FILED: May 23, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-6194
(2:24-cv-00088-EWH-LRL)

MICHAEL WAYNE KELLER

Petitioner - Appellant

v.

CHADWICK S. DOTSON, Director of Prisons

Respondent - Appellee

O R D E R

The court dismisses this proceeding for failure to prosecute pursuant to Local Rule 45.

For the Court--By Direction

/s/ Nwamaka Anowi, Clerk

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

MICHAEL WAYNE KELLER,

Petitioner,

v. Case No. 2:24-cv-88

CHADWICK S. DOTSON, Director,
Virginia Department of Corrections,

Respondent.

FINAL ORDER

Before the Court is Michael Wayne Keller's Objection to the Magistrate Judge's Report and Recommendation ("R&R"). ECF No. 14. For the reasons stated below, Keller's Objection, ECF No. 16, is OVERRULED, Respondent's Motion to Dismiss, ECF No. 9, is GRANTED, Keller's Motion to Dismiss, ECF No. 13, is DENIED, and the Petition, ECF No. 1, is DENIED and DISMISSED WITH PREJUDICE.

I. LEGAL STANDARD

When a petition is referred for a report and recommendation, "the magistrate [judge] makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with this court." *Estrada v. Witkowski*, 816 F. Supp. 408, 410 (D.S.C. 1993) (citing *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976)). If a specific objection to the report and recommendation is made, the Court "shall make a *de novo*[1]

[1] "*De novo*" means "anew." *De Novo*, BLACK'S LAW DICTIONARY (7th ed. 1999). In the context of this statute, it means that the District Court considers the issues objected to as if for the first time, without considering the Report and Recommendation.

determination of those portions of the report . . . to which objection is made" and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). However, the Court is not required to conduct a review or provide an explanation for adopting the factual or legal conclusions of the magistrate judge's report and recommendation to which no objection is made. Fed. R. Civ. P. 72(b); *Carniewski v. W. Virginia Bd. of Prob. & Parole*, 974 F.2d 1330 (Table) (4th Cir. 1992); *Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Thus, the Court must only review those portions of the report and recommendation where a party has made a specific written objection. *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 316 (4th Cir. 2005).

II. BACKGROUND

On February 27, 2020, Keller was convicted by a Newport News Circuit Court jury of aggravated malicious wounding and use of a firearm in the commission of a felony. ECF No. 11, Ex. 1 at 11. On June 16, 2020, Keller was sentenced to twenty years for aggravated malicious wounding and three years for use of a firearm in the commission of a felony. *Id.* at 11–13. Keller appealed his conviction and sentence. *Id.*, Ex. 2 at 90–110. The Court of Appeals denied his appeal. *Id.* at 1–11. Keller then appealed to the Supreme Court of Virginia, *id.*, Ex. 3 at 3 – 24, which issued a summary denial, *id.* at 1. On August 12, 2022, Keller, proceeding *pro se*, filed a state habeas petition in the Circuit Court of Newport News. *Id.*, Ex. 4 at 22–34. The circuit court found Keller's claims to be without merit and dismissed the Petition. *Id.* at 1–4. Keller appealed, *id.*, Ex. 5 at 3–51, and his appeal was summarily denied on December 11, 2023, *id.* at 1.

On January 26, 2024, Keller filed the instant Petition under 28 U.S.C. § 2254 in this Court. ECF No. 1. Keller asserts the following claims in his Petition:

> Petitioner was denied his 5th, 6th and 14th Constitutional Amendment rights to due process and the effective assistance of counsel. Counsel for petitioner proved

> ineffective during trial when failing to request a jury instruction defining heat of passion, which prejudiced petitioner because absent the instruction deprived the jury of any legal avenue to find Petitioner guilty of of [sic] the lesser offense of unlawful wounding as opposed to aggravated malicious wounding, as charged.
>
> ECF No. 1 at 5.

On August 26, 2024, Magistrate Judge Leonard issued the R&R recommending that this Court grant the Respondent's Motion to Dismiss, deny Keller's Motion to Dismiss, and deny and dismiss with prejudice the Petition. ECF No. 14. In support of this recommendation, Magistrate Judge Leonard concluded (1) that Keller's first claim, relating to various constitutional due process violations, was "simultaneously exhausted and procedurally defaulted for purposes of federal habeas review," *id.* at 9, and (2) that as to Keller's second claim, the Circuit Court of Newport News's finding that Keller failed to satisfy the standard in *Strickland v. Washington*, 466 U.S. 668 (1984), was not unreasonable, *id.* at 15. Keller timely objected. ECF No. 16. However, Keller only objected to Magistrate Judge Leonard's finding relating to his second claim. *Id.* at 2. Accordingly, this Court will conduct a *de novo* review of the portions of the R&R addressing Keller's second claim (his ineffective assistance of counsel claim) and will review the remainder of the R&R for clear error.

