February 19, 2013) (ECF No. 12-1). By an order entered February 19, 2013, the circuit court sentenced Earp to a total of thirty-six years in prison, with twelve years suspended. Id. at 2.

Earp, by counsel, appealed to the Court of Appeals of Virginia, challenging the sufficiency of the evidence to support his convictions. Pet. for Appeal, Earp v. Commonwealth, No. 1799-13-1 (ECF No. 12-2).[1] The Court of Appeals denied his appeal in a per curiam opinion, holding that the Commonwealth's evidence was sufficient to prove beyond a reasonable doubt that Earp committed the charged offenses. Earp v. Commonwealth, No. 1799-13-1 (Va. Ct. App., April 30, 2014). A three judge panel denied the appeal on the same grounds. Earp v. Commonwealth, (Va. Ct. App. June 20, 2014). The Supreme Court of Virginia refused Earp's petition for appeal. Earp v. Commonwealth, No. 140989 (Va. Jan. 7, 2015) (ECF No. 12-3).

On July 28, 2014, while his direct appeal was pending, Earp filed a petition for a writ of habeas corpus in the Supreme Court of Virginia. The petition was unsigned, but Earp later submitted a "verification" signed before a Notary on August 21, 2014, attesting that he filed the July 28 petition and that the facts it contained were "true and accurate." Pet., Earp v. Warden, No. 141148 at 8 (ECF No. 12-4). The Supreme Court habeas petition alleged that the trial court had "abused its discretion" in finding Earp guilty of second degree murder and in the admission of an in-court identification of Earp made by one of the witnesses. It also asserted that the prosecutor had relied on false testimony, that Earp's sentence violated principles of proportionality, and that his trial counsel failed to investigate the case. The Virginia Supreme

[1] Earp's original appeal was denied because a necessary transcript of trial proceedings was not timely filed. Earp v. Commonwealth, No. 0366-13-1 (Aug. 6, 2013). Earp's counsel filed a motion for a delayed appeal which was granted September 16, 2013. The result of the delayed appeal addressed the substance of Earp's assignments of error, and its analysis is discussed in detail in this report.

Court dismissed Earp's habeas claims as unsupported by factual contentions. Earp v. Warden, No. 141148 (November 25, 2014) (ECF No. 12-5).

Earp then filed a second habeas petition in the Circuit Court for the City of Hampton. In his circuit court habeas, Earp alleged three classes of claims: ineffective assistance of counsel, prosecutorial misconduct, and sufficiency of the evidence. Each class of claims included various theories of relief. The circuit court, in a written opinion, dismissed Earp's claims as successive. Final Order, Earp v. Director, No. CL16-105 (Hpt. Cir. Ct., May 2, 2016) (ECF No. 12-8). Although the court concluded that Earp's claims were barred as successive, it nonetheless examined the individual claims and concluded that his claims of prosecutorial misconduct and sufficiency of the evidence were barred claims of trial court error which should have been raised on direct appeal. It also found each of Earp's claims of ineffective assistance lacked merit. Id.

Earp appealed the circuit court's dismissal in the Supreme Court of Virginia on August 2, 2016. See Petition for Appeal, Earp v. Clarke, No. 161118. Finding no reversible error, the Supreme Court of Virginia refused Earp's petition for appeal on April 19, 2017. Earp v. Clarke, No. 161118 (Va. Apr. 19, 2017) (EC No. 12-9).

Earp timely filed his federal habeas petition on July 20, 2017, and alleged claims for relief which largely mirror those in his circuit court habeas petition. Specifically, Earp alleged two claims of prosecutorial misconduct, two claims related to the sufficiency of the evidence and seven claims related to the alleged ineffectiveness of his trial or appellate counsel. The Respondent filed a Rule 5 Answer and Motion to Dismiss along with the notice to pro sé plaintiffs required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). (ECF Nos. 9-12). The Respondent argues that Earp's claims of prosecutorial misconduct and sufficiency of the evidence are procedurally defaulted, and that he cannot show cause and prejudice to excuse the

default. With regard to his ineffectiveness claims, the Respondent argues that they are insufficient to permit review under Martinez. Earp replied to the Motion with a written brief and the matter is ripe for review.

II. RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The state court's decision on Earp's sufficiency claims were not contrary to, or an unreasonable application of, clearly established federal law.

Exhausted state habeas claims are governed by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Under the AEDPA, federal courts may not grant relief on any claim adjudicated on the merits by the state court, unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law" or "resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. §§ 2254(d)(1)-(2).[2]

A state court's decision is contrary to clearly established federal law if the court arrives at a conclusion opposite to one reached by the Supreme Court on a question of law, or decides a case differently than the Supreme Court on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A state court unreasonably applies clearly established federal law if it identifies the correct legal principle, but unreasonably applies it to the facts of the case. Id. at 413; White v. Woodall, 134 S. Ct. 1697, 1706 (2014). To warrant relief, the state court's application must be "objectively unreasonable," not simply incorrect. Barnes v. Joyner, 751 F.3d 229, 238-39 (4th Cir. 2014) (citing Robinson v. Polk, 438 F.3d 350, 355 (4th Cir. 2006); Williams, 529 U.S. at 411). Finally, a state court makes an unreasonable determination of

[2] Although the Respondent contends Earp's sufficiency claims were procedurally defaulted by the successive habeas petition in circuit court, he had previously presented a sufficiency claim on direct appeal. As a result, this Report will analyze the sufficiency claims under 28 U.S.C. 2254(d).

fact when its application of the law depends, in whole or in part, on a factual finding that is not supported by evidence in the record. See Wiggins v. Smith, 539 U.S. 510, 528 (2003).

Earp argues that the evidence used to convict him of second-degree murder was insufficient.[3] Because Earp exhausted this claim on his direct appeal, the court looks to the Virginia Court of Appeals' decision to assess whether it "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. § 2254(d).

An essential element to the right to due process secured by the Fourteenth Amendment to the Federal Constitution is that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979) (citing In re Winship, 397 U.S. 358 (1970)). Therefore, a petitioner who alleges that the evidence was insufficient to sustain a conviction has stated a constitutional claim cognizable in a federal habeas corpus proceeding, id. at 321, but he faces a high bar.

In reviewing a sufficiency of the evidence claim, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original). The reviewing court must consider circumstantial as well as direct evidence, and allow the prosecution the benefit of all reasonable inferences from the facts proven

[3] On direct appeal, Earp challenged the sufficiency of the evidence as to several of his convictions, arguing that the evidence did not establish that he held a firearm or fired one. See Earp v. Commonwealth, No. 1799-13-1 (Va. Ct. App. Apr. 30, 2014) (ECF No. 12-2).

to those sought to be established. United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982).

As the Supreme Court has expressly recognized, it is wholly the responsibility of the fact-finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences. Jackson, 443 U.S. at 319. In Wright v. West, the Supreme Court expounded upon Jackson, stating:

> In Jackson, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "all of the evidence is to be considered in the light most favorable to the prosecution"; that the prosecution need not affirmatively "rule out every hypothesis except that of guilt"; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."

505 U.S. 277, 296-97 (1992) (internal citations omitted) (emphasis in original).

Again, through the lens of Section 2254, the court looks first to the state court's decision. Here, the Court of Appeals of Virginia conducted a full review of Earp's claim that there was insufficient evidence to convict him. See Earp v. Commonwealth, No. 1799-13-1 (Va. Ct. App. Apr. 30, 2014) (per curiam). Thus, Earp is only entitled to relief if that determination was an unreasonable application of the above-cited Supreme Court precedent. The undersigned finds that it was not. Based on the evidence presented at trial, and as discussed by the Court of Appeals, there was adequate evidence for a rational trier of fact to find all the elements of Earp's offenses.

Based on a review of the trial record, the Court of Appeals of Virginia summarized the facts as follows:

> Marco Archer's white Malibu car was stolen on the evening of April 22, 2012. Later that evening, Archer and the victim, Archer's brother, were riding in the victim's truck when they saw the stolen Malibu at a gas station. Kurtis

Toombs was putting gas in the stolen car, and there was a passenger in the stolen car. Archer and the victim pursued the Malibu and maneuvered the truck he was driving to block the Malibu. Toombs backed up the Malibu for a distance and stopped. Archer and the victim exited the victim's truck. Archer testified that he saw the man who was seated in the passenger seat jump out of the window, fall to the ground, pull out a black pistol, shoot the victim in the chest, and flee the scene. The victim died as a result of the shooting. Archer identified appellant as the passenger in the stolen car, and he stated he learned appellant's name from news reports. Archer did not see where the driver went after the car stopped.

