FILED: July 14, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 20-7592
(3:19-cv-00805-DJN-RCY)

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FRED M. CARRINGTON

Petitioner - Appellant

v.

HAROLD W. CLARKE, Director, Department of Corrections

Respondent - Appellee

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JUDGMENT

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In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

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

/s/ PATRICIA S. CONNOR, CLERK

Appendix A

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 20-7592**

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FRED M. CARRINGTON,

Petitioner - Appellant,

v.

HAROLD W. CLARKE, Director, Department of Corrections,

Respondent - Appellee.

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Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. David J. Novak, District Judge. (3:19-cv-00805-DJN-RCY)

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Submitted: March 10, 2021 Decided: July 14, 2021

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Before GREGORY, Chief Judge, KING, Circuit Judge, and TRAXLER, Senior Circuit Judge.

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Dismissed by unpublished per curiam opinion.

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Fred M. Carrington, Appellant Pro Se.

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Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Fred M. Carrington seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Carrington's 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). 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). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). 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. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Carrington has not made the requisite showing. Accordingly, we deny a certificate of appealability 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*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRED M. CARRINGTON,
Petitioner,

v. Civil No. 3:19cv805 (DJN)

HAROLD W. CLARKE,
Respondent.

**ORDER**

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

1. Petitioner's Objections (ECF No. 18) are hereby OVERRULED;

2. The Report and Recommendation (ECF No. 17) is hereby ACCEPTED and ADOPTED;

3. The Motion to Dismiss (ECF No. 9) is hereby GRANTED;

4. The action is hereby DISMISSED; and,

5. A certificate of appealability is hereby DENIED.

Should Petitioner desire to appeal, a written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof. Failure to file a notice of appeal within that period may result in the loss of the right to appeal.

Let the Clerk file a copy of the Order electronically and send a copy to Petitioner.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: September 14, 2020

Appendix B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Richmond Division**

**FRED M. CARRINGTON,**

Petitioner,

v. Civil Action No. **3:19CV805**

**HAROLD W. CLARKE,**

Respondent.

**REPORT AND RECOMMENDATION**

Petitioner, a Virginia inmate proceeding *pro se* and *in forma pauperis*, filed this petition for habeas corpus under 28 U.S.C. § 2254 ("§ 2254 Petition," ECF No. 1).[1] Carrington was convicted in the Circuit Court of the City of Norfolk of Distribution of a Schedule I or II Controlled Substance third or subsequent offense, Possession of a Schedule I or II Controlled Substance with Intent to Distribute third or subsequent offense, and of Conspiracy to Distribute a Schedule I or II Controlled Substance. (ECF No. 11–1, at 1.) The Circuit Court sentenced Carrington to twenty-five years of incarceration for the above crimes. (*Id.* at 2.) The matter is before the Court for a Report and Recommendation pursuant to 28 U.S.C. § 636(b). For the reasons that follow, it is RECOMMENDED that the § 2254 Petition be DENIED.

**A. Carrington's Claims**

| | |
|---|---|
| Claim 1 | The arrest and search of Petitioner violated the Fourth Amendment. (ECF No. 1–1, at 1.) |
| Claim 2 | The evidence was insufficient evidence to support Petitioner's convictions for distribution of heroin third offense and conspiracy to distribute heroin. (*Id.*) |
| Claim 3 | The evidence was insufficient to support Petitioner's conviction for possession with intent to distribute heroin third offense. (*Id.*) |
| Claim 4 | The Circuit Court erred when allowed Detective Gillespie to testify as an expert in this case. (*Id.*) |
| Claim 5 | "Allowing the enhanced punishment for these said two charges violated" Petitioner's right under the Eighth and Fourteenth Amendments and |

[1] The Court employs the pagination assigned to parties' submissions by the CM/ECF docketing system. To the extent practicable, the Court corrects the punctuation, capitalization, and spelling in any documents filed by the parties.