III. ANALYSIS

A petition seeking habeas relief shall be granted only when a petitioner can show that the adjudication of his state court claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). For Keller to have been entitled to habeas relief in state court based on his ineffective assistance of counsel claim, he would have had to show that (1) his counsel provided deficient assistance and

(2) he was prejudiced because of counsel's deficiency. *Strickland*, 466 U.S. at 700. To satisfy the first prong enumerated in *Strickland*, Keller was required to show that his "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688–89. To satisfy the second prong, Keller was required to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The last reasoned decision was that of the Circuit Court of Newport News. ECF No. 11, Ex. 4, 1–4. Accordingly, this Court must look at whether that decision was contrary to or an unreasonable application of clearly established Federal law or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Wilson v. Sellers*, 584 U.S. 122, 128–30 (2018). The Circuit Court held that Keller failed to satisfy the test as outlined in *Strickland*. ECF No. 11, Ex. 4 at 2–3. Specifically, the Circuit Court found that Keller failed to show that his counsel provided deficient assistance that prejudiced him. *Id.* The Circuit Court further opined that:

> Keller's claim of ineffective assistance of counsel is based on a mistaken factual premise. He argues that the jury should have been instructed on the definition of heat of passion as that term is defined in the Virginia Model Jury Instruction (VMJI).
>
> The Court finds that the record in the criminal case demonstrates that the very definition that he contends should have been provided (VMJI 37.200) was in fact provided to the jury in Instruction 13. That instruction first defined malice, then defined heat of passion. The Court further finds that Keller's counsel argued to the jury that Keller did not intend to shoot the victim and that Keller was in a very heightened emotional state, with no cooling off period. Counsel argued that the shooting was a tragic accident.
>
> The Court finds that the jury had definitions of malice and heat of passion. The Court further finds that the jury was instructed on the presumption of innocence and the Commonwealth's burden of proof. It was given the "waterfall" instruction, advising that it must resolve any question as to severity of offense in favor of the lesser crime. The Court finds that the jury received correct and proper instructions to guide its application of the law to the facts. The jury rejected Keller's defense.
>
> *Id.*

Following a *de novo* review, this Court finds that Keller has failed to show that the adjudication of his state court claims was contrary to or an unreasonable application of clearly established Federal law or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The Court agrees that Keller's claim of ineffective assistance of counsel is based on a mistaken factual premise. *Id.* Keller believes a heat of passion instruction was not given and that it was ineffective for his counsel not to advocate for it. ECF No. 1 at 5. However, a review of the record clearly shows that Keller's attorney asked that the instruction be given and that it was given. ECF No. 11, Ex. 1 at 3. Accordingly, Keller's Objection is OVERRULED.

IV. CONCLUSION

Following careful consideration, the Court ACCEPTS AND ADOPTS IN WHOLE the Report and Recommendation. Accordingly, Keller's Objection, ECF No. 16, is OVERRULED, Respondent's Motion to Dismiss, ECF No. 9, is GRANTED, Keller's Motion to Dismiss is DENIED, ECF No. 13, and Keller's Petition, ECF No. 1, is DENIED and DISMISSED WITH PREJUDICE.

Finding that the basis for dismissal of Keller's Section 2254 Petition is not debatable and alternatively finding that Keller has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is DENIED. 28 U.S.C. § 2253(c); *see* Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a); *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483–85 (2000).

Keller is ADVISED that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. R. App. P. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). If Keller intends to seek a certificate

of appealability from the Fourth Circuit, he must do so within thirty (30) days from the date of this Order. Keller may seek such a certificate by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk shall forward a copy of this Order to Keller and to counsel of record for the Respondent.

It is SO ORDERED.

/s/
Elizabeth W. Hanes
United States District Judge

Norfolk, Virginia
Date: February 20, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION,

MICHAEL WAYNE KELLER,

Petitioner,

v. **CASE NO. 2:24-cv-00088**

CHADWICK S. DOTSON,

Respondent.

