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

CAMERON PAUL CROCKETT,
Petitioner,

v. **Civil Action No. 3:18cv139**

HAROLD W. CLARKE,
Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF RULE 5 ANSWER AND MOTION TO DISMISS

The respondent, by counsel, submits the following brief in support of his Rule 5 Answer and Motion to Dismiss:

1. Cameron Paul Crockett is detained under a final judgment of the Circuit Court of the City of Virginia Beach (trial court) entered on January 2, 2013. In May 2011, a jury convicted Crockett of involuntary manslaughter, but the trial ended in a mistrial when the jury could not agree on Crockett's punishment. (Case No. CR09-999; first conviction order and mistrial order attached collectively as Respondent's Exhibit 1.)[1] In March 2012, a second jury convicted Crockett of involuntary manslaughter. (Second conviction order attached as Respondent's Exhibit 2.) Crocket absconded, the trial court conducted the sentencing phase in his absence, and the jury fixed his sentence at five years' imprisonment. (Jury sentencing order attached as Respondent's Exhibit 3.)

[1] Crockett originally was charged with aggravated involuntary manslaughter. But the jury acquitted him of that charge and convicted him of the lesser-included offense of involuntary manslaughter. (Respondent's Exhibit 1.)

2. When Crockett finally returned, he was charged with and pleaded guilty to felony failure to appear, and the trial court sentenced him to an active sentence of 3 years' incarceration. (Failure-to-appear conviction and sentencing order attached as Respondent's Exhibit 4.) Crockett moved for a new trial on the involuntary manslaughter charge, but the trial court denied the motion and imposed the five-year active sentence fixed by the jury. (Motion for new trial, with exhibits, attached as Respondent's Exhibit 5; involuntary manslaughter sentencing order attