VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on **Friday** the **14th** *day of* **May, 2021**.

Andrew Huy Chrostowski,
No. 1379035 Petitioner,

against Record No. 200666

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

Upon a Petition for Rehearing

On consideration of the petition of the petitioner to set aside the judgment rendered herein on January 25, 2021 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste: *Douglas B Robelen (S)*

Clerk

By: illegible signature

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on **Monday** the **25th** *day of* **January, 2021**.

Andrew Huy Chrostowski,

No. 1379035 Petitioner,

against Record No. 200666

Harold W. Clarke, Director of the

Virginia Department of Corrections, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the replacement petition for a writ of habeas corpus filed May 21, 2020, and the respondent's motion to dismiss, the Court is of the opinion that the motion should be granted and the petition should be dismissed.

Petitioner pled guilty and was convicted in the Circuit Court of Loudoun County of driving under the influence of alcohol, fourth offense within ten

years, and driving with a revoked license while under the influence of alcohol, and was sentenced to seven years' imprisonment with three years suspended. Petitioner did not appeal and now challenges the legality of his confinement pursuant to these convictions.

In claim (1), petitioner contends he was denied the effective assistance of counsel because trial counsel failed to make a constitutionally adequate inquiry into viable defenses. Specifically, petitioner asserts trial counsel failed to fully investigate petitioner's mental health issues which, petitioner contends, counsel could have used to support a defense of diminished capacity. Petitioner alleges he suffers from Post-Traumatic Stress Disorder, Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Bi-Polar Disorder, and that at the time of the offense he was

not receiving any medication for these disorders. But for counsel's failure to conduct an adequate investigation, petitioner would not have pled guilty and would have been acquitted because of his mental health issues.

The Court holds claim (1) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668. 687 (1984). Counsel investigated petitioner's mental health issues and presented evidence and argument as to those issues in mitigation at petitioner's sentencing. However, petitioner suggests that these mental health issues would have formed the basis for a defense of diminished capacity. Diminished capacity, however, is not a defense to driving under the influence of alcohol or driving with a revoked license while under the influence of alcohol. See *Stamper v.*

Commonwealth. 228 Va. 707 (1985) (holding that evidence of a defendant's mental state at the time of the offense, absent insanity, is irrelevant to the issue of guilt). Trial counsel is not ineffective for failing to assert a frivolous defense. *Washington v. Murray*. 952 F.2d 1472, 1481 (4th Cir. 1991). 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.'

In claim (2), petitioner contends he was sentenced disproportionately, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Petitioner asserts he is less culpable for his actions than a similarly situated adult because his underlying mental health and addiction issues resulted in his diminished capacity. Petitioner argues that, based on the reasoning in

Graham v. Florida, 560 U.S. 48 (2010), the court should have considered his unique circumstances presented by his mental health issues in sentencing him. By failing to sentence petitioner to mental health treatment rather than prison, the court imposed a disproportionate and unconstitutional punishment.

The Court holds claim (2) is barred because this non-jurisdictional issue could have been raised during the direct appeal process and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton v. Parrigan*, 215 Va. 27, 29 (1974).

Accordingly, the petition is dismissed.

A Copy,

Teste: *Douglas B Robelen (S)*

Clerk

By: Illegible signature

Deputy Clerk

VIRGINIA SUPREME COURT

ANDREW HUY CHROSTOWSKI, #1379035 Petitioner v. HAROLD W. CLARKE, Director of the Virginia Department of Corrections, Respondent.	**PETITION FOR WRIT OF HABEAS CORPUS**

Counsel
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PETITION FOR WRIT OF HABEAS CORPUS

Andrew Huy Chrostowski ("Chrostowski") petitions this Court pursuant to Virginia Code § 8.01-654(A)(2) and 37.2-844.

Place of detention: The Petitioner is detained by the Commonwealth of Virginia in the Greensville Correctional Center in Jarrett, Virginia by and through an order of this Circuit Court for the county of Loudoun for a sentence imposed on August 1, 2018, for: (1) driving under the influence of alcohol, fourth or subsequent offense within 10 years, in violation of Va. Code §18.2-266 (case number 30933); and (2) driving with a revoked license while under the influence of alcohol in violation of Va. Code § 46.2-391 (D, 2a, ii) (case number 30933-01). Chrostowski was sentenced to five years with two

years suspended for the violation of Va. Code §18.2-266 and two years with one year suspended for the violation of Va. Code § 46.2-391 (D, 2a, ii).

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief: Circuit Court for Loudoun County, 18 E Market Street, 3rd Floor, Leesburg, VA 20178

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):

Sentence was imposed upon convictions for:

(1) driving under the influence of alcohol, fourth or subsequent offense within 10 years, in violation of Va. Code §18.2-266 (case number 30933);

(2) driving with a revoked license while under the influence of alcohol in violation of Va. Code § 46.2-391 (D,2a,ii) (case number 30933-01).

3. The date upon which sentence was imposed and the terms of the sentence:

Sentence was imposed on August 1, 2018. Chrostowski was sentenced to five years with two years suspended for the violation of Va. Code §18.2-266 and two years with one year suspended for the violation of Va. Code § 46.2-391 (D,2a,ii).

4. Check which plea you made and whether trial by jury:

The Petitioner pleaded guilty to the above-mentioned charges.

5. The name and address of each attorney, if any, who represented you at your criminal trial:
Tabitha N. Blake, Assistant Public Defender, 3 East Market Street, Leesburg, Virginia 20176

6. Did you appeal the conviction? No

7. If you answered "yes" to 6: state the result and the date your appeal or petition for certiorari was decided:

8. List the names and addresses of each attorney, if any, who represented you on your appeals:
NA.

B. Habeas Corpus

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus

in either a State of Federal court? No

10. If you answered "yes" to 9, list with respect to each conviction the name and location of the court in which each was filed:

11. Did you appeal from the disposition of your petition for habeas corpus?

NA

a. If you answered "yes" to 11, state: the result and the date of each petition:

NA.

C. Other Petitions, Motions or Applications

12. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the

nature of the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you:

NA

D. Present Petition

13. State the grounds which make your detention unlawful, including the facts on which you intend to rely.

I. Defense counsels' failure to make a constitutionally adequate inquiry into viable defenses denied Chrostowski reasonable effective and competent assistance of counsel and undermined the proper function of the adversarial process in violation of minimum performance standards required under the U.S. Constitution as

stated in Strickland, which deprived Chrostowski of his right to present "full and fair defense". Crane v. Kentucky, 476 U.S. 683, 690 (1986).

II. Chrostowski's right to be free from cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution was violated when Chrostowski was sentenced to a disproportionate sentence despite his lessened culpability.

14. List each ground set forth in 14, which has been presented in any other proceeding: NA

15. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not.

Ineffective assistance of counsel claims must be

brought in a petition for writ of habeas corpus. The violations of the Eighth and Fourteenth Amendments were not known to Chrostowski at the time of trial.

RESPECTFULLY SUBMITTED,

By: _____

Counsel

Dale R. Jensen (VSB 71109)
Dale Jensen, PLC
606 Bull Run
Staunton, VA 24401
(434) 249-3874
(866) 372-0348 facsimile
djensen@dalejensenlaw.com
Counsel

Signed, sealed and delivered in the presence of:

STATE OF VIRGINIA)
)
COUNTY/CITY GREENSVILLE)

The petitioner being first duly sworn, says:
He signed the foregoing petition;
The facts stated in the petition are true to the best of his information and belief.

Executed on: _____, 2020

_____
Andrew Huy Chrostowski, 1379035
Greensville Correctional Center
901 Corrections Way
Jarratt, VA 23870

Subscribed and sworn before me this ____ day of _____ 2020.

_____

Notary Public
My term expires: _____

Certificate

The undersigned counsel certifies that the page count for this Petition and Memorandum in Support excluding appendices, exhibits, cover page, table of contents, table of authorities, and certificate is 21 and the word count is 4,228.

Dated: April __, 2020

By:

Dale Jensen

Counsel
Dale R. Jensen (VSB 71109)
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Certificate of Service

I certify that on the __th day of April 2020, I mailed, postage prepaid, a true copy of the foregoing document to:

Harold W. Clarke
Director of the Virginia Department of Corrections
P.O. Box 26963
Richmond, VA 23261-6963

Mark Herring
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

Dated: August 10, 2015

_____

Dale R. Jensen

POST-TRAUMATIC STRESS DISORDER (PTSD)

Source: https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967

Overview

Post-traumatic stress disorder (PTSD) is a mental health condition that's triggered by a terrifying event — either experiencing it or witnessing it. Symptoms may include flashbacks, nightmares and severe anxiety, as well as uncontrollable thoughts about the event.