Toombs testified that he was driving a white Malibu with appellant as a passenger. He stated a truck stopped in front of the car and he put the car he was driving in reverse until it came to a sudden stop. Toombs testified that appellant pulled out a Glock gun and cocked it, and then Toombs and appellant climbed out of the window of the car. Toombs and appellant ran in different directions, and Toombs heard a gunshot. Toombs did not see anyone else in the area.

A member of the Crime Scene Unit recovered a .45 caliber Auto Federal cartridge casing in the street in the area of the shooting. A firearms examiner testified that the cartridge casing found at the scene and the bullet recovered from the victim's body were consistent with having been fired from a Glock .45 caliber Auto Pistol. A black Samsung cell phone was found in the passenger seat of the white Malibu. Appellant later identified this phone as belonging to him.

On the day of the shooting, Detective Bonds went to appellant's residence to execute a search warrant. While the police were there, appellant arrived at the location and fled when he saw the police. However, appellant did later report voluntarily to the police station. In an interview with Bonds, appellant said he was not at the location of the crime and he had never fired a gun. He admitted he was with Toombs for a period of time on the date of the shooting. He denied he shot the victim.

Kelton Brown testified that on April 23, 2012, appellant told him that he "thought" he may have shot somebody. Brown stated appellant described riding with Toombs and exiting a white Malibu through the window when they encountered the men in the truck. Brown testified that appellant said he did not know what the circumstances were, so he pulled out his gun and fired "backwards while he was running."

Marshall Turner testified that on April 24, 2012, appellant said to him, "I shot a guy." Turner stated that appellant described the encounter with the men in the truck. He testified that appellant stated that he jumped out of the car and "shot a guy with a .45 in the chest one time," then fled the scene. Appellant said that he knew the man was dead when he saw him fall to the ground. Turner also testified that appellant said he later threw the gun into the water, but he did not identify the location of the body of water.

Earp v. Commonwealth, No. 1799-13-1 (Va. Ct. App., April 30, 2014), pgs. 1-3 (ECF No. 12-2 at 42-44.).

Virginia adheres to the common law definition of murder: The unlawful killing of another with malice aforethought. Wood v. Commonwealth, 124 S.E. 458, 459 (Va. 1924). "Malice inheres in the 'doing of a wrongful act intentionally, or without just cause or excuse or as a result of ill will'." Fizon v. Commonwealth, 60 Va. App. 1, 11 (2012) (quoting Dawkins v. Commonwealth, 186 Va. 55 (1941), Va. Code Ann. § 18.2-32. Malice may be inferred from the deliberate use of a deadly weapon. Luck v. Commonwealth, 32 Va. App. 827, 834 (2000). And in Virginia, murder, other than capital murder, and murder of the first degree is murder of the second degree. Thus in Virginia every unlawful homicide is presumed to be second degree murder. Pugh v. Commonwealth, 223 Va. 663, 667 (1982).

Here, there was ample evidence from which a rational trier of fact could have found all the elements of second degree murder. See Va. Code Ann. § 18.2-32. Accordingly, the Virginia Court of Appeals' decision was not contrary to, or an unreasonable application of, clearly established federal law.

To begin with, two individuals identified Earp as the person who shot Aaron Archer. Both of these witnesses testified that Earp had a handgun, and one – Marco Archer – testified he saw Earp shoot it towards the victim (Archer's brother). Two other witnesses testified that Earp admitted to them that he had "shot someone" on the day in question. While Earp argued to the Virginia Court of Appeals that the witnesses had little opportunity to observe the shooter, the appellate court properly held that "'[t]he credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented.'" Earp v. Commonwealth, No. 1799-13-1 (Va. Ct. App. Apr. 30, 2014) (per curiam) (quoting Sandoval v. Commonwealth, 455 S.E.2d 730, 732 (1995)). And

although Earp argues now that the evidence was insufficient to convict him because the witnesses' testimony was at times inconsistent with his own timeline of events, the elements of second degree murder could be proven beyond a reasonable doubt based on the evidence presented at trial. In other words, a rational juror could find that Earp was the person that fired the fatal shots based on the witness testimony, despite the fact that their testimony did not align precisely with Earp's version of the facts, or with each component of the Government's narrative at trial.