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by the Court.** This action came for decision by the Court. The issues have been considered and a decision has been rendered.

IT IS **ORDERED AND ADJUDGED** that the Court **ACCEPTS AND ADOPTS IN WHOLE** the Report and Recommendation. Keller's Objection is **OVERRULED,** Respondent's Motion to Dismiss is **GRANTED,** Keller's Motion to Dismiss is **DENIED,** and Keller's Petition is **DENIED** and **DISMISSED WITH PREJUDICE.** A certificate of appealability is **DENIED.** Petitioner is **ADVISED** that he may seek a certificate from the United States Court of Appeals for the Fourth Circuit by filing a written notice of appeal with the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510 within thirty (30) days.

DATED: February 20, 2025

FERNANDO GALINDO
Clerk of Court

/s/
By_____
J.L. Meyers
Deputy Clerk

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

MICHAEL WAYNE KELLER,

Petitioner,

v. **Civil Action No.: 2:24cv88**

CHADWICK S. DOTSON, Director,
Virginia Department of Corrections,

Respondent.

REPORT AND RECOMMENDATION

This matter is before the Court on Petitioner Michael Wayne Keller's ("Petitioner") Petition for a Writ of Habeas Corpus ("the Petition") filed pursuant to 28 U.S.C. § 2254, ECF No. 1, Respondent Chadwick S. Dotson's ("Respondent") Motion to Dismiss, ECF No. 9, and Petitioner's Motion to Dismiss, ECF No. 13. The matter was referred for a recommended disposition to the undersigned United States Magistrate Judge ("the undersigned") pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C), Federal Rule of Civil Procedure 72(b), Eastern District of Virginia Local Civil Rule 72, and the April 2, 2002, Standing Order on Assignment of Certain Matters to United States Magistrate Judges. The undersigned makes this recommendation without a hearing pursuant to Federal Rule of Civil Procedure 78(b) and Eastern District of Virginia Local Civil Rule 7(j). For the following reasons, the undersigned **RECOMMENDS** that Respondent's Motion to Dismiss, ECF No. 9, be **GRANTED**, Petitioner's "Motion to Dismiss Respondent's Motion to Dismiss and Rule 5 Answer," be **DENIED**, and the Petition, ECF No. 1, be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 27, 2020, Petitioner was convicted by a Newport News Circuit Court jury of aggravated malicious wounding and use of a firearm in the commission of a felony. ECF No. 11, attach. 1 at 11. The jury fixed Petitioner's sentence at twenty years of imprisonment for aggravated malicious wounding and three years of imprisonment for use of a firearm in the commission of a felony. *Id.* at 8, 10. The trial court imposed the jury's sentence on June 16, 2020. *Id.* at 11–13.

Petitioner's convictions arose out of events that occurred on May 15, 2019. *Id.* at 14:16–19. Petitioner spent the afternoon drinking with a friend at the Sand Bar in Newport News. *Id.* at 85:5–24. At around 10:00 p.m., Petitioner's girlfriend Megan Hodges picked him and his friend up and drove to Hoss's Deli. *Id.* at 87:1–11. Hodges also brought Petitioner's gun for him. *Id.* at 88:4–10.

While at Hoss's Deli, Petitioner noticed that Hodges had received messages from other men on her cellphone. *Id.* at 89:12–90:11. Petitioner confronted Hodges and asked her why other men were contacting her. *Id.* Hodges became upset and left Hoss's Deli, with Petitioner following her outside to her car. *Id.* at 90:12–91:9. They both got into the car, continuing to argue loud enough that bystanders could hear. *Id.* at 92:4–13. At one point, Petitioner exited the vehicle to kick its bumper. *Id.* at 92:14–93:3.

Steven Barton witnessed Petitioner and Hodges arguing in the parking lot and approached them. *Id.* at 15:7–16. Barton did not know either Petitioner or Hodges, but he grew concerned when he saw Petitioner kick Hodges' car and overheard the two loudly arguing. *Id.* Barton walked toward the couple and told Petitioner not to speak to Hodges in that tone and manner. *Id.* Barton did not possess or brandish a weapon and did not use a threatening tone. *Id.* at 19:19–20:3, 39:14–40:5, 55:17–56:8. As Barton approached, Petitioner pulled out a gun, said he would "blow

[Barton's] f[***]ing head off" and fired multiple shots. *Id.* at 41:6–42:2. One of the bullets hit Barton in the head, but he ultimately survived. *Id.* at 16:5–17. Petitioner fled the scene and was arrested the following day. *Id.* at 67:18–68:4. He was ultimately charged with aggravated malicious wounding and use of a firearm in the commission of a felony. *See id.* at 7–10.