Most people who go through traumatic events may have temporary difficulty adjusting and coping, but with time and good self-care, they usually get better. If the symptoms get worse, last for months or

even years, and interfere with your day-to-day functioning, you may have PTSD.

Getting effective treatment after PTSD symptoms develop can be critical to reduce symptoms and improve function.

Symptoms

Post-traumatic stress disorder symptoms may start within one month of a traumatic event, but sometimes symptoms may not appear until years after the event. These symptoms cause significant problems in social or work situations and in relationships. They can also interfere with your ability to go about your normal daily tasks.

PTSD symptoms are generally grouped into four types: intrusive memories, avoidance, negative changes in thinking and mood, and changes in

physical and emotional reactions. Symptoms can vary over time or vary from person to person.

Intrusive memories

Symptoms of intrusive memories may include:

- Recurrent, unwanted distressing memories of the traumatic event
- Reliving the traumatic event as if it were happening again (flashbacks)
- Upsetting dreams or nightmares about the traumatic event
- Severe emotional distress or physical reactions to something that reminds you of the traumatic event

Avoidance

Symptoms of avoidance may include:

- Trying to avoid thinking or talking about the

traumatic event

- Avoiding places, activities or people that remind you of the traumatic event

Negative changes in thinking and mood

Symptoms of negative changes in thinking and mood may include:

- Negative thoughts about yourself, other people or the world
- Hopelessness about the future
- Memory problems, including not remembering important aspects of the traumatic event
- Difficulty maintaining close relationships
- Feeling detached from family and friends
- Lack of interest in activities you once enjoyed
- Difficulty experiencing positive emotions
- Feeling emotionally numb

Changes in physical and emotional reactions

Symptoms of changes in physical and emotional reactions (also called arousal symptoms) may include:

- Being easily startled or frightened
- Always being on guard for danger
- Self-destructive behavior, such as drinking too much or driving too fast
- Trouble sleeping
- Trouble concentrating
- Irritability, angry outbursts or aggressive behavior
- Overwhelming guilt or shame

For children 6 years old and younger, signs and symptoms may also include:

- Re-enacting the traumatic event or aspects of the traumatic event through play
- Frightening dreams that may or may not include aspects of the traumatic event

Intensity of symptoms

PTSD symptoms can vary in intensity over time. You may have more PTSD symptoms when you're stressed in general, or when you come across reminders of what you went through. For example, you may hear a car backfire and relive combat experiences. Or you may see a report on the news about a sexual assault and feel overcome by memories of your own assault.

When to see a doctor

If you have disturbing thoughts and feelings about a

traumatic event for more than a month, if they're severe, or if you feel you're having trouble getting your life back under control, talk to your doctor or a mental health professional. Getting treatment as soon as possible can help prevent PTSD symptoms from getting worse.

If you have suicidal thoughts

If you or someone you know has suicidal thoughts, get help right away through one or more of these resources:

- Reach out to a close friend or loved one.
- Contact a minister, a spiritual leader or someone in your faith community.
- Call a suicide hotline number — in the United States, call the National Suicide Prevention Lifeline at 1-800-273-TALK (1-800-273-8255) to reach a trained counselor. Use that same

number and press 1 to reach the Veterans Crisis Line.

- Make an appointment with your doctor or a mental health professional.

When to get emergency help:

If you think you may hurt yourself or attempt suicide, call 911 or your local emergency number immediately.

If you know someone who's in danger of attempting suicide or has made a suicide attempt, make sure someone stays with that person to keep him or her safe. Call 911 or your local emergency number immediately. Or, if you can do so safely, take the person to the nearest hospital emergency room.

Causes

You can develop post-traumatic stress disorder

when you go through, see or learn about an event involving actual or threatened death, serious injury or sexual violation.

Doctors aren't sure why some people get PTSD. As with most mental health problems, PTSD is probably caused by a complex mix of:

- Stressful experiences, including the amount and severity of trauma you've gone through in your life
- Inherited mental health risks, such as a family history of anxiety and depression
- Inherited features of your personality — often called your temperament
- The way your brain regulates the chemicals and hormones your body releases in response to stress

Risk factors

People of all ages can have post-traumatic stress disorder. However, some factors may make you more likely to develop PTSD after a traumatic event, such as:

- Experiencing intense or long-lasting trauma
- Having experienced other trauma earlier in life, such as childhood abuse
- Having a job that increases your risk of being exposed to traumatic events, such as military personnel and first responders
- Having other mental health problems, such as anxiety or depression
- Having problems with substance misuse, such as excess drinking or drug use
- Lacking a good support system of family and friends

- Having blood relatives with mental health problems, including anxiety or depression

Kinds of traumatic events

The most common events leading to the development of PTSD include:

- Combat exposure
- Childhood physical abuse
- Sexual violence
- Physical assault
- Being threatened with a weapon
- An accident

Many other traumatic events also can lead to PTSD, such as fire, natural disaster, mugging, robbery, plane crash, torture, kidnapping, life-threatening medical diagnosis, terrorist attack, and other extreme or life-threatening events.

Complications

Post-traumatic stress disorder can disrupt your whole life — your job, your relationships, your health and your enjoyment of everyday activities.

Having PTSD may also increase your risk of other mental health problems, such as:

- Depression and anxiety
- Issues with drugs or alcohol use
- Eating disorders
- Suicidal thoughts and actions

Prevention

After surviving a traumatic event, many people have PTSD-like symptoms at first, such as being unable to stop thinking about what's happened. Fear, anxiety, anger, depression, guilt —

all are common reactions to trauma. However, the majority of people exposed to trauma do not develop long-term post-traumatic stress disorder.

Getting timely help and support may prevent normal stress reactions from getting worse and developing into PTSD. This may mean turning to family and friends who will listen and offer comfort. It may mean seeking out a mental health professional for a brief course of therapy. Some people may also find it helpful to turn to their faith community.

Support from others also may help prevent you from turning to unhealthy coping methods, such as misuse of alcohol or drugs.

Exhibit 2-1

CERTIFICATE OF BLOOD ALCOHOL ANALYSIS

AS DETERMINED BY A CHEMICAL TEST OF

THE ACCUSED'S BREATH

5-8-17 illegible signature

Date CLERK/DEPUTY CLERK

Name of the accused	Name of the Court:
Chrostowski, Andrew, H	Loudon Gen Dist

BREATH ANALYSIS

Sample examined and test conducted by:		Agency
Fraley, Kristopher, T		Purcellville PD
DPS License Number	License Expires	Date Test Conducted
30063	05/01/2018	05/07/2017

Exhibit 2-2

Test equipment number 01473	

Results Time Sample Taken: 00:41 EDT

Samples Alcohol Content: 0.15 grams per 210 liters of breath

Loudoun County General District Court

Received

Illegible signature 5-8-17

Clerk/Deputy Clerk Date

ATTEST:

I CERTIFY THAT THE ABOVE IS AN ACCURATE RECORD OF THE TEST CONDUCTED; THAT THE TEST WAS CONDUCTED WITH THE TYPE OF

EQUIPMENT AND IN ACCORDANCE WITH THE METHODS APPROVED BY THE DEPARTMENT OF FORENSIC SCIENCE; THAT THE TEST WAS CONDUCTED IN ACCORDANCE WITH THE DEPARTMENT'S SPECIFICATIONS; THAT PRIOR TO ADMINISTRATION OF THE TEST THE ACCUSED WAS ADVISED OF HIS RIGHT TO OBSERVE THE PROCESS AND SEE THE BLOOD ALCOHOL READING ON THE EQUIPMENT USED TO PERFORM THE BREATH TEST, AND THAT I POSSESS A VALID LICENSE TO CONDUCT SUCH TEST, GIVEN UNDER MY HAND THIS 7 DAY OF MAY, 2017.