The Court of Appeals of Virginia, viewing this evidence in the light most favorable to the Commonwealth, held that there was sufficient evidence to sustain Earp's convictions. That conclusion was not unreasonable. Therefore, Earp has failed to show that he is being held in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, Earp is not entitled to federal habeas relief on his sufficiency claims.

B. Earp's claims of prosecutorial misconduct are procedurally defaulted, and he has not shown cause or prejudice to excuse the default.

Earp's two claims of prosecutorial misconduct relate to the prosecutor's alleged presentation of "unreliable and unsupported testimony," and failure to disclose an allegedly exculpatory witness statement. Pet. at 21-23 (ECF No. 1). He raised both these claims in his circuit court habeas petition, which that court dismissed as successive. Earp v. Director of Dept. of Corr., No. CL16-105, Final Order, May 2, 2016 (ECF No. 12-8) (citing Va. Code § 8.01-654(B)(2)).

Before seeking a federal writ of habeas corpus, inmates in custody pursuant to the judgment of a state court must either (1) exhaust the remedies available to them in state court or (2) demonstrate that such state remedies are either unavailable or ineffective in protecting their rights. 28 U.S.C. § 2254(b)(1). "To satisfy the exhaustion requirement, a habeas petitioner must

fairly present his claim to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997). "Fair presentation" requires a state prisoner "to present the state courts with the same claim he urges upon the federal courts." Picard v. Connor, 404 U.S. 270, 276 (1971); see also Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998) (acknowledging the interest in giving state courts the first opportunity to remedy constitutional errors in state proceedings). Failure to comply with state procedures in raising a claim bars a petitioner from raising that claim in a federal habeas petition unless the petitioner can show cause for the default and resulting prejudice. Bassette v. Thompson, 915 F.2d 932, 937 (4th Cir. 1990) (citing Wainwright v. Sykes, 433 U.S. 72 (1977)).

Earp's prosecutorial misconduct claims are procedurally defaulted under state law. Virginia law prohibits successive habeas petitions alleging grounds of available to the petitioner at the time of his initial filing. Va. Code § 8.01-654(B)(2). The Hampton Circuit Court, which first considered Earp's claims of prosecutorial misconduct, expressly relied on this procedural bar in dismissing them. Earp v. Director, No. CL16-105, Final Order at 5. The Virginia rule barring successive petitions is well established as an "adequate and independent state law ground for decision." Mackall v. Angelone, 131 F.3d 442, 446 (4th Cir. 1997) (citing Coleman v. Thompson, 501 U.S. 722, 730 (1991)). Earp has not shown any factors which would meet the cause and prejudice standard necessary to overcome procedural default. He has alleged no "objective factor external to the defense" which impeded his efforts to comply with the state procedural rule. Wolfe v. Johnson, 565 F.3d 140, 158 (4th Cir. 2009) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Additionally, the Court's review of the record confirms that failing to review his claims will not result in a fundamental miscarriage of justice. Earp's petition also presents no "new reliable evidence" supporting a claim of actual innocence.

Coleman, 501 U.S. at 730; Sharpe v. Bell, 539 F.3d 372, 377 (4th Cir. 2010). Because Earp has not shown cause excusing his failure to comply with state procedure or a fundamental miscarriage of justice, his claims of prosecutorial misconduct are procedurally defaulted and barred from federal review.

C. Earp's ineffective assistance of counsel claims are also procedurally defaulted, and not eligible for review under the Martinez exception.

Earp's final claim for habeas relief alleges seven reasons why his counsel at trial and on appeal was constitutionally ineffective.[4] As with his other claims, these were dismissed as successive by the Hampton Circuit Court, and are therefore procedurally defaulted. However, with respect to claims of ineffective assistance of counsel, the Supreme Court's decision in Martinez v. Ryan, 1132 S.Ct. 1309 (2012) may excuse a procedural default if it results from inadequate representation during the initial collateral review proceedings. Because Earp was not represented during his initial collateral review, this report will analyze his ineffectiveness claims under Martinez.