At trial, Petitioner's lawyer argued that the Commonwealth failed to prove the element of malice for the charge of aggravated malicious wounding, moved to strike, and requested that the jury only consider the lesser included offense of unlawful wounding. *Id.* at 75:25–78:15. In support of his motion, defense counsel suggested that Petitioner was in a "highly emotional state" and that the shooting was "a classic case of heat of passion," negating any element of malice. *Id.* at 77:16–21. In opposition, the Commonwealth argued that heat of passion negates malice only when the victim of the crime is the one who provokes the emotion. *Id.* at 78:17–82:8. The prosecutor also argued that heat of passion was ultimately a question of fact that rested with the jury. *Id.* The trial judge denied defense counsel's motion. *Id.* at 82:9–19.

The question of heat of passion came up again at the jury instruction conference. *Id.* at 123:2–129:5. Defense counsel requested Jury Instruction 13 be given, which described both malice and heat of passion. *Id.* The instruction provides that:

> Malice is that state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason. Malice may result from any unlawful or unjustifiable motive including anger, hatred or revenge. Malice may be inferred from any deliberate, willful, and cruel act against another, however sudden. Heat of passion excludes malice when that heat of passion arises from provocation that reasonably produces an emotional state of mind such as hot blood, rage, anger, resentment, terror or fear so as to cause one to act on impulse without conscious reflection. Heat of passion must be determined from circumstances as they appeared to defendant, but those circumstances must be such as would have aroused heat of passion in a reasonable person. If a person acts upon reflection or deliberation, or after his passion has cooled, or there has been a reasonable time or opportunity for cooling, then the act is not attributable to heat of passion.

Id. at 3. After debate, the judge ultimately agreed to give Instruction 13. *Id.* at 129:5.

The judge also gave Jury Instruction 14, over defense counsel's objection, which provided: "[w]here it is not the victim of the crime who provoked the defendant's heat of passion, the evidence will not support a finding of heat of passion." *Id.* at 130:1–131:20; *see also id.* at 4. Additionally, the judge gave instructions on the burden of proof, the elements of aggravated malicious wounding, malicious wounding, unlawful wounding, and a waterfall instruction. *Id.* at 1–6. After the jury deliberated, Petitioner was convicted of aggravated malicious wounding, along with use of a firearm in the commission of a felony. *Id.* at 11–13. The judge ultimately sentenced Petitioner to twenty-three years of incarceration. *Id.* at 13.

On appeal, counsel argued that the trial court erred in giving Jury Instruction 14, arguing that the instruction was misleading and confusing. *Id.*, attach. 2 at 90–110. Appellate counsel also challenged the sufficiency of the evidence on the element of malice. *Id.* The Court of Appeals of Virginia denied Petitioner's appeal, holding that Jury Instruction 14 was not confusing, misleading, or an inaccurate statement of the law and that there was sufficient evidence to prove malice. *Id.* at 1–11. Petitioner further appealed to the Virginia Supreme Court, which issued a summary denial. *Id.*, attach. 3 at 1.

Petitioner then filed a state habeas petition in the Circuit Court for the City of Newport News ("the state habeas court"). *Id.*, attach. 4 at 22–34. In his state petition, he alleged that:

> Counsel for petitioner proved ineffective when failing to request a jury instruction defining heat of passion, which prejudiced petitioner because absent the instruction deprived the jury of any legal avenue to find petitioner guilty of unlawful wounding as opposed to aggravated malicious wounding.

Id. at 31. The state habeas court found Petitioner's claims without merit and dismissed the Petition. *Id.* at 1–4. He then appealed to the Virginia Supreme Court, *id.*, attach. 5 at 3–18, alleging that:

> The court committed error when finding that trial counsel for appellant properly requested and the jury was provided a proper Virginia model jury instruction

> defining heat of passion. [And] the court committed error when finding that trial counsel for appellant provided effective assistance of counsel.

Id. at 7. The Virginia Supreme Court issued a summary denial on December 11, 2023. *Id.* at 1.