BREATH TEST OPERATOR

Illegible signature 5240

X I HAVE RECEIVED A COPY OF THIS CERTIFICATE OF ANALYSIS

Illegible signature

SUBJECT'S SIGNATURE

☐ SUBJECT REFUSED TO SIGN FOR COPY OF CERTIFICATE OF ANALYSIS

Exhibit 3-1

MEDICAL HISTORY REPORT SUMMARY

MENTAL HEALTH EVALUATION

Mental Health Sick Calls

Call date	06-20-2017 2:00 pm
Clinician Name	Carol Perez
Requested by Patient?	Yes
Subjective	06-20-2017 2:00pm- Perez, Carol Client Specific Narrative: PSYCHIATRIC EVALUATION Patient name: Andrew Chrostowski Date of evaluation: 6/20/2017

	Source of information: patient, chart Identifying Information: in ADC for 6th DUI - court 6/23 Accompanied by: ADC mental health staff --- HISTORY Chief Complaint: "trying to relook at that whole end of the spectrum to help me" History of Present Illness: Only able to focus if has "a motor and tools in my hands." Sometimes has sudden episodes of "drinking till drunk so my brain resets." Drinks on anniversaries of death of mother/family illness. "I haven't slept since

	I was born." Can sleep 12 to 6 if works many hours. 2-3 hours per night here. Brain is "overprocessing .... peanut gallery." Denies hallucinations, psychosis. Never tired unless working a lot. Nightmares at night. Watching mother die/hospitalization trauma/gunshot wound ... has nightmares, flashbacks, hypervigilance. Can read books for up to 30 minutes. Past Psychiatric History: OX adhd (ED, LD), age 4, has been on medications in past (age 4 to 18), then refused, trying to restart now that going in and out of jail; saw a doctor who started Adderall 15 mg BID (was calmer, more focused). Was

	psychiatrically hospitalized as a child; Never suicidal. Denies history of psychosis. Was away from home in hospitals/schools for much of his early childhood. "I was so drugged up all the time." Substance Use History: has been sober for 2 years, drank May 6 after finding out uncle sick with cancer Past Medical History: has 7 pins/rod in leg; device holding shoulder together; cord wrapped around neck during childbirth, multiple head injuries (unclear if LOC), no seizures Allergies: cecJor (hives)

	Current Medications: Adderall 10 or 15 mg BID (prior to ADC) - very helpful Past Medications: multiple meds as a child, does not remember; Wellbutrin ("a joke" – no effect), Strattera ?; Ritalin/Concerta; remeron (sleeps but drools), Benadryl (effective for sleep) Family History: Alzheimer's on paternal side; no substance abuse or mental illness Social History: graduated H.S. with 3.8 average; working as a tradesman; mother was sick intermittently/died about 5 years

	(has been sick since before he was born); has 2 younger siblings, both working; married, 6 year-old and 4 month old Review of Systems: no physical complaints
	PSYCHIATRIC SPECIALTY EXAMINATION Constitutional: well-developed, in no apparent physical distress Vital Signs (3 of 7): General appearance: well-groomed, good

	eye contact Musculoskeletal: Assessment of muscle strength and tone/notation of any atrophy or abnormal movements: rubbing legs, moving around Examination of gait and station: normal Psychiatric: Speech: normal rate, tone and volume, hyperverbal Thought processes (rate of thoughts, content of thoughts): coherent and goal-directed Description of associations (e.g. loose,

	tangential, circumstantial, intact): intact Description of abnormal/psychotic thoughts (including hallucinations, delusions, obsessions, preoccupation with violence): denies Suicidal ideation _present _x_ absent Homicidal ideation _ present _x_ absent Insight/judgment: Complete Mental status examination: Mood/affect: mood - "agitated"; affect full range Orientation to time, place, person:

	Recent/remote memory: Attention span/concentration: Language (naming, repetition): Fund of knowledge: --- MEDICAL DECISION MAKING Data (medical records/labs/tests reviewed): ASSESSMENT/PLAN: Try Benadryi/Prazosin for insomnia/nightmares; look for Strattera samples at Loudoun

	MHSADS NEXT APPOINTMENT/RETURN TO CLINIC: 1month or as needed CURRENT DIAGNOSIS: ADHD, PTSD ASSESSMENT/PLAN CHANGES TO MEDICATIONS: CURRENT MEDICATIONS: Benadryl25 mg qhs, Prazosin 1 mg qhs; Strattera to be ordered tomorrow MEDICATIONS DISPENSED: Benadryl

	25 mg qhs #30, 2 ref; Prazosin 1 mg qhs #30, 2 re Length of visit: 40 minutes
Objective	[blank]
Assessment	[blank]
Plan	[blank]
Education	[blank]
Recorded By	Perez, Carol
Notes Regarding Note Off	[blank]

*Note: page 158 out of 160 pulled from the full medical history report.

OPPOSITIONAL DEFIANT DISORDER (ODD)

Source: https://www.mayoclinic.org/diseases-conditions/oppositional-defiant-disorder/symptoms-causes/syc-20375831

Overview

Even the best-behaved children can be difficult and challenging at times. But if your child or teenager has a frequent and persistent pattern of anger, irritability, arguing, defiance or vindictiveness toward you and other authority figures, he or she may have oppositional defiant disorder (ODD).

As a parent, you don't have to go it alone in trying to manage a child with ODD. Doctors, mental health professionals and child development experts can help.

Behavioral treatment of ODD involves learning skills to help build positive family interactions and to manage problematic behaviors. Additional therapy, and possibly medications, may be needed to treat related mental health disorders.

Symptoms

Sometimes it's difficult to recognize the difference between a strong-willed or emotional child and one with oppositional defiant disorder. It's normal to exhibit oppositional behavior at certain stages of a child's development.

Signs of ODD generally begin during preschool years. Sometimes ODD may develop later, but almost always before the early teen years. These behaviors cause significant impairment with family, social activities, school and work.

The Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association, lists criteria for diagnosing ODD. The DSM-5 criteria include emotional and behavioral symptoms that last at least six months.

Angry and irritable mood:

- Often and easily loses temper
- Is frequently touchy and easily annoyed by others
- Is often angry and resentful

Argumentative and defiant behavior:

- Often argues with adults or people in authority
- Often actively defies or refuses to comply with adults' requests or rules

- Often deliberately annoys or upsets people
- Often blames others for his or her mistakes or misbehavior

Vindictiveness:

- Is often spiteful or vindictive
- Has shown spiteful or vindictive behavior at least twice in the past six months

ODD can vary in severity:

- Mild. Symptoms occur only in one setting, such as only at home, school, work or with peers.
- Moderate. Some symptoms occur in at least two settings.
- Severe. Some symptoms occur in three or more settings.

For some children, symptoms may first be seen

only at home, but with time extend to other settings, such as school and with friends.

When to see a doctor

Your child isn't likely to see his or her behavior as a problem. Instead, he or she will probably complain about unreasonable demands or blame others for problems. If your child shows signs that may indicate ODD or other disruptive behavior, or you're concerned about your ability to parent a challenging child, seek help from a child psychologist or a child psychiatrist with expertise in disruptive behavior problems.

Ask your primary care doctor or your child's pediatrician to refer you to the appropriate professional.

Causes

There's no known clear cause of oppositional defiant disorder. Contributing causes may be a combination of inherited and environmental factors, including:

- Genetics - a child's natural disposition or temperament and possibly neurobiological differences in the way nerves and the brain function
- Environment - problems with parenting that may involve a lack of supervision, inconsistent or harsh discipline, or abuse or neglect

Risk factors

Oppositional defiant disorder is a complex problem. Possible risk factors for ODD include:

- Temperament - a child who has a temperament that includes difficulty

regulating emotions, such as being highly emotionally reactive to situations or having trouble tolerating frustration

- Parenting issues - a child who experiences abuse or neglect, harsh or inconsistent discipline, or a lack of parental supervision
- Other family issues - a child who lives with parent or family discord or has a parent with a mental health or substance use disorder
- Environment - oppositional and defiant behaviors can be strengthened and reinforced through attention from peers and inconsistent discipline from other authority figures, such as teachers

Complications

Children and teenagers with oppositional defiant disorder may have trouble at home with

parents and siblings, in school with teachers, and at work with supervisors and other authority figures. Children with ODD may struggle to make and keep friends and relationships.

ODD may lead to problems such as:

- Poor school and work performance
- Antisocial behavior
- Impulse control problems
- Substance use disorder
- Suicide

Many children and teens with ODD also have other mental health disorders, such as:

- Attention-deficit/hyperactivity disorder (ADHD)
- Conduct disorder
- Depression

- Anxiety
- Learning and communication disorders

Treating these other mental health disorders may help improve ODD symptoms. And it may be difficult to treat ODD if these other disorders are not evaluated and treated appropriately.

Prevention

There's no guaranteed way to prevent oppositional defiant disorder. However, positive parenting and early treatment can help improve behavior and prevent the situation from getting worse. The earlier that ODD can be managed, the better.

Treatment can help restore your child's self-esteem and rebuild a positive relationship between you and your child. Your child's relationships with

other important adults in his or her life — such as teachers and care providers — also will benefit from early treatment.