Appendix B

| | |
|---|---|
| | "Clause I, Article I, Section 9, of the United States Constitution as well as the Virginia Constitution prohibiting ex post facto law." (*Id.*) |
| Claim 6 | Permitting Petitioner to be convicted of both possession with intent to distribute heroin third or subsequent offense and distribution of heroin third or subsequent offense violated the prohibition against multiplicity/duplicity and his rights under the Double Jeopardy Clause. (*Id.*) |

As explained below, Claim 1 is not cognizable on federal habeas, Claim 4 is procedurally defaulted, and Claims 2, 3, 5, and 6 lack merit. Because Respondent concedes that Petitioner exhausted his claims by presenting them to the Virginia courts either on his direct appeal or during his state habeas proceedings, it is unnecessary to provide a preliminary discussion of the Petitioner's state proceedings.

**B. Alleged Fourth Amendment Violation–Claim 1**

The Supreme Court has held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976) (footnote omitted). "The rationale for the Court's ruling was that, in the context of a federal habeas corpus challenge to a state court conviction, 'the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of the application of the rule persist with special force.'" *United States v. Scarborough*, 777 F.2d 175, 182 (4th Cir. 1985) (quoting *Stone*, 428 U.S. at 494–95). Therefore, in a habeas proceeding, when a federal district court is faced with Fourth Amendment claims, it should "first inquire as to whether or not the petitioner was afforded an *opportunity* to raise his Fourth Amendment claims under the then existing state practice." *Doleman v. Muncy*, 579 F.2d 1258, 1265 (4th Cir. 1978).

Because Virginia provided Carrington with an opportunity to raise his Fourth Amendment claims at trial and on appeal, this Court need not inquire further "unless [Carrington] alleges something to indicate that his opportunity for a full and fair litigation of his Fourth Amendment

claim or claims was in some way impaired." *Id.* The United States Court of Appeals for the Fourth Circuit has admonished that "the burden of pleading and proof is upon [the petitioner] to indicate in the petition . . . the *reasons* he has, and *the facts in support thereof*, as to why he contends he did not receive an opportunity for a full and fair litigation of his Fourth Amendment claims." *Id.* at 1266.[2] (alteration in original) (emphasis added). Carrington fails to demonstrate that he did not receive a full and fair opportunity to litigate his Fourth Amendment claims. Accordingly, it is RECOMMENDED that Claim 1 be DISMISSED.

**C. Applicable Constraints Upon Federal Habeas Review**

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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[2] Carrington contends that the Virginia courts failed to correctly decide his Fourth Amendment claims. This contention is insufficient to undermine the fact Carrington was provided a fair opportunity to raise his Fourth Amendment claims. In this regard, the Fourth Circuit has emphasized that "the ultimate rule of deference" contemplated by *Stone* "would of course be swallowed if impairment in this sense could be shown simply by showing error—whether of fact or law—in the state court proceeding." *Sneed v. Smith*, 670 F.2d 1348, 1355–56 (4th Cir. 1982). Thus, in *Sneed*, the Fourth Circuit rejected the petitioner's claim that allegedly false testimony by a police officer and the application of incorrect constitutional standards constituted an impairment of his opportunity for full and fair litigation of his Fourth Amendment claim. *Id.* at 1356.

> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

**D. Sufficiency of the Evidence–Claims 2 and 3**

In Claims 2 and 3, Carrington contends that the insufficient evidence was present to support his convictions. A federal habeas petition warrants relief on a challenge to the sufficiency of the evidence only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The relevant question in conducting such a review 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 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)). The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318.

Detective Randall W. Gillespie testified that he was working undercover as a drug user on March 12, 2015, on Chapel Street in Norfolk, Virginia. (ECF No. 11–10, at 36–37.) On that date, Detective Gillespie encountered Petitioner, another individual, later identified as David Platt, and a third person in a wheelchair. (*Id.* at 41.) Platt entered Detective Gillespie's vehicle. (*Id.* at 43–44.) Platt asked Detective Gillespie what he wanted and Gillespie responded that he wanted dope, which is a street term for heroin. (*Id.* at 44.) Platt directed Detective Gillespie to pull his vehicle into a parking lot up the street. (*Id.* at 45.) Detective Gillespie moved his car, but instead of pulling into the parking lot, he moved the car to place where he would be able to see Petitioner. (*Id.* at 46.) Detective Gillespie gave Platt $20, and Platt left the vehicle. (*Id.* at 52.)