Petitioner then filed the instant Petition on January 26, 2024, where he raised the following ground:

> Petitioner was denied his 5th, 6th and 14th Constitutional Amendment rights to due process and the effective assistance of counsel. Counsel for petitioner proved ineffective during trial when failing to request a jury instruction defining heat of passion, which prejudiced petitioner because absent the instruction deprived the jury of any legal avenue to find Petitioner guilty of of [sic] the lesser offense of unlawful wounding as opposed to aggravated malicious wounding, as charged.

ECF No. 1 at 5. On May 9, 2024, the Respondent filed a Motion to Dismiss, a memorandum in support, and Roseboro Notice. ECF No. 9–12. In response, Petitioner filed what he captioned "Motion to Dismiss Respondent's Motion to Dismiss and Rule 5 Answer." ECF No. 13. By this pleading, Petitioner contends that Respondent's argument is insufficient and should be dismissed, *id.* at 2, so the Court will also construe Petitioner's filing as an opposition brief to Respondent's Motion. As such, the Petition, ECF No. 1, and Respondent's Motion to Dismiss, ECF No. 9, are ripe for recommended disposition.

II. DISCUSSION

The Court interprets Petitioner's claim to raise two grounds for habeas relief: (1) that Petitioner was denied his "5th, 6th and 14th Constitutional Amendment rights to due process"; and (2) that counsel was ineffective "when failing to request a jury instruction defining heat of passion." ECF No. 1 at 5. The undersigned will consider each in turn.

A. Exhaustion and Procedural Default

Before considering the merits of a federal habeas petition, the Court must make a preliminary inquiry into whether Petitioner appropriately exhausted the claims asserted in the

Petition, and/or whether Petitioner has procedurally defaulted on his claims such that they are simultaneously exhausted and defaulted for purposes of federal habeas review.

1. Exhaustion

Section 2254 allows a prisoner held in state custody to challenge his detention on the ground that his custody violates the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A state prisoner, however, must exhaust his available state remedies or demonstrate the absence or ineffectiveness of such remedies before petitioning for federal habeas relief to give "state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing." *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998). Importantly, "[t]he burden of proving that a claim is exhausted lies with the habeas petitioner." *Id.* The exhaustion requirement is satisfied if the individual fairly presents his claim in the highest state court with jurisdiction to consider it through either direct appeal or post-conviction proceedings. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844–48 (1999). Fair presentation requires a petitioner to: (1) present the same claims (2) to all appropriate state courts. *Mahdi v. Stirling*, 20 F.4th 846, 892 (4th Cir. 2021) (citing *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011)). Presenting the same claim requires including "'both the operative facts and the controlling legal principles' associated with each claim." *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (quoting *Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000)). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (internal citations omitted). "The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will

not turn the trick." *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)). "Thus, a petitioner convicted in Virginia first must have presented the same factual and legal claims raised in his federal habeas corpus application to the Supreme Court of Virginia on direct appeal or in a state habeas corpus petition." *Moody v. Dir., Va. Dep't of Corr.*, No. 1:14cv1581, 2016 WL 927184, at *3 (E.D. Va. Mar. 3, 2016) (citing *Duncan v. Henry*, 513 U.S. 364 (1995)), *appeal dismissed*, 669 F. App'x 160 (4th Cir. 2016).

2. Procedural Default

"A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default." *Breard*, 134 F.3d at 619. As the Fourth Circuit has explained, the procedural default 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)); *see also Hedrick v. True*, 443 F.3d 342, 359 (4th Cir. 2006) ("A federal claim is deemed procedurally defaulted where 'a state court has declined to consider the claim's merits on the basis of an adequate and independent state procedural rule.' A federal court cannot review a procedurally defaulted claim unless the prisoner can demonstrate cause and prejudice for the default or a fundamental miscarriage of justice.") (quoting *Fisher v. Angelone*, 163 F.3d 835, 844 (4th Cir. 1998)) (internal citations omitted). As the Supreme Court observed, "[t]he procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine." *Davila v. Davis*, 582 U.S. 521, 527–28 (2017).

Additionally, a petitioner seeking federal habeas relief procedurally defaults his claims when he "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.'" *Breard*, 134 F.3d at 619 (quoting *Coleman*, 501 U.S. at 735 n.1). Under these circumstances, the claim is considered simultaneously exhausted and procedurally defaulted so long as "it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court." *Baker*, 220 F.3d at 288 (citing *Gray v. Netherland*, 518 U.S. 152, 161 (1996)). Importantly, if "the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence," a federal court may not review the simultaneously exhausted and procedurally defaulted claim. *Id.* (quoting *Gray*, 518 U.S. at 162).