ADULT ATTENTION-DEFICIT/HYPERACTIVITY DISORDER (ADHD)

Source: https://www.mayoclinic.org/diseases-conditions/adult-adhd/symptoms-causes/syc-20350878

Overview

Adult attention-deficit/hyperactivity disorder (ADHD) is a mental health disorder that includes a combination of persistent problems, such as difficulty paying attention, hyperactivity and impulsive behavior. Adult ADHD can lead to unstable relationships, poor work or school performance, low self-esteem, and other problems.

Though it's called adult ADHD, symptoms start in early childhood and continue into adulthood.

In some cases, ADHD is not recognized or diagnosed until the person is an adult. Adult ADHD symptoms may not be as clear as ADHD symptoms in children. In adults, hyperactivity may decrease, but struggles with impulsiveness, restlessness and difficulty paying attention may continue.

Treatment for adult ADHD is similar to treatment for childhood ADHD. Adult ADHD treatment includes medications, psychological counseling (psychotherapy) and treatment for any mental health conditions that occur along with ADHD.

Symptoms

For some children, symptoms may first be seen only at home, but with time extend to other settings, such as school and with friends.

Some people with ADHD have fewer symptoms as they age, but some adults continue to have major symptoms that interfere with daily functioning. In adults, the main features of ADHD may include difficulty paying attention, impulsiveness and restlessness. Symptoms can range from mild to severe.

Many adults with ADHD aren't aware they have it — they just know that everyday tasks can be a challenge. Adults with ADHD may find it difficult to focus and prioritize, leading to missed deadlines and forgotten meetings or social plans. The inability to control impulses can range from impatience waiting in line or driving in traffic to mood swings and outbursts of anger.

Adult ADHD symptoms may include:

- Impulsiveness
- Disorganization and problems prioritizing
- Poor time management skills
- Problems focusing on a task
- Trouble multitasking
- Excessive activity or restlessness
- Poor planning
- Low frustration tolerance
- Frequent mood swings
- Problems following through and completing tasks
- Hot temper
- Trouble coping with stress

What's typical behavior and what's ADHD?

Almost everyone has some symptoms similar to ADHD at some point in their lives. If your difficulties are recent or occurred only occasionally in the past, you probably don't have ADHD. ADHD is diagnosed only when symptoms are severe enough to cause ongoing problems in more than one area of your life. These persistent and disruptive symptoms can be traced back to early childhood.

Diagnosis of ADHD in adults can be difficult because certain ADHD symptoms are similar to those caused by other conditions, such as anxiety or mood disorders. And many adults with ADHD also have at least one other mental health condition, such as depression or anxiety.

When to see a doctor

If any of the symptoms listed above continually disrupt your life, talk to your doctor

about whether you might have ADHD.

Different types of health care professionals may diagnose and supervise treatment for ADHD. Seek a provider who has training and experience in caring for adults with ADHD.

Causes

While the exact cause of ADHD is not clear, research efforts continue. Factors that may be involved in the development of ADHD include:

- Genetics. ADHD can run in families, and studies indicate that genes may play a role.
- Environment. Certain environmental factors also may increase risk, such as lead exposure as a child.
- Problems during development. Problems with the central nervous system at key moments in

development may play a role.

Risk factors

Risk of ADHD may increase if:

- You have blood relatives, such as a parent or sibling, with ADHD or another mental health disorder
- Your mother smoked, drank alcohol or used drugs during pregnancy
- As a child, you were exposed to environmental toxins — such as lead, found mainly in paint and pipes in older buildings
- You were born prematurely

Complications

ADHD can make life difficult for you. ADHD has been linked to:

- Poor school or work performance
- Unemployment
- Financial problems
- Trouble with the law
- Alcohol or other substance misuse
- Frequent car accidents or other accidents
- Unstable relationships
- Poor physical and mental health
- Poor self-image
- Suicide attempts

Coexisting Conditions

Although ADHD doesn't cause other psychological or developmental problems, other disorders often occur along with ADHD and make treatment more challenging. These include:

- Mood disorders. Many adults with ADHD also have depression, bipolar disorder or another

mood disorder. While mood problems aren't necessarily due directly to ADHD, a repeated pattern of failures and frustrations due to ADHD can worsen depression.

- Anxiety disorders. Anxiety disorders occur fairly often in adults with ADHD. Anxiety disorders may cause overwhelming worry, nervousness and other symptoms. Anxiety can be made worse by the challenges and setbacks caused by ADHD.
- Other psychiatric disorders. Adults with ADHD are at increased risk of other psychiatric disorders, such as personality disorders, intermittent explosive disorder and substance use disorders.
- Learning disabilities. Adults with ADHD may score lower on academic testing than would be expected for their age, intelligence and

education. Learning disabilities can include problems with understanding and communicating.

VIRGINIA SUPREME COURT

ANDREW HUY CHROSTOWSKI, #1379035, Petitioner vs. HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS, Respondent.	Case No. _____ **DECLARATION IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

DECLARATION OF ANDREW HUY CHROSTOWSKI IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I, Andrew Huy Chrostowski, make this Declaration in support of my Petition for Writ of Habeas Corpus. This Declaration is based upon my personal knowledge, unless otherwise stated, and I am qualified to testify to the facts related herein. If called as a witness, I could and would competently testify to the facts set forth herein. I declare as follows:

1. I am over the age of eighteen and am legally competent to make this declaration. I have personal knowledge of the matters stated herein and would testify that they are true if called upon to do so.

2. At all relevant times, I have suffered from posttraumatic stress disorder ("PTSD"), attention deficit hyperactivity disorder ("ADHD"), Oppositional Defiant Disorder, and bi-polar disorder.

3. At all relevant times prior to the incident, I was working and supporting his family as best as I could.

4. At the time of the incident for which I was convicted, I was drinking because he had just found out that my uncle was diagnosed with terminal cancer.

5. This diagnosis caused me to re-experience stress from watching my mother die.

6. I was also not on any mental health medication at the time, despite a compelling need for such medication.

7. I was refused help by Loudoun County and its probation office even though I asked for help to get mental health medication.

8. No one was injured as a result of my riding my moped on May 6, 2017.

9. For my defense, I was assigned a public defender.

10. Prior to trial, my assigned public defender had minimal contact with me.

11. My assigned public defender made no inquiry whatsoever into my mental health even after I advised her of my issues.

12. In particular, prior to my trial, my assigned public defender did not move for a psychiatric examination of me.

13. As a result of not properly preparing to defend me, after a motion to strike was denied at trial, my assigned public defender coerced me into changing my plea in the case to guilty.

14. In preparation for filing my Petition, I contracted with a forensic psychologist to examine me.

15. The Respondent denied the forensic psychologist access to me.

I hereby declare that the above statements are true to the best of my knowledge and belief and that I understand they are made for use as evidence in court and are subject to penalty for perjury.

Executed on: April 21, 2020

Wet signature of

Andrew Huy Chrostowski

Andrew Huy Chrostowski, 1379035

Greensville Correctional Center

901 Corrections Way

Jarratt, VA 23870

Subscribed and sworn before me this 21th day of April 2020.

Wet signature of Lynn Driver

Notary Public

Stamp with Registration # 7013268

My term expires: March 31, 2022

BIPOLAR DISORDER

Source: https://www.mayoclinic.org/diseases-conditions/bipolar-disorder/symptoms-causes/syc-20355955

Overview

Bipolar disorder, formerly called manic depression, is a mental health condition that causes extreme mood swings that include emotional highs (mania or hypomania) and lows (depression).

When you become depressed, you may feel sad or hopeless and lose interest or pleasure in most activities. When your mood shifts to mania or hypomania (less extreme than mania), you may feel euphoric, full of energy or unusually irritable. These mood swings can affect sleep, energy, activity, judgment, behavior and the ability to think clearly.

Episodes of mood swings may occur rarely or multiple times a year. While most people will experience some emotional symptoms between episodes, some may not experience any.

Although bipolar disorder is a lifelong condition, you can manage your mood swings and other symptoms by following a treatment plan. In most cases, bipolar disorder is treated with medications and psychological counseling (psychotherapy).

Symptoms

There are several types of bipolar and related disorders. They may include mania or hypomania and depression. Symptoms can cause unpredictable changes in mood and behavior, resulting in significant distress and difficulty in life.

- Bipolar I disorder. You've had at least one manic episode that may be preceded or followed by hypomanic or major depressive episodes. In some cases, mania may trigger a break from reality (psychosis).
- Bipolar II disorder. You've had at least one major depressive episode and at least one hypomanic episode, but you've never had a manic episode.
- Cyclothymic disorder. You've had at least two years — or one year in children and teenagers — of many periods of hypomania symptoms and periods of depressive symptoms (though less severe than major depression).
- Other types. These include, for example, bipolar and related disorders induced by certain drugs or alcohol or due to a medical

condition, such as Cushing's disease, multiple sclerosis or stroke.