In Martinez, the United States Supreme Court recognized that "[i]nadequate 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." Id. at 1315. Specifically, Martinez established a test to determine whether a petitioner can show cause for defaulting on an ineffective assistance claim on the basis of inadequate representation in state habeas proceedings. First, the state imposing the conviction must require the prisoner to raise an ineffective assistance claim in an initial collateral proceeding rather than on direct review.[5] Id. at 1318. Second, the

[4] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

[5] "Initial-review collateral proceedings" are those proceedings under state law "which provide the first occasion to raise a claim." Martinez, 132 S. Ct. at 1315; see, e.g., Lenz v. Commonwealth, 544 S.E.2d

state must have failed to appoint counsel in the initial-review collateral proceeding, or appointed counsel in the collateral proceeding must have been ineffective under Strickland v. Washington, 466 U.S. 668 (1984). See Martinez, 132 S. Ct. at 1318. Finally, the underlying ineffective assistance claim must have "some merit." Id.

As to the first step under Martinez, Virginia law requires a petitioner to raise all claims of ineffective assistance of counsel on collateral review, and thus Earp's case meets this requirement. See Lenz v. Commonwealth, 544 S.E.2d 299, 304 (Va. 2001). Earp filed two state habeas petitions without the assistance of counsel, thus he meets Martinez's second requirement because counsel was not appointed for his initial-review collateral proceeding. However, Earp fails to show that any of his claims are meritorious, and therefore fails to establish that Martinez excuses his procedural default.

In order for Earp to plausibly allege a meritorious claim of ineffective assistance of counsel, he must satisfy the "performance" and "prejudice" prongs of the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984).[6] To satisfy the "performance" prong of the test, Earp must show that "counsel's representation fell below an objective standard of reasonableness" such that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To satisfy the "prejudice" prong of the test, Earp must prove that "there is a reasonable probability that, but for counsel's

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299, 304 (Va. 2001) (explaining that Virginia requires that ineffective assistance claims be brought in collateral proceedings).

[6] As both prongs of the test are "separate and distinct elements" of an ineffective assistance claim, Earp must satisfy both requirements of the test to prevail on the merits. Spencer v. Murray, 18 F.3d 229, 232-33 (4th Cir. 1994); see Strickland, 466 U.S. at 697. Likewise, the court can address the elements in any order. And the court reviews alleged errors of counsel individually, not cumulatively. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998).

unprofessional errors, the result of the proceeding would have been different." Id. at 694.[7] The underlying inquiry is whether "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). The difficult burden is on the petitioner to show that counsel's performance was deficient because "counsel is presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 687.

1. Ineffectiveness claims a – c, failure to investigate and present evidence.

In his first three claims, Earp argues that his counsel was constitutionally ineffective for failing to fully investigate his case and present alibi witnesses and other evidence he claims would raise a reasonable probability of a different outcome. Specifically, he identified four witnesses who he claims would have contradicted elements of the Government's timeline – Cherry Earp, Delante Ballard, Calvin Braxton and Wynn Ford. Pet. at 6-7 (ECF No. 1). He also argues that GPS evidence from his phone would have corroborated his statement that he was not present at the time of the shooting. He also argues that medical evidence of his heart condition would have undermined the witnesses' description of his exiting the car through the window. Id. at 9-13. Respondent argues that Earp's evidentiary claims of ineffectiveness lack merit because he fails to proffer any affidavit, GPS or medical records which support his claims, and fails to explain how the evidence would have changed the outcome of the proceedings. (ECF No. 12 at 13-15).

When a petitioner alleges that his counsel failed to conduct an adequate investigation, such an allegation "does not warrant habeas relief absent a proffer of what favorable evidence or

[7] The Supreme Court has defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Lovitt v. True, 403 F.3d 171, 181 (4th Cir. 2005).

testimony would have been produced." Beaver, 93 F.3d at 1195. Moreover, as to the merits of a claim of inadequate investigation, "Strickland does not require defense counsel to 'investigate every conceivable line of mitigating evidence .... Instead, it imposes upon counsel 'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " Gray, 529 F.3d at 229 (quoting Wiggins v. Smith, 539 U.S. 510, 533 (2003); Strickland, 466 U.S. at 691). If a petitioner raises a claim that his counsel failed to present relevant testimony at trial, his claim "does not warrant habeas relief absent a proffer of what [the] evidence ... would have been." Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996). Here, Earp fails to proffer the specific evidence his counsel should have presented at trial, or explain how that evidence would have led to a different result.