After Platt left the vehicle, he went straight over to Petitioner and "he made some kind of hand-to-hand exchange, and then . . . he immediately turned around and started walking back to [Detective Gillespie's] vehicle." (*Id.* at 55–56.) When Platt got back to Detective Gillespie's vehicle, he handed Detective Gillespie two capsules of what was later determined to be heroin. (*Id.* at 57.) Detective Gillespie then gave the signal for the other police officers to come arrest Platt and Petitioner. (*Id.* at 57–58.)

Investigator Rodrick A. Cosca testified that he assisted in the arrest of Petitioner. Cosca testified that he approached Petitioner from behind, while two officers approached Petitioner from the other direction. (*Id.* at 95–96.) Petitioner ignored the commands of the other officers, turned away, and reached toward his waist. (*Id.*) Cosca grabbed Petitioner's arms, Petitioner resisted, and the officers handcuffed Petitioner. (*Id.* at 96.) Petitioner continued to reach for his waist. (*Id.*) Thereafter, Cosca observed a plastic baggy sticking out of Petitioner's pants. (*Id.* at 99–100.) Cosca found 44 oval-shaped capsules in the baggie. (*Id.* at 101.) Cosca also recovered $119 in currency from Petitioner in increments of $20, $10, $5, and $1 bills. (*Id.* at 102.) Additionally, Cosca recovered the specific $20 bill Detective Gillespie had handed to Platt. (*Id.* at 103–04.) Cosca testified that Petitioner did not have on his person any devices commonly used to ingest heroin. (*Id.* at 105.) The two capsules sold to Detective Gillespie and the capsules recovered from Petitioner's person were determined to contain heroin. (*Id.* at 136–37.)

The above described evidence amply supports Petitioner's convictions. The Court of Appeals of Virginia, persuasively explained why Petitioner's argument to the contrary lacked merit:

> Appellant maintains that the evidence failed to prove that he sold the heroin to Gillespie or that he possessed the forty-four capsules with the intent to distribute. He points out that his medical records established he was addicted to heroin and that he began to exhibit withdrawal symptoms following his arrest. Appellant also notes that he had a "peach pill" in his possession at the time of his arrest that was used to treat heroin addiction. Finally, he asserts that the quantity of heroin in his

possession was consistent with personal use rather than an intent to distribute because it constituted approximately an eleven-day supply for a heroin user.

. . . .

[T]he evidence was sufficient for a rational fact finder to conclude that appellant sold the two capsules of heroin to Gillespie. Gillespie saw appellant standing with Platt in a high-drug area prior to Platt entering Gillespie's vehicle and negotiating Gillespie's purchase of heroin. Immediately after Gillespie told Platt he wanted to purchase heroin and gave Platt $20, Platt approached appellant and engaged in a hand-to-hand transaction. Platt returned from this exchange and turned over two heroin capsules to Gillespie. At no time after Gillespie gave Platt $20 did Platt reach into his own pockets. When the police arrested appellant, appellant had forty-four capsules of heroin in a plastic baggie concealed in his waistband. He also had $119 in increments of $20, $10, $5, and $1 bills. Twenty dollars of this currency matched the previously recorded currency Gillespie had given to Platt to purchase heroin.

. . . .

Likewise, we conclude that the trial court did not err by denying appellant's motions to strike and to set aside the possession of heroin with the intent to distribute charge. While appellant argues that the evidence failed to prove he intended to distribute the forty-four capsules of heroin found in his waistband, "[i]ntent is a question to be determined by the fact finder." *Craig v. Craig*, 59 Va. App. 527, 536, 721 S.E.2d 4, 28 (2012). "[A] [fact finder]'s decision on the question of intent is accorded great deference on appeal and will not be reversed unless clearly erroneous." *Towler v. Commonwealth*, 59 Va. App. 284, 297, 718 S.E.2d 463, 470 (2011). "Absent a direct admission by the defendant, intent to distribute must necessarily be proved by circumstantial evidence," *Williams v. Commonwealth*, 278 Va. 190, 194, 677 S.E.2d 280, 282 (2009), "including a person's conduct and statements." *Robertson v. Commonwealth*, 31 Va. App. 814, 820, 525 S.E.2d 640, 643 (2000).