Bipolar II disorder is not a milder form of bipolar I disorder, but a separate diagnosis. While the manic episodes of bipolar I disorder can be severe and dangerous, individuals with bipolar II disorder can be depressed for longer periods, which can cause significant impairment.

Although bipolar disorder can occur at any age, typically it's diagnosed in the teenage years or early 20s. Symptoms can vary from person to person, and symptoms may vary over time.

Mania and hypomania

Mania and hypomania are two distinct types of episodes, but they have the same symptoms. Mania is more severe than hypomania and causes

more noticeable problems at work, school and social activities, as well as relationship difficulties. Mania may also trigger a break from reality (psychosis) and require hospitalization.

Both a manic and a hypomanic episode include three or more of these symptoms:

- Abnormally upbeat, jumpy or wired
- Increased activity, energy or agitation
- Exaggerated sense of well-being and self-confidence (euphoria)
- Decreased need for sleep
- Unusual talkativeness
- Racing thoughts
- Distractibility
- Poor decision-making — for example, going on buying sprees, taking sexual risks or making

foolish investments

Major depressive episode

A major depressive episode includes symptoms that are severe enough to cause noticeable difficulty in day-to-day activities, such as work, school, social activities or relationships. An episode includes five or more of these symptoms:

- Depressed mood, such as feeling sad, empty, hopeless or tearful (in children and teens, depressed mood can appear as irritability)
- Marked loss of interest or feeling no pleasure in all — or almost all — activities
- Significant weight loss when not dieting, weight gain, or decrease or increase in appetite (in children, failure to gain weight as expected can be a sign of depression)
- Either insomnia or sleeping too much

- Either restlessness or slowed behavior
- Fatigue or loss of energy
- Feelings of worthlessness or excessive or inappropriate guilt
- Decreased ability to think or concentrate, or indecisiveness
- Thinking about, planning or attempting suicide

Other features of bipolar disorder

Signs and symptoms of bipolar I and bipolar II disorders may include other features, such as anxious distress, melancholy, psychosis or others. The timing of symptoms may include diagnostic labels such as mixed or rapid cycling. In addition, bipolar symptoms may occur during pregnancy or change with the seasons.

Symptoms in children and teens

Symptoms of bipolar disorder can be difficult to identify in children and teens. It's often hard to tell whether these are normal ups and downs, the results of stress or trauma, or signs of a mental health problem other than bipolar disorder.

Children and teens may have distinct major depressive or manic or hypomanic episodes, but the pattern can vary from that of adults with bipolar disorder. And moods can rapidly shift during episodes. Some children may have periods without mood symptoms between episodes.

The most prominent signs of bipolar disorder in children and teenagers may include severe mood swings that are different from their usual mood swings.

When to see a doctor

Despite the mood extremes, people with bipolar disorder often don't recognize how much their emotional instability disrupts their lives and the lives of their loved ones and don't get the treatment they need.

And if you're like some people with bipolar disorder, you may enjoy the feelings of euphoria and cycles of being more productive. However, this euphoria is always followed by an emotional crash that can leave you depressed, worn out — and perhaps in financial, legal or relationship trouble.

If you have any symptoms of depression or mania, see your doctor or mental health professional. Bipolar disorder doesn't get better on its own. Getting treatment from a mental health professional

with experience in bipolar disorder can help you get your symptoms under control.

When to get emergency help

Suicidal thoughts and behavior are common among people with bipolar disorder. If you have thoughts of hurting yourself, call 911 or your local emergency number immediately, go to an emergency room, or confide in a trusted relative or friend. Or call a suicide hotline number — in the United States, call the National Suicide Prevention Lifeline at 1-800-273-TALK (1-800-273-8255).

If you have a loved one who is in danger of suicide or has made a suicide attempt, make sure someone stays with that person. Call 911 or your local emergency number immediately. Or, if you think you can do so safely, take the person to the

nearest hospital emergency room.

Causes

The exact cause of bipolar disorder is unknown, but several factors may be involved, such as:

- Biological differences. People with bipolar disorder appear to have physical changes in their brains. The significance of these changes is still uncertain but may eventually help pinpoint causes.
- Genetics. Bipolar disorder is more common in people who have a first-degree relative, such as a sibling or parent, with the condition. Researchers are trying to find genes that may be involved in causing bipolar disorder.

Risk factors

Factors that may increase the risk of developing bipolar disorder or act as a trigger for the first episode include:

- Having a first-degree relative, such as a parent or sibling, with bipolar disorder
- Periods of high stress, such as the death of a loved one or other traumatic event
- Drug or alcohol abuse

Complications

Left untreated, bipolar disorder can result in serious problems that affect every area of your life, such as:

- Problems related to drug and alcohol use
- Suicide or suicide attempts
- Legal or financial problems

- Damaged relationships
- Poor work or school performance

Co-Occurring Conditions

If you have bipolar disorder, you may also have another health condition that needs to be treated along with bipolar disorder. Some conditions can worsen bipolar disorder symptoms or make treatment less successful. Examples include:

- Anxiety disorders
- Eating disorders
- Attention-deficit/hyperactivity disorder (ADHD)
- Alcohol or drug problems
- Physical health problems, such as heart disease, thyroid problems, headaches or obesity

Prevention

There's no sure way to prevent bipolar disorder. However, getting treatment at the earliest sign of a mental health disorder can help prevent bipolar disorder or other mental health conditions from worsening.

If you've been diagnosed with bipolar disorder, some strategies can help prevent minor symptoms from becoming full-blown episodes of mania or depression:

- Pay attention to warning signs. Addressing symptoms early on can prevent episodes from getting worse. You may have identified a pattern to your bipolar episodes and what triggers them. Call your doctor if you feel you're falling into an episode of depression or mania. Involve family members or

friends in watching for warning signs.

- Avoid drugs and alcohol. Using alcohol or recreational drugs can worsen your symptoms and make them more likely to come back.
- Take your medications exactly as directed. You may be tempted to stop treatment — but don't. Stopping your medication or reducing your dose on your own may cause withdrawal effects or your symptoms may worsen or return.

VIRGINIA COURT OF APPEALS

ANDREW HUY CHROSTOWSKI, #1379035, Petitioner vs. HAROLD W. CLARKE, Director of the Virginia Department of Corrections, Respondent.	Case No. _____ **MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

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I. JURISDICTION

Pursuant to Va. Code, §8.01-654 et seq. petitioner Andrew Huy Chrostowski ("Chrostowski") appeal was sentenced on June 25, 2018. Petitioner avers that the habeas corpus petition is timely filed.

This Court has original jurisdiction to entertain this action pursuant to Virginia Supreme Court Rule 5:7.

II. STATEMENT OF FACTS

At all relevant times, Chrostowski has suffered from posttraumatic stress disorder ("PTSD"), attention deficit hyperactivity disorder ("ADHD"),

Oppositional Defiant Disorder, bi-polar disorder, and other emotional disorders. Chrostowski Decl. at ¶ 2. In addition, Chrostowski was and is

learning disabled. Symptoms of PTSD include self-destructive behavior, such as drinking too much or driving too fast. See, e.g., Exhibit 1 (copied from https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967. Symptoms of ADHD include impulsiveness and trouble coping with stress. See, e.g., https://www.mayoclinic.org/diseases-conditions/adult-adhd/symptoms-causes/syc-20350878. At all relevant times prior to the incident, Chrostowski was working and supporting his family as best as he could. Chrostowski Decl. at ¶ 3.

At the time of the incident for which Chrostowski was convicted,

Chrostowski was drinking because he had just found out that his uncle was diagnosed with terminal cancer. Chrostowski Decl. at ¶ 4. This diagnosis

caused Chrostowski to re-experience trauma and stress from watching his mother die. Chrostowski Decl. at ¶ 5. Chrostowski was also not on any mental health medication at the time, despite a compelling need for such medication. Chrostowski Decl. at ¶ 6. Chrostowski was refused help by Loudoun County and its probation office even though Chrostowski asked for help to get mental health medication. Chrostowski Decl. at ¶ 7.

On May 6, 2017 at approximately 11:30 PM, Chrostowski was observed operating his moped on a road. Exhibit 1 at p. 5. The moped was weaving in the lane in which it was traveling. Exhibit 1 at p. 5. After being stopped by the police, Chrostowski was tested with a blood alcohol content of 0.15 grams per 210 liters of breath, which was above the legal limit. Exhibit 2.