Absent a showing of cause for the default and prejudice or a fundamental miscarriage of justice, such as actual innocence, this Court cannot review the merits of a defaulted claim. *See Harris v. Reed*, 489 U.S. 255, 262 (1989); *Sparrow v. Dir., Dep't of Corr.*, 439 F. Supp. 2d 584, 588 (E.D. Va. 2006) (explaining that "a petitioner may nonetheless overcome procedural default, and have his claims addressed on the merits, by showing either cause and prejudice for the default, or that a miscarriage of justice would result from the lack of such review") (citing *Coleman*, 501 U.S. at 750; *Savino v. Murray*, 82 F.3d 593, 602 (4th Cir. 1996)). The Fourth Circuit has held that "[t]o establish cause, a petitioner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Hedrick*, 443 F.3d at 366 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Davila*, 582 U.S. at 528 ("A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner.") (quoting *Coleman*, 501 U.S. at 753). "This requires a demonstration that 'the factual or legal basis for the claim was not reasonably available to the claimant at the time of the state proceeding.'" *Hedrick*, 443 F.3d at 366 (quoting *Roach v. Angelone*, 176 F.3d 210, 222 (4th Cir. 1999)). "Importantly, a court need

not consider the issue of prejudice in the absence of cause." *Booker v. Clarke*, No. 1:15cv781, 2016 WL 4718951, at *5 (E.D. Va. Sept. 8, 2016), *appeal dismissed*, 678 F. App'x 152 (4th Cir. 2017), *cert. denied*, 583 U.S. 888 (2017) (citing *Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995), *cert. denied*, 517 U.S. 1171 (1996)).

3. Ground 1 of Petitioner's Claim is Simultaneously Exhausted and Procedurally Defaulted

In Ground 1, Petitioner alleges that he "was denied his 5th, 6th and 14th Constitutional Amendment rights to due process." ECF No. 1 at 5. Petitioner did not raise this claim to the Supreme Court of Virginia on direct appeal or in his state habeas petition. *See* ECF No. 11, attach. 3 at 10; *id.*, attach. 4 at 31; *id.*, attach. 5 at 7. If Petitioner were to present this portion of the claim in a new state habeas petition to the Supreme Court of Virginia, it would be procedurally barred as untimely under Virginia Code § 8.01-654(A)(2) and successive under Virginia Code § 8.01-654(B)(2). Both Virginia Code § 8.01-654(A)(2) and § 8.01-654(B)(2) constitute adequate and independent state-law grounds for a decision. *Sparrow*, 439 F. Supp. 2d at 587–88 (finding that Va. Code § 8.01-654(A)(2) is an independent and adequate state procedural rule); *Clagett v. Angelone*, 209 F.3d 370, 379 (4th Cir. 2000) (finding that Va. Code § 8.01-654(B)(2) is an independent and adequate state procedural rule). Accordingly, the portion of Petitioner's claim concerning the Fifth, Sixth, and Fourteenth Amendment rights to due process is simultaneously exhausted and procedurally defaulted for purposes of federal habeas review.

4. Petitioner Cannot Demonstrate Cause and Prejudice, or a Fundamental Miscarriage of Justice to Overcome Procedural Default.

As noted, Petitioner may overcome procedural default by "showing [] cause and prejudice or a fundamental miscarriage of justice due to [his] actual innocence." *Silk v. Johnson*, No. 3:08cv271, 2009 WL 742552, at *3 (E.D. Va. Mar. 20, 2009) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998), and *Harris*, 489 U.S. at 262). "[C]ause" refers to "some objective factor

external to the defense [that] impeded counsel's [or the petitioner's] efforts to comply with the State's procedural rule." *Strickler v. Greene*, 527 U.S. 263, 283 n.24 (1999) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Petitioner offers no argument or evidence that some objective factor impeded his ability to comply with the state procedural rules. Therefore, Petitioner fails to overcome procedural default. Absent cause, a prejudice analysis is unnecessary. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995) (noting that courts should not consider the issue of prejudice absent cause to avoid the risk of reaching an alternative holding).