Here, the direct and circumstantial evidence was sufficient for a rational fact finder to conclude that appellant possessed the heroin with the intent to distribute it. Because appellant actually sold heroin to Gillespie through Platt, the jury was presented with direct evidence of appellant's intent. Although appellant presented evidence he was a heroin addict, he had no ingestion devices or "used" capsules with him at the time the heroin was recovered.

Furthermore, Gillespie, who testified as an expert witness regarding the sale, packaging, use, and distribution of narcotics in Norfolk, opined that the heroin in appellant's possession was inconsistent with personal use. Gillespie based his opinion on appellant using Platt as a "runner," the lack of ingestion devices on appellant, and the large quantity of heroin in appellant's possession. Gillespie also based his opinion on the fact that appellant was in a "high drug" area, and had over $100 in small denominations at the time of his arrest. Gillespie explained that a user typically purchased drugs with that amount of money "pretty quickly."

Thus, the evidence was competent, credible, and sufficient to prove beyond a reasonable doubt that appellant possessed the heroin with the intent to distribute it.

(ECF No. 11–4, at 6–8 (alteration in original).) Because the evidence amply supports Petitioner's convictions for distribution of heroin and possession with intent to distribute, the Virginia courts acted reasonably in rejecting Petitioner's challenges to those convictions.

Moreover, the evidence also supports the conclusion that Petitioner conspired with Platt to distribute heroin. As noted by the Court of Appeals of Virginia:

> Here, at the time appellant provided the heroin capsules to Platt, the evidence was sufficient for a rational fact finder to conclude that appellant knew Platt was "buying" the heroin for the purpose of selling it to Gillespie. Because Platt made contact with Gillespie within appellant's sight, and Platt immediately returned from Gillespie's vehicle with purchase money, the jury could rationally infer that appellant sold the heroin to Platt knowing that Platt intended to sell it illegally. *Cf. Feigley v. Commonwealth*, 16 Va. App. 717, 723, 432 S.E.2d 520, 525 (1993) (reversing conspiracy conviction and noting that "[n]o money was exchanged between Feigley and [the middle man] until the sale to [the police officer] was complete").
>
> While the evidence failed to prove an express agreement between appellant and Platt, a rational fact finder could conclude from the circumstantial evidence that an implied agreement to distribute the heroin existed by virtue of their conduct. Accordingly, the evidence was competent, credible, and sufficient to prove beyond a reasonable doubt that appellant was guilty of conspiracy.

(*Id.* at 11 (alterations in original).) Because the evidence was sufficient to support Petitioner's convictions, it is RECOMMENDED that Claims 2 and 3 be DISMISSED.

**E. Alleged Error with Respect to Detective Gillespie's Testimony–Claim 4**

In Claim Four, Petitioner states:

> Petitioner claims that [the Circuit Court erred] allowing undercover Detective Gillespie to qualify and testify as an expert witness in this case where he was the key witness and over defense objections. Petitioner states by allowing Detective Gillespie to continue to opine until taken as a whole his testimony invaded the province of the jury by through his testimony as a whole.

(ECF No. 1–2, at 1.) This claim fails primarily because Petitioner does not identify a constitutional right that was violated by Detective Gillespie's testimony. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Moreover, as explained below, Petitioner procedurally

defaulted any challenge that Detective Gillespie's testimony invaded the province of the jury because he purportedly testified to the ultimate fact at issue in Petitioner's case. (ECF No. 11–4, at 9.)