Applying Strickland, the trial records show that any issue as to the witnesses' credibility and reliability was before the factfinder, and Earp fails to describe or produce any additional evidence his counsel should have provided to change the outcome of the trial. The alibi witnesses he described were his mother and friends and none have provided any affidavit or declaration regarding their expected testimony. Moreover, Earp's description of their supposed testimony would not conclusively rebut the Government's case against him. He states that his mother would have confirmed his departure and arrival at her house on the evening of the shooting, but it does not appear she could testify to his whereabouts during the shooting. Pet. at 6 (ECF No. 1). The other alleged alibi witnesses were apparently intended to dispute the timing of the statements he made to testifying witnesses, but neither was prepared to say Earp was with them during the shooting. Earp has also not produced any medical records suggesting he was physically incapable of crawling out of the car window as described by the witnesses. He has not produced any GPS records nor has he coherently explained how any GPS records would

have undermined the Government's case. The records would at most reveal only the location of his phone, not Earp himself. And as Respondent points out, Earp's phone was recovered in the stolen vehicle at the scene of the shooting. Although Earp claims he had "forgotten" his phone when he exited the vehicle earlier, leaving it behind, he has not explained how GPS evidence of the phone's location would have undermined trial testimony, or corroborated his account.

Trial counsel is given much deference with regard to strategies used at trial, and Earp fails to proffer specific evidence his counsel should have introduced which would produce a reasonable likelihood of a different result. See Strickland, 466 U.S. at 687; Gray v. Branker, 529 F.3d 220, 229 (4th Cir. 2008). Because Earp fails to show that his second claim is meritorious, this claim should be dismissed.

2. Ineffectiveness claim d, Archer's identification of Earp.

Earp's fourth ineffectiveness claim argues that his attorney was ineffective in not moving to suppress or exclude testimony from the victim's brother, Marco Archer, identifying Earp as the shooter. According to Earp, Archer could not identify him at the preliminary hearing, and thus his testimony at trial was influenced by investigators identifying Earp as the subject of investigation. This alleged error does not meet either prong of the Strickland test.

In order for in-court identifications to be excluded on the basis of improper police conduct, Earp must first establish that the original out-of-court identification involved improper, unnecessarily suggestive methods. Neil v. Biggers, 409 U.S. 188, 198-99 (1972). Second, Even if the original out-of-court identification was suspect, the court must still consider "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." Id. at 199; United States v. Saunders, 501 F.3d 384, 389 (4th Cir. 2007).

In this case, Earp has not produced any evidence that Archer's original identification was unduly suggestive. Moreover, on cross-examination, his attorney did contest Archer's ability to see the shooter, and pointed out differences between Archer's testimony at the preliminary hearing (at which he did not identify Earp by name) and his trial testimony. Trial Tr., Commonwealth v. Earp, No. CR120007336-00 at 50-51, 53. In addition, Archer testified that the Commonwealth did not direct him on who to identify or prepare him to testify before his appearance. Id. at 57. Earp has not shown that any further efforts to exclude Archer's statements would have been successful. See, Moody v. Polk, 408 F.3d 141, 151 (4th Cir. 2005) (counsel not required to file frivolous motions).

3. Ineffectiveness claim e, failure to object to prosecutorial misconduct.

In his fifth ineffectiveness claim, Earp argues that his counsel was ineffective in failing to object to the prosecutor's allegedly improper closing argument, and to the admission of Earp's statements to acquaintances that he had "shot someone." With respect to the testimony regarding his admissions, Earp offers no evidence that the statements were false, other than his own contrary testimony. All this testimony was evaluated by the factfinder, and the prosecutor's reliance on Earp's admissions was entirely proper. See, Thomas v. Commonwealth, 44 Va. App. 741, 754, 607 S.E.2d 738, 744 (2005) ("entrusting juries with the task of weighing evidence of all probative gradations and [giving] them the freedom to accept or reject what they will . . . is customary grist for the jury mill"); see also, Moody, 408 F.3d at 151.

With respect to the closing argument, Earp has not identified any statements he believes were objectionable, making only a vague reference to "bad character arguments." In failing to identify the allegedly objectionable statements, Earp has failed to plausibly allege his attorney's ineffectiveness on this ground. Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992)

(conclusory allegations are insufficient to state claim for habeas relief). Moreover, the court's own review of counsel's closing argument reveals nothing improper. Trial Tr. at 2017-11. Accordingly, claim e does not plausibly allege a meritorious claim for ineffective assistance of counsel. See Strickland, 466 U.S. at 694.

4. Ineffectiveness claim f, failure to assert defense of justification.

In his sixth ineffectiveness claim, Earp argues that his attorney should have offered a defense of justification when his other evidence failed to convince the jury that he was not present at the time of the shooting. He contends that the victim's use of his vehicle to block the stolen car in which he was riding placed him in fear for his life, and it was reasonable for him to arm himself in self-defense. Pet. at 18 (ECF No. 1).

In any ineffectiveness case, a particular decision not to investigate or pursue a defense must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments. Strickland, 466 U.S. at 690-91. "Counsel is not ineffective merely because he overlooks ones strategy while vigilantly pursuing another." Williams v. Kelly, 816 F.2d 939, 950 (4th Cir. 1987). Attorneys frequently exercise their professional judgment, which necessarily involves setting priorities. United States v. Mason, 774 F.3d 824, 830 (4th Cir. 2014) (quoting Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (en banc).

In this case, Earp's trial counsel reasonably attempted to discredit the Commonwealth's primary witnesses, pointing out weaknesses in their ability to observe and inconsistencies in their testimony. Counsel also persuaded the trial judge to consider extensive portions of Earp's statements to police, effectively placing his defense before the factfinder without requiring him to testify. Trial Tr. at 169-99. This was entirely consistent with Earp's insistent position that he was not present at the scene of the crime, and not the shooter identified by trial witnesses.

Moreover, in Virginia the defense of justification requires the person asserting it to prove that "without any fault on his part in provoking or bringing on the difficulty [he] kills another under reasonable apprehension of death or great bodily harm to himself." Avent v. Commonwealth, 279 Va. 175, 199 (2010). The evidence in this case does not establish that Earp was reasonably in fear of death or great bodily harm. Although his vehicle had been blocked, there is no evidence that either of the Archer brothers was armed, no witness testified that they were armed, and their vehicle had already stopped at the time Earp exited the stolen vehicle and pointed his handgun at the victim. In light of the limited evidence suggesting a defense of justification was plausible, and the significant harm to Earp's other defenses in asserting one, his attorney's decision to forego raising that alternate defense did not fall below an objective standard of reasonableness. Strickland, 466 U.S. at 687.

5. Effectiveness claim g, failure to raise meritorious appellate issues.

In his final claim of ineffectiveness, Earp asserts generally that his attorney was ineffective in failing to present meritorious issues on appeal. His petition does not cite any specific meritorious issue he claims counsel overlooked, instead arguing that the claims submitted in his petition and in numerous objections his counsel made during trial should have been pursued on direct appeal. This is insufficient to state meritorious claim for ineffectiveness under Strickland.

It is well established that counsel need not raise every colorable claim on appeal. Cole v. Brankier, 328 App'x 149, 158 (4th Cir. 2008) (citing Jones v. Barnes, 463 U.S. 745, 754 (1983)). The "brief that raises every colorable issue runs the risk of burying good arguments." Jones, 463 U.S. at 753. Appellate counsel enjoys "significant latitude to develop a strategy that may omit meritorious claims in order to avoid burying issues in a legal jungle." Burket v. Angelone, 208

F.3d 172, 189 (4th Cir. 2000). In light of the significant deference due counsel's strategic decisions on appeal, and Earp's failure to identify any specific error which he claims would have produced a different result, his sixth ineffectiveness claim fails to plausibly allege a meritorious claim for relief. Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992) (unsupported, conclusory allegations are insufficient to state claims for habeas relief).

III. RECOMMENDATION

For the foregoing reasons, the undersigned recommends that Respondent's Motion to Dismiss (ECF No. 10) be GRANTED and that Earp's petition for a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED and all of his claims DISMISSED with prejudice.

IV. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendation within fourteen (14) days from the date of mailing of this Report to the objecting party, 28 U.S.C. §636(b)(1)(C), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of the right to appeal from a judgment of this Court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 F.2d 91 (4th Cir.

1984).

The Clerk is directed to mail a copy of this Order to the Petitioner and provide an electronic copy to counsel of record for the Respondent.

/s/
Douglas E. Miller
United States Magistrate Judge

DOUGLAS E. MILLER
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia
May 4, 2018

Clerk's Mailing Certificate

A copy of the foregoing Report and Recommendation was mailed this date to each of the following:

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Fernando Galindo, Clerk

By _____
Deputy Clerk

May 4, 2018