Petitioner also does not assert in the alternative that he is actually innocent, nor does he present any evidence of actual innocence.[1] Absent a sufficient assertion of actual innocence, or evidence supporting actual innocence, Petitioner cannot demonstrate a fundamental miscarriage of justice. *Royal v. Taylor*, 188 F.3d 239, 244 (4th Cir. 1999) ("In order to use an actual innocence claim as a procedural gateway to assert an otherwise defaulted claim, 'the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'") (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Accordingly, the undersigned **FINDS** that the portion of Petitioner's claim referencing his constitutional due process rights are simultaneously exhausted and procedurally defaulted, and thus, should be dismissed. Having conducted a preliminary inquiry to determine the extent to which the Court can review the merits of the Petition, the Court now turns to the merits of the remaining claim.[2]

[1] As Respondent points out, the exception created in *Martinez v. Ryan*, 566 U.S. 1, 13 (2012), does not apply to this claim because it does not implicate ineffective assistance of counsel.

[2] Petitioner raised Ground 2, ineffective assistance of counsel, in his state habeas petition. As such, it is properly exhausted.

B. Standards of Review on Merits of Remaining Claims

1. *28 U.S.C. § 2254(d)*

Habeas relief is warranted only if Petitioner can demonstrate that the adjudication of each of his claims by the state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Thus, federal habeas relief is precluded, so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Id.* ("It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further."). In other words, "AEDPA prohibits federal habeas relief for any claim adjudicated on the merits in state court, unless one of the exceptions listed in § 2254(d) obtains." *Premo v. Moore*, 562 U.S. 115, 121 (2011).

In *Williams v. Taylor*, the Supreme Court explained that the "exceptions" encapsulated by § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U.S. 362, 404–05 (2000). A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Id.* at 405–06. This Court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from

Supreme Court decisions, but unreasonably applies it to the facts of the particular case. *Id.* at 407–08; *see also Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) ("The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable."). "The focus of the [unreasonable application] inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and . . . an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

In making this determination under Section 2254(d)(1), the Court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) ("Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court."). Thus, it is this Court's obligation to focus on "the state court decision that previously addressed the claims rather than the petitioner's freestanding claims themselves." *McLee v. Angelone*, 967 F. Supp. 152, 156 (E.D. Va. 1997).

Because the state habeas court's opinion denying Petitioner's habeas relief is the last reasoned state court opinion addressing his ineffective assistance of counsel claim, this Court will "look through" the Supreme Court of Virginia's summary denial to the trial court's reasoning. *See Wilson v. Sellers*, 584 U.S. 122, 128–30 (2018). In undertaking such review, this Court is mindful that "a determination of a factual issue made by a State court shall be presumed to be correct. The

applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

2. Ineffective Assistance of Counsel

Generally, to have been entitled to habeas relief in state court for ineffective assistance of counsel claims under the Sixth Amendment, Petitioner had to show both that his defense counsel provided deficient assistance, and that he was prejudiced as a result of counsel's deficiency. *Strickland v. Washington*, 466 U.S. 668, 700 (1984) (conceptualizing the inquiry as two required prongs: a deficiency prong and a prejudice prong). First, to establish deficient performance, Petitioner was required to show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688–89 (holding that there is a strong presumption that trial counsel provided reasonable professional assistance). Second, Petitioner was also required to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The United States Supreme Court summarized the high bar faced by petitioners in a federal habeas proceeding where a petitioner's Sixth Amendment ineffective assistance of counsel claims were previously rejected by the state court:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," . . . and when the two apply in tandem, review is "doubly" so . . . . The *Strickland* standard is a general one, so the range of reasonable applications is substantial. . . . Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Premo, 562 U.S. at 122–23 (internal citations omitted); *see also Knowles v. Mirzayance,* 556 U.S. 111, 123 (2009) ("Under the doubly deferential judicial review that applies to a *Strickland* claim

evaluated under the § 2254(d)(1) standard . . . [petitioner's] ineffective-assistance claim fails.") (citing *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) (per curiam)).

With these principles in mind, the undersigned now turns to the merits of the remaining claim in the Petition.

C. Facts and Findings of Law

In his claim, Petitioner alleges that that:

> Counsel for petitioner proved ineffective during trial when failing to request a jury instruction defining heat of passion, which prejudiced petitioner because absent the instruction deprived [sic] the jury of any legal avenue to find Petitioner guilty of the lesser offense of unlawful wounding as opposed to aggravated malicious wounding, as charged.