Before a state prisoner can bring a § 2254 petition in federal district court, the prisoner must first have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). State exhaustion "is rooted in considerations of federal-state comity," and in Congressional determination via federal habeas laws "that exhaustion of adequate state remedies will 'best serve the policies of federalism.'" *Slavek v. Hinkle*, 359 F. Supp. 2d 473, 479 (E.D. Va. 2005) (some internal quotation marks omitted) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92, 492 n.10 (1973)). The purpose of exhaustion is "to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal quotation marks omitted). Exhaustion has two aspects. First, a petitioner must utilize all available state remedies before the petitioner can apply for federal habeas relief. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844–48 (1999). As to whether a petitioner has used all available state remedies, the statute notes that a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

The second aspect of exhaustion requires a petitioner to have offered the state courts an adequate "opportunity" to address the constitutional claims advanced on federal habeas. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotation marks omitted) (quoting *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995)). "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Id.* Fair presentation demands that a petitioner present "both the operative facts and the controlling

legal principles" to the state court. *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (internal quotation marks omitted) (quoting *Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000)). The burden of proving that a claim has been exhausted in accordance with a "state's chosen procedural scheme" lies with the petitioner. *Mallory v. Smith*, 27 F.3d 991, 994–95 (4th Cir. 1994).

"A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default." *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998). This doctrine provides that "[i]f a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991)). A federal habeas petitioner also procedurally defaults claims when he or she "fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Id.* (quoting *Coleman*, 501 U.S. at 735 n.1).[3] The burden of pleading and proving that a claim is procedurally defaulted rests with the state. *Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010) (citations omitted). Absent a showing of "cause for the default and actual prejudice as a result of the alleged violation of federal law," or a showing that "failure to consider the claims will result in a fundamental miscarriage of justice," this Court cannot review the merits of a defaulted claim. *Coleman*, 501 U.S. at 750; *see Harris v. Reed*, 489 U.S. 255, 262 (1989).

On direct appeal, the Court of Appeals of Virginia observed:

> While appellant is correct that any expert witness is prohibited from invading the province of the jury by testifying regarding the ultimate fact in issue, *see Justiss v. Commonwealth*, 61 Va. App. 261, 273, 734 S.E.2d 699, 705 (2012), appellant does not identify any specific testimony by Gillespie that arguably invaded the province

[3] Under these circumstances, even though the claim has not been fairly presented to the Supreme Court of Virginia, the exhaustion requirement is "technically met." *Hedrick v. True*, 443 F.3d 342, 364 (4th Cir. 2006) (citing *Gray v. Netherland*, 518 U.S. 152, 161–62 (1996)).

> of the jury. Furthermore, appellant did not object to Gillespie's testimony on the basis that it invaded the province of the jury. When Gillespie testified that, in his expert opinion, the amount of heroin in appellant's possession was inconsistent with personal use, appellant did not object to this testimony on the basis that it invaded the province of the jury. . . .
>
> "The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." *Ohree v. Commonwealth*, 26 Va. App. 299,308,494 S.E.2d 484,488 (1998); *see also* Rule 5A:18. "Although Rule 5A:18 contains exceptions for good cause or to meet the ends of justice, appellant does not argue these exceptions and we will not invoke them *sua sponte*." *Williams v. Commonwealth*, 57 Va. App. 341, 347, 702 S.E.2d 260, 263 (2010).
>
> Accordingly, to the extent appellant maintains that Gillespie should not have been allowed to testify to the ultimate fact in issue, appellant has failed to preserve that argument for appeal.

(ECF No. 11–4, at 9.) Rule 5A:18 constitutes an adequate and independent ground for denying a claim. *See Clagett v. Angelone*, 209 F.3d 370, 378 (4th Cir. 2000). Accordingly, it is RECOMMENDED that Claim 4 be DISMISSED as procedurally defaulted and for failing to identify a constitutional violation.