No one was injured as a result of Chrostowski riding his moped. Chrostowski Decl. at ¶ 8.

For his defense, Chrostowski was assigned a public defender. Chrostowski Decl. at ¶ 9. Prior to trial, Chrostowski's assigned public defender had minimal contact with Chrostowski. Chrostowski Decl. at ¶ 10. Chrostowski's assigned public defender made no inquiry whatsoever into Chrostowski's mental health even after Chrostowski advised her of his issues. Chrostowski Decl. at ¶ 11. In particular, prior to his trial, Chrostowski's assigned public defender did not move for a psychiatric examination of Chrostowski. Chrostowski Decl. at ¶ 12. As a result of not properly preparing to defend Chrostowski, after a motion to strike was denied at trial, Chrostowski's assigned public defender coerced Chrostowski into changing his plea in the case to

guilty. Chrostowski Decl. at ¶ 13.

In preparation for filing his Petition, Chrostowski contracted with a forensic psychologist to examine him. Chrostowski Decl. at ¶ 14. The Respondent denied the forensic psychologist access to Chrostowski. Chrostowski Decl. at ¶ 15.

III. AUTHORITIES AND ARGUMENT

A. Defense counsels' failure to make a constitutionally adequate inquiry into viable defenses denied Chrostowski reasonable effective and competent assistance of counsel and undermined the proper function of the adversarial process in violation of minimum performance standards required under the U.S. Constitution as stated in *Strickland*,

which

deprived Chrostowski of his right to present "full and fair defense". *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Defense Counsel's refusal to conduct reasonable pretrial investigation into Chrostowski's mental health issues, even after having been made aware of those issues, denied Chrostowski reasonable effective assistance of counsel, undermining the proper function of the adversarial process. In violation of the minimum required performance standard for counsel as stated, inter alia, in *Strickland*, supra, and *Wiggins v. Smith*, 539 U.S. 510 (2003).

In *Wiggins v. Smith*, supra, the Court held (emphasis added):

Strategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, **a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances**, applying a heavy measure of deference to counsel's judgments." Id. [*Strickland*], at 690-691,104 S.Ct. 2052.

Our opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that **counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfilled] their obligation to conduct a thorough investigation of the defendant's background**." 529 U.S., at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). While *Williams* had not yet been decided at the time the Maryland Court of

> Appeals rendered the decision at issue in this case, cf. post, at 156 L Ed 2d, at 497-498 (Scalia, J., dissenting), *Williams*' case was before us on habeas review. Contrary to the dissent's contention, post, at 156 L Ed 2d, at 499, we therefore made no new law in resolving Williams' ineffectiveness claim. See *Williams*, 529 U.S., at 390, 120 S.Ct. 1495 (noting that the merits of Williams' (123 S.Ct. 2536) claim "are squarely governed by our holding in *Strickland*"); see also id., at 395, 120 S.Ct. 1495 (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland*'s performance prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today. Cf. *Strickland*, 466 U.S., at 690-691, 80 L Ed 2d 674, 104 S Ct 2052 (establishing that "thorough investigations" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also id., at 688-689, 80 L Ed 2d 674, 104 S Ct 2052 ("Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable")."

539 U.S. at 521-522.

The refusal of counsel to not fully investigate Chrostowski's mental health issues was objectively unreasonable. The refusal to fully investigate and obtain supporting medical evidence supporting Chrostowski's diminished capacity deprived Chrostowski of reasonable effective assistance of counsel, undermining the proper function of the adversarial process.

Counsel's failure to investigate is a clear violation of performance prong of *Strickland*'s counsel performance standard, prejudicing Chrostowski by denying him effective assistance of counsel undermining the proper function of the adversarial process.

For had counsel provided a complete investigation the outcome would have resulted in Chrostowski going to trial and very likely being

acquitted because of his mental health issues.

Chrostowski attempted to develop medical evidence in support of his Petition for Writ of Habeas Corpus by retaining an expert in forensic psychiatry. That expert required an in depth personal examination of Chrostowski to prepare expert testimony, which would have included a Declaration that Chrostowski desired to submit with his Petition for Writ of Habeas Corpus. The Virginia Department of Corrections, under the direction of Respondent, denied Chrostowski access to the referenced expert. Consequently, at a minimum, Chrostowski should be allowed to conduct discovery and develop the expert testimony in support of his Petition for Writ of Habeas Corpus. This expert testimony will further show both the Strickland performance and prejudice prongs are met in this case.

Defense counsel's lack of preparation and failure to advocate on behalf of Chrostowski during the trial denied Chrostowski reasonable effective assistance of counsel, undermining the proper function of the adversarial process, in violation of *Strickland*'s standard *supra*, and *United States v. Cronic*, 104 S.Ct. 2039, 466 U.S. 648, 80 L.Ed.2d 657 (1984) (overruled on other grounds). In *Cronic,* the Court Held,

> The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, the kind of testing envisioned by the Sixth Amendment has occurred.

466 U.S. at 656-657.

The *Cronic* Court further held (emphasis added):

> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the

> right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance" which is to be "for his defence" Thus, "**the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.**" *United States v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). **If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment**." *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940) (footnote omitted)."

466 U.S. at 654-655.

As evidenced by the mental health evaluations

in Chrostowski's past, Chrostowski had a substantial, reasonable defense based on his mental health issues. See Exhibit 3, passim. To reiterate, Chrostowski has attempted to be fully evaluated by a licensed mental health professional in preparation for his Petition. Chrostowski Decl. at ¶ 14. The Respondent has denied any such evaluation. Chrostowski Decl. at ¶ 15. As a result, discovery including, without limitation, a full mental health evaluation must be performed prior to ruling on Chrostowski's Petition.

As stated in *Cronic*:

> **If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere**

> **formal appointment."** *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940) (footnote omitted)."

Cronic, 466 U.S. at 654-655.

Defense counsel's failure to competently evaluate viable defenses, denied Chrostowski reasonable effective assistance of counsel, undermined the proper function of the adversarial process in violation of Constitutional minimum performance standards as stated in Strickland, supra, and deprived Chrostowski of right to present 'full and fair defense', as required under the U.S. Constitution. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

In *Crane*, the United States Supreme Court held, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Id. Chrostowski's defense counsel

deprived him of any meaningful opportunity to present a complete defense because they did not competently prepare available defenses in his behalf, and then misadvised him to enter a guilty plea, which covered up the fact that no investigation had been conducted into Chrostowski's case in general, and mental health issues in particular, and had prepared no defense in his behalf.

Where counsel failed to make anything approaching a constitutionally competent evaluation of potential viable defenses, they denied Chrostowski reasonable effective assistance of counsel, undermining the proper function of the adversarial process in violation of *Strickland's* two-prong test.

Where defense counsel failed to provide Chrostowski with assistance for his defense, counsel did not meet the performance standard of *Strickland*

et al., denying Chrostowski his constitutionally guaranteed rights and undermined the proper function of the adversarial process, which prejudiced Chrostowski, for had his counsel properly performed in his behalf the outcome would have been completely different.

B. Chrostowski's right to be free from cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution was violated when Chrostowski was sentenced to a disproportionate sentence despite his lessened culpability.

The Eighth Amendment to the

United States Constitution prohibits "excessive" sanctions. U.S. Const., Amend. VIII; *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 2246, 153 L. Ed. 2d 335, 343 (2002). The Eighth Amendment is applicable to Virginia through operation of the Fourteenth Amendment to the United States Constitution. U.S. Const., Amend. XIV; *Edwards v. Whitlock*, 57 Va. Cir. 337 (2002); Estelle v. Gamble, 429 U.S. 97, 101 (1976).

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. In *Weems v. United States*, 217 U.S. 349 (1910), the Supreme Court held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. The Court explained

"that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." Id. at 367. Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for ; "'the status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Id. at 667.

The United States Supreme Court has read the text of the Eighth Amendment to prohibit "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive."

Atkins, 122 S.Ct. at 2247 n.7. A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. * * * The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-101. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407,

419, 128 S. Ct. 2641, 2649, 171 L. Ed. 2d 525, 538 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Burger, C. J., dissenting)).