ECF No. 1 at 5. In reviewing Petitioner's state habeas petition, the Supreme Court of Virginia issued a summary denial of Petitioner's claim. ECF No. 11, attach. 3 at 1. As such, this Court looks through to the last reasoned decision, here, the state habeas court's opinion. *See Currica v. Miller*, 70 F.4th 718, 724 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 525 (2023) (citing *Wilson*, 584 U.S. at 125). The state habeas court held that this claim failed under the test out lined in *Strickland*, because counsel "did not provide deficient assistance that prejudiced" Petitioner. ECF No. 11, attach. 4 at 2–3. The habeas court further opined that:

> Keller's claim of ineffective assistance of counsel is based on a mistaken factual premise. He argues that the jury should have been instructed on the definition of heat of passion as that term is defined in the Virginia Model Jury Instruction (VMJI).
>
> The Court finds that the record in the criminal case demonstrates that the very definition that he contends should have been provided (VMJI 37.200) was in fact provided to the jury in Instruction 13. That instruction first defined malice, then defined heat of passion. The Court further finds that Keller's counsel argued to the jury that Keller did not intend to shoot the victim and that Keller was in a very heightened emotional state, with no cooling off period. Counsel argued that the shooting was a tragic accident.

> The Court finds that the jury had definitions of malice and heat of passion. The Court further finds that the jury was instructed on the presumption of innocence and the Commonwealth's burden of proof. It was given the "waterfall" instruction, advising that it must resolve any question as to severity of offense in favor of the lesser crime. The Court finds that the jury received correct and proper instructions to guide its application of the law to the facts. The jury rejected Keller's defense.

Id. The undersigned finds that the state habeas court was not unreasonable in finding that Petitioner failed to satisfy *Strickland*'s demanding standard with respect to this claim. The state habeas court determined that the jury instruction Petitioner requested regarding heat of passion was in fact provided to the jury, albeit coupled with an instruction regarding malice. *Id.* ("The Court finds that the record in the criminal case demonstrates that the very definition that he contends should have been provided (VMJI 37.200) was in fact provided to the jury in Instruction 13. That instruction first defined malice, then defined heat of passion."). The state habeas court also cited several other jury instructions that were provided, including on the presumption of innocence, on the Commonwealth's burden of proof, and on lesser included crimes. *Id.* That court also highlighted trial counsel's closing argument, which discussed Petitioner's lack of intent and heightened emotional state. *Id.* Thus, based on the record before it, the state habeas court reasonably found that Petitioner's claim of ineffective assistance of counsel was based on a mistaken factual premise. The undersigned cannot disagree. Petitioner's claim is founded on his belief that a heat of passion instruction was not given, and that it was ineffective for his lawyer to not advocate for it. ECF No. 1 at 5. However, the state habeas court found that based on the record, the model jury instruction for heat of passion *was* given in Jury Instruction 13. ECF No. 11, attach. 1 at 3. Because the state habeas court's application of *Strickland* was not unreasonable or contrary to federal law, the undersigned **RECOMMENDS** that Petitioner's claim be **DENIED**.

III. RECOMMENDATION

For these reasons, the undersigned **RECOMMENDS** that the Respondent's Motion to Dismiss, ECF No. 9, be **GRANTED**, Petitioner's "Motion to Dismiss Respondent's Motion to Dismiss and Rule 5 Answer," ECF No. 13, be **DENIED**, and the Petition, ECF No. 1, be **DENIED** and **DISMISSED WITH PREJUDICE**.

IV. REVIEW PROCEDURE

By receiving a copy of this Report and Recommendation, Petitioner is notified that:

1. Any party may serve on the other party and file with the Clerk of this Court specific written objections to the above findings and recommendations within fourteen days from the date this Report and Recommendation is forwarded to the objecting party, *see* 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), computed pursuant to Federal Rule of Civil Procedure Rule 6(a). A party may respond to another party's specific written objections within fourteen days after being served with a copy thereof. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

2. A United States District Judge shall make a *de novo* determination of those portions of this Report and Recommendation or specified findings or recommendations to which objection is made. The parties are further notified that failure to file timely specific written objections to the above findings and recommendations will result in a waiver of the right to appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984), *cert. denied*, 474 U.S. 1019 (1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984).

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

/s/
Lawrence R. Leonard
United States Magistrate Judge

Norfolk, Virginia
August 16, 2024

Lawrence R. Leonard
United States Magistrate Judge

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