**F. Alleged Violations with Respect to Enhanced Punishment–Claim 5**

In Claim 5, Petitioner complains that, "[a]llowing the enhanced punishment for these said two charges violated" Petitioner's right under the Eighth and Fourteenth Amendments and "Clause I, Article I, Section 10 and Clause III, Article I, Section 9 of the United States Constitution as well as the Virginia Constitution prohibiting ex post facto law." (ECF No. 1–1, at 1.) In rejecting this claim on direct appeal, the Court of Appeals of Virginia observed:

> In the fifth assignment of error, appellant contends the trial court erred by refusing to "strike the enhanced punishment from the two counts of [violating] Code § 18.2–248(C)[4]" because punishing him under that statute violated his

[4] Code § 18.2–248(C) provides in pertinent part as follows:

> Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than $ 500,000. . . .
>
> When a person is convicted of a third or subsequent offense under this subsection . . . , he shall be sentenced to imprisonment for life or for a period of not

Fourteenth Amendment due process and notice rights, his Eighth Amendment protection against cruel and unusual punishment, and his rights under both the United States and Virginia Constitution prohibiting ex post facto laws. Stripped down to its essence, appellant's argument is that he could not be constitutionally prosecuted, convicted, and punished for both distributing heroin and possessing heroin with the intent to distribute where both offenses were committed in a short period of time. He contends that both offenses were charged under Code § 18.2–248(C) and "cover[ed] the same situation/fluid offense."

. . . .

B. Cruel and Unusual Punishment

Appellant asserts that the trial court erred by denying his motion to dismiss on the basis that the twenty-year mandatory sentences provided in Code § 18.2–248(C) for his two convictions for a third or subsequent offense constituted cruel and unusual punishment under the Eighth Amendment.

> 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)).

*Cole v. Commonwealth*, 58 Va. App. 642, 653–54, 712 S.E.2d 759, 765 (2011). Here, appellant did not receive a life sentence and was sentenced within statutory limits. Accordingly, the trial court did not err by denying appellant's motion to dismiss on Eighth Amendment grounds.

C. *Ex Post Facto Laws*; Due Process and Notice Under the Fourteenth Amendment

Appellant asserts that the enhanced punishment provided in Code § 18.2–248(C) for a third or greater offense is unconstitutional because it violates the prohibition in the Virginia and United States Constitutions against *ex post facto* laws. Applying the same rationale, he asserts that the enhanced punishment provided in the statute violates his "due process and notice rights" under the Fourteenth Amendment.[5] Both of appellant's constitutional arguments present questions of law that this Court reviews *de novo*. *Crawford v. Commonwealth*, 281 Va. 84, 97, 704 S.E.2d 107, I 15 (2011) (citing *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005)).

"The United States Constitution, article I, § 10, and the Virginia Constitution, article I, § 9, prohibit the Commonwealth from enacting *ex post facto* laws." *Kitze v. Commonwealth*, 23 Va. App. 213, 216, 475 S.E.2d 830, 832 (1996) (citations omitted). An *ex post facto* law has been defined as:

---

less than 10 years, 10 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence, and he shall be fined not more than $500,000.

[5] Appellant does not elaborate on his "due process and notice rights" argument except to assert that "under the facts of this case an *ex post facto* statute the way it is being used in the case at bar . . . was reversible error and violated the defendant's U.S. 14th [A]mendment due process and notice rights . . . . "

> any statute which punishes as a crime an act previously-committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

*Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (citations omitted). "The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts." *Dodson v. Commonwealth*, 23 Va. App. 286, 294, 476 S.E.2d 512, 516 (1996) (quoting *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)).

The United States Supreme Court has recognized four categories of *ex post facto* laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

*Stogner v. California*, 539 U.S. 607, 612 (2003) (quoting *Calder v. Bull*, 3 U.S. 386, 390–91 (1798)) (emphasis omitted).

Here, appellant was convicted for conduct that occurred in 2015, after the enactment of the enhanced punishment provision in Code § 18.2–248(C). Therefore, no *ex post facto* violation or "due process/notice" violation exists.