The Atkins case recognized the lesser culpability of the mentally retarded, even in the commission of capital crimes, and forbid the imposition of the death penalty on mentally retarded offenders. Similarly, the Supreme Court recently recognized that persons who commit crimes while they are under 18 years of age are not as morally culpable as similarly disposed adult offenders, and prohibited the imposition of the death penalty on juvenile offenders, regardless of the heinousness of their crimes. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 1194 (2005). As compared to adults, juveniles have a "lack of maturity and an

underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.* at 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

The Supreme Court has gone a step further regarding the imposition of life sentences on juvenile murders convicted of committing a non-murder offense. On May 17, 2010, the United States Supreme Court issued its decision in *Graham v. Florida*, 130 S.Ct. 2011, 2028 (2010). Writing for a 5-

to-4 majority, Justice Anthony Kennedy called life without parole an "especially harsh punishment" for a juvenile and said that while states may be permitted to keep young offenders locked up, they must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." As such, juvenile offenders could not receive a life sentence for non-murder offenses. The *Graham* decision further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, the Supreme Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion).

The Supreme Court recently expanded the *Graham* decision in its decision issued in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In *Miller,* the Court found that the Eighth Amendment to the United States Constitution forbade a sentencing scheme that mandated life in prison without possibility of parole for juvenile offenders. *Id.* In *Miller*, the confluence of the two lines of precedent relied upon in Graham led to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment. *Id.* Such would violate "the evolving standards of decency that mark the progress of a maturing society." *Id.*

Chrostowski submits that the rationale underlying the *Graham* and *Miller* decisions should be applied in any case in which a mitigating factor exists that would make a defendant less culpable

than a similarly situated adult. Herein, as noted, Chrostowski suffered from PTSD, ADHD, Oppositional Defiant Disorder, and bi-polar disorder at the time of the offenses at issue.

Symptoms of PTSD include self-destructive behavior, such as drinking too much or driving too fast. See, e.g., https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967.

Symptoms of ADHD include impulsiveness and trouble coping with stress. See, e.g., Exhibit 5, copied from https://www.mayoclinic.org/diseases-conditions/adult-adhd/symptoms-causes/syc-20350878.

Symptoms of Oppositional Defiant Disorder include active defiance or refusal to comply with rules. See, e.g., Exhibit 4, copied from

https://www.mayoclinic.org/diseases-conditions/oppositional-defiant-disorder/symptoms-causes/syc-20375831.

Symptoms of bi-polar disorder include poor decision-making, such as the decision-making that took place leading up to Chrostowski's arrest.

Even taken individually, Chrostowski's mental illnesses prove diminished culpability. Taken together, they likely resulted in Chrostowski not being responsible for the acts that he committed.

Just as a juvenile should not be sentenced as an adult, due at least in part to a lack of ability to control impulses, so should Chrostowski have received a lesser sentence than a similarly situated adult offender due to his psychological problems that inhibited impulse control and self-destructive behavior, which contributed to the appearance of the

degradation of Chrostowski's moral character. In Virginia, the judiciary has chosen to distinguish the *Graham* mandate on the theory that the conditional release provisions of Va. Code § 53.1-40.0 render the analysis in *Graham* inapposite, and ignore the role of culpability of individual offenders. *Angel v. Commonwealth*, 281 Va. 248, 704 S.E.2d 386 (2011). Chrostowski submits that such violates the spirit and logic of the *Graham* decision and its progeny and has, in effect, virtually the identical result as the sentence found to be unconstitutional in *Graham*. The plain language of Va. Code § 53.1-40.01 only comes into play if an inmate is at least 60 years old. It has been estimated that "serving twenty years in prison will take 16 years off your life expectancy". Silverman, I. & M. Vega (1996) Corrections. St. Paul, MN: West. The average life expectancy in the United

States is presently 78.7 years. http://www.cdc.gov/nchs/fastats/lifexpec.htm. Thus, for an inmate that has sentenced to in excess of twenty years, the provisions of Va. Code § 53.1-40.01 offers effectively no relief at all since most prisoners would die before ever becoming eligible for its provisions, which effectively puts Virginia's *Angel* decision in violation of at least the spirit, and possibly the actual black letter law, of *Graham*. Accordingly, the *Graham* decision must operate herein to result in a reduced sentence for Chrostowski.

Chrostowski avers that the reasoning of the *Graham* decision is such that he should have received mental health treatment rather than a prison sentence.

Accordingly, based upon Chrostowski's

lessened culpability, Chrostowski's sentence, which failed to account for such mitigating factors, represents a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

IV. CONCLUSION

For all of the reasons stated herein, Chrostowski's Petition for Habeas Corpus should be granted.

RESPECTFULLY SUBMITTED,

By: _____
Counsel

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Certificate of Service

I certify that on the _th day of April 2020, I mailed, postage prepaid, a true copy of the foregoing document to:

Harold W. Clarke
Director of the Virginia Department of Corrections
P.O. Box 26963
Richmond, VA 23261-6963

Mark Herring
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Dated: April 15, 2020
Dated: October 4, 2019

_____

Dale R. Jensen

V I R G I N I A:

IN THE SUPREME COURT

ANDREW HUY CHROSTOWSKI, No. 1379035,

Petitioner,

v. Record No. 200666

DIRECTOR,

DEPARTMENT OF CORRECTIONS,

Respondent.

MOTION TO DISMISS

The respondent, by counsel, moves this Court to deny and dismiss Chrostowski's petition for writ of habeas corpus. In support of this motion, the respondent says as follows:

1. The petitioner, Andrew Huy

Chrostowski, is in the respondent's custody pursuant to a judgment of the Circuit Court of Loudon County (trial court) entered on August 1, 2018. On January 31, 2018, the petitioner entered guilty pleasto the charges of driving under the influence of alcohol, fourth offense within ten years and driving with a revoked license while under the influence of alcohol. (CaseNos. CR00030933 and CR00030933-01). The trial court sentenced Chrostowski to a total of seven years' incarceration with three years suspended. Chrostowski did not appeal to the Court of Appeals of Virginia or this Court.

2. Chrostowski's petition for a writ of habeas corpus was filed on May 19,2020, and the record from the underlying criminal matter was filed June 2, 2020. Chrostowski

appears to assert the following claims:

I. Defense counsel's failure to make a constitutionally adequate inquiry into viable defenses denied Chrostowski reasonable effective and competent assistance of counsel and undermined the proper function of the adversarial process in violation of minimum performance standards required under the U.S. Constitution as stated in *Strickland*, which deprived Chrostowskiof his right to present "full and fair defense."*rane v. Kentucky*, 476 U.S. 683, 690 (1986).

II. Chrostowski's right to be free from cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendmentsto the United States Constitution was violated when Chrostowski was sentenced to a disproportionate sentence despite his lessened culpability.

NON-COGNIZABLE CLAIMS

3. Chrostowski could have raised

claim II at trial and pursued it on appeal, but did not. "A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error." *Slayton v. Parrigan*, 215 Va. 27, 29, 205S.E.2d 680, 682 (1974). "A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non- jurisdictional defect of a judgment of conviction." *Id.* at 30, 205 S.E.2d at 682. Accordingly, this newly-raised claim is barred from consideration pursuant to the rule of *Slayton v. Parrigan.*

4. And in any event, claim II is without merit. The United States Supreme Court has never found a non-life "sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual

punishment" in violation of the Eighth Amendment. *Hutto v. Davis*, 454 U.S. 370, 372 (1982) (*per curiam*) (quoting with approval *Davis v. Davis*, 585 F.2d 1226, 1229 (4th Cir. 1978)). And the Court of Appeals of Virginia has held, consistent with the United States SupremeCourt, that proportionality review "is not available for any sentence less than life imprisonment without the possibility of parole." *Cole v. Commonwealth*, 58 Va. App. 642, 654, 712 S.E.2d 759, 765 (2011) (quoting *United States v. Malloy*, 568 F.3d 166, 180 (4th Cir. 2009); *see also United States v. Hong*, 242 F.3d 528, 532 (4thCir. 2001)); *see also United States v. Polk*, 905 F.2d 54, 55 (4th Cir. 1990).

STANDARD OF REVIEW

FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

5. In his petition, Chrostowski has alleged ineffective assistance of counsel. However, he cannot meet the highly demanding standard set forth for such claims in *Strickland v. Washington*, 466 U.S. 668 (1984).

6. Under *Strickland*, the petitioner has the burden to show both that his attorney's performance was deficient ***and*** that he was prejudiced as a result. *See Strickland*, 466 U.S. at 687. "[A] petitioner can prevail on an ineffective assistanceclaim only upon proving both deficient performance of trial counsel and resulting prejudice." *Friedline v. Commonwealth*, 265

Va. 273, 279, 576 S.E.2d 491, 494 (2003). "Without proof of *both deficient performance and prejudice to the defense*,we concluded it could not be said that the sentence or conviction 'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable,' and the sentence or conviction should stand." *Bell v. Cone*, 535 U.S. 685, 695 (2002) (emphasis added) (quoting *Strickland*, 466 U.S. at 687).

7. The first prong of the *Strickland* test, the "performance" inquiry,"requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "The Sixth Amendment's guarantee of assistance of counsel requires that counsel

exercise such care and skill as a reasonably competentattorney would exercise for similar services under the circumstances." *Frye v. Commonwealth*, 231 Va. 370, 400, 345 S.E.2d 267, 287 (1986). "We cautioned in *Strickland* that a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance *because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight*." *Cone*, 535 U.S. at 702 (emphasis added). *See also Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000) (reviewing court "must be highly deferential in scrutinizing [counsel's] performance and must filter the distorting effects of hindsight from [its] analysis").

8. Where a petitioner has pled guilty at trial, in order to satisfy the secondprong of the *Strickland* test, "prejudice," he must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *See also Burket*, 208 F.3d at 189. The issue of prejudice in such cases requires an objective analysis. *See Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988). *Cf. Koper v.Angelone*, 961 F. Supp. 916, 921-22 (W. D. Va. 1997) (reasonable defendant, when considering whether to plead guilty, takes into account strength of Commonwealth's case and whether plea of guilty would minimize sentence).

9. An ineffective counsel claim may

be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements." *Spencer v. Murray*, 18 F.3d 229, 232-33 (4th Cir. 1994). *See Strickland*, 466 U.S. at 697; *Williams v. Warden*, 278 Va. 641, 647-49, 685 S.E.2d 674, 677-78 (2009) (applying only "prejudice" prong); *Sheikh v. Buckingham Correctional Center*, 264Va. 558, 566-67, 570 S.E.2d 785, 790 (2002) (applying only "performance" prong).

10. A criminal defendant is normally bound by his statements at trial concerning the adequacy of his counsel and the voluntariness of his plea. *Anderson v.Warden*, 222 Va. 511, 516, 281 S.E.2d 885, 888 (1981). *See also Beck v. Angelone*,261 F.3d 377, 396 (4th Cir. 2001) (same). "[The] colloquy

between a judge and a defendant before accepting a guilty plea is . . . an important safeguard that protects

11. Furthermore, "the representations of the defendant . . . as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). "Solemn declarations in open court carry a strong presumption of verity." *Id.* at 74. Given this presumption, the petitioner must offer valid reasons why his prior statements should not be conclusively accepted as true to mount a collateral attack of his guilty plea. *See Anderson*, 222 Va. at 516, 281 S.E.2d at 888; *see alsoVia v. Superintendent, Powhatan Correctional*

Center, 643 F.2d 167, 171-72 (4th Cir. 1981) (same). "Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy." *Fields v. Attorney General of State of Md.*, 956 F.2d 1290, 1299 (4th Cir.1992) (citing *Blackledge*, 431 U.S. at 74-75; *Little v. Allsbrook*, 731 F.2d 238, 239-40 n. 2 (4th Cir. 1984)); *Beck*, 261 F.3d at 396 (same).

RESPONSE TO PETITIONER'S CLAIMS

12. In claim I, Chrostowski alleges that counsel was ineffective for failingto investigate viable defenses. Specifically, Chrostowski asserts that counsel's"failure to fully investigate and obtain supporting medical evidence supporting Chrostowski's diminished capacity deprived Chrostowski of

reasonable effective assistance of counsel." (Memorandum in Support of Petition at 5). This claim is without merit.

13. Chrostowski requested a jury trial and the jury was empaneled and heard evidence on January 31, 2018. The petitioner made a motion to strike the evidence at the close of the Commonwealth's case, which the trial court denied. The Petitioner argued that the moped he was driving was not a "motor vehicle" for purposes of the charged code section and that the Commonwealth failed to prove hewas driving on a highway. (Tr. 1/31/2018 at 128-129).[1] Argument on the motion continued through p. 160 of the transcript. Here, even assuming counsel did not investigate the petitioner's mental health issues,[2] counsel did fully prepare for the

requested jury trial and presented legal defenses to the charges. In this case "counsel is not ineffective merely because he overlooks one strategy while diligently pursuing another." *Williams v. Kelly*, 816 F.2d 939, 950 (4th. 1987).

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[1] Counsel for the petitioner provided the trial and plea transcripts to undersigned counsel. It is not clear if those transcripts were filed with this Court. Therefore, they are attached to this pleading as an exhibit.

[2] As will be more fully explained below, it is apparent that counsel did investigate the petitioner's mental health issues and properly presented them to the trial court.

14. When the trial court denied the

motion to strike, Chrostowski, after consultation with his attorney, decided to enter guilty pleas to the two charges. Whenhe pled guilty, the trial court engaged in a colloquy with the petitioner to ensure his plea was freely and voluntarily given. During the colloquy, Chrostowski acknowledged that he understood the elements of the offense, that he was pleading guilty "freely and voluntarily" and that he was "in fact, guilty of these charges." (Tr.1/31/2018 at 163). Chrostowski also acknowledged that he had enough time to speakwith his attorney and stated that he had decided for himself to plead guilty. (Tr. 1/31/2018 at 164-165). The petitioner has not offered a valid reason to contradict hisearlier statements that were made under oath, therefore, the present

allegation does not warrant relief under the rule in Anderson v. Warden.

15. In addition, the petitioner now claims that an investigation into his mental health issues would have provided a basis for a defense to the charges. This assertion is without factual or legal support. Initially, the petitioner fails to identify,other than by some vague reference to diminished capacity, what defense would have been available to him had counsel done the requisite investigation. However, the Supreme Court of Virginia has said:

> For the purposes of determining criminal responsibility a perpetrator is either legally insane or sane; there is **no** sliding scale of insanity. The shifting and subtle gradations of mental

> illness known to psychiatry areuseful only in determining whether the borderline of insanity has beencrossed. Unless an accused contends that he was beyond that borderlinewhen he acted, his mental state is immaterial to the issue of specific intent. *See Johnson v. State*, 292 Md. 405, 439 A.2d 542 (1982); *Bethea v. United States*, 365 A.2d 64 (D.C. App. 1976), *cert. denied*, 433 U.S. 911 (1977). Accordingly, we hold that evidence of a criminal defendant's mental state at the time of the offense is, in the absence of an insanity defense, irrelevant to the issue of guilt.

Stamper v. Commonwealth, 228 Va. 707, 717, 324 S.E.2d 682, 687 (1985). Here, the petitioner has made no allegations of

insanity, has not proffered that an insanity defense may have been available and has only alleged that he had a diminished capacity. As diminished capacity is not a defense to any charges, counsel was not ineffective for failing to assert a frivolous defense. *Washington v. Murray*, 952 F.2d 1472, 1481 (4th 1991) (counsel cannot be ineffective for falling to raise a frivolous defense); and *see generally Correll v. Commonwealth*, 232 Va. 454, 470, 352 S.E.2d 352, 361 (1987) (holding counsel had no duty to object to admission of presentencereport because it was admissible). Consequently, the petitioner has failed to establishdeficient performance or prejudice as required by *Strickland*.

16. Moreover, counsel did investigate

the petitioner's mental health issuesand properly presented them to the trial court. Prior to the petitioner's sentencing, counsel submitted a sentencing memorandum, which contained a history of the petitioner's mental health issues[3]. (Ex. A). The document was submitted for the only issue on which it could have been legally relevant, sentencing. When the trial court sentenced the petitioner, it was aware of his mental health history and the trial courtnecessarily considered the defendant's history when fashioning an appropriate sentence for him. Chrostowski does not challenge counsel's performance in

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[3] It appears this document was not included with the criminal record that was filedin this Court. *See* Rule 5:7(a)(2).

regards to sentencing.

17. As the petitioner has failed to plead that discovery would lead to any admissible relevant evidence, the petitioner's request for discovery should be denied.

18. Every allegation not expressly admitted is denied.

19. The petitioner's claims can be resolved on the basis of the record without the need for an evidentiary hearing. See Va. Code § 8.01-654(B)(4); *Friedline v. Commonwealth*, 265 Va. 273, 576 S.E.2d 491 (2003); *Arey v. Peyton*, 209 Va. 370, 164 S.E.2d 691 (1968).

WHEREFORE, as to the writ for habeas corpus, the respondent prays that this Court enter an order to deny and dismiss the

petition for a writ of habeas corpus.

Respectfully submitted,

DIRECTOR,

DEPARTMENT OF CORRECTIONS

By: ____/s/_____

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CERTIFICATE OF SERVICE

On June 29, 2020, a copy of this motion was electronically filed with this Court and emailed to counsel for the petitioner, Dale Jensen, Esq., at djensen@dalejensenlaw.com.

/s/
Craig Stallard
Assistant Attorney General