I only had two charges not three for the mandatory ten year sentence

(ECF No. 11–4, at 12–14 (textual alterations in original).)[6] The Court discerns no unreasonable application of the law and no unreasonable determination of the facts with respect to the Court of Appeals' rejection of Petitioner's constitutional challenges to his enhanced punishment. *See* 28 U.S.C. § 2254(d)(1)–(2). Accordingly, it is RECOMMENDED that Claim 5 be DISMISSED.

**G. Alleged Double Jeopardy, Multiplicity Problems**

Finally, in Claim 6, Petitioner contends that permitting him to be convicted of both possession with intent to distribute heroin third or subsequent offense and distribution of heroin third or subsequent offense violated the prohibition against multiplicity/duplicity and his right under the Double Jeopardy Clause. As noted by the Court of Appeals of Virginia,

> "Multiplicity . . . is the charging of a single offense in several counts." *United States v. Stewart*, 256 F.3d 231, 247 (4th Cir. 2001) (quoting *United States v. Burns*,

[6] The Court altered the footnote number for footnote number 5.

990 F.2d 1426, 1438 (4th Cir. 1993)). The danger is that a defendant may be given multiple sentences for the same offense. *Burns*, 990 F.2d at 1438.

(ECF No. 11–4, at 13 n.5.) In rejecting this claim, the Court of Appeals of Virginia observed:

> "The Double Jeopardy Clause . . . provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' U.S. Const., Amdt. 5. This protection applies both to successive punishments and to successive prosecutions for the same criminal offense." *Peake v. Commonwealth*, 46 Va. App. 35, 39, 614 S.E.2d 672, 674 (2005) (quoting *United States v. Dixon*, 509 U.S. 688, 695–96 (1993)).
>
> > In both the multiple punishment and multiple prosecution contexts, [the United States Supreme] Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution,
>
> *Dixon*, 509 U.S. at 696.
>
> > Under *Blockburger*, the "applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." "The test of whether there are separate acts sustaining several offenses 'is whether the same evidence is required to sustain them.'"
>
> *Henry v. Commonwealth*, 21 Va. App. 141, 146, 462 S.E.2d 578, 580–81 (1995) (footnote and citations omitted).
>
> Here, distribution of heroin requires proof that possession of heroin with the intent to distribute does not - the actual sale of heroin. Because each charge was based upon different conduct, the trial court did not err by denying appellant's motion to dismiss on double jeopardy grounds. For similar reasons, the trial court did not err by denying appellant's motion to dismiss on the basis that the two charges were multiplicitous. Appellant committed two distinct offenses; therefore, two charges were warranted.

(ECF No. 11–4, at 13 (alteration in original).) Once again, the Court discerns no unreasonable application of the law and no unreasonable determination of the facts with respect to the Court of Appeals' rejection of this claim. *See* 28 U.S.C. § 2254(d)(1)–(2). Accordingly, it is RECOMMENDED that Claim 6 be DISMISSED.

**H. Conclusion**

It is RECOMMENDED that Respondent's Motion to Dismiss (ECF No. 9) be GRANTED. It is further RECOMMENDED that Petitioner's claims and the action be DISMISSED.

Petitioner is advised that he may file specific written objections to the Report and Recommendation within fourteen (14) days of the date of entry hereof. Such objections should be numbered and identify with specificity the legal or factual deficiencies of the Magistrate Judge's findings. *See* Fed. R. Civ. P. 72(b). Failure to timely file specific objections to the Report and Recommendation may result in the dismissal of his claims, and it may also preclude further review or appeal from such judgment. *See Carr v. Hutto*, 737 F.2d 433, 434 (4th Cir. 1984).

The Clerk is DIRECTED to send a copy of this Report and Recommendation to Petitioner and counsel for Respondent.

It is so ORDERED.

/s/
Roderick C. Young
United States Magistrate Judge

Date: July 22, 2020
Richmond, Virginia

FILED: August 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 20-7592
(3:19-cv-00805-DJN-RCY)

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FRED M. CARRINGTON

Petitioner - Appellant

v.

HAROLD W. CLARKE, Director, Department of Corrections

Respondent - Appellee

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ORDER

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The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Gregory, Judge King, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix A

Appendix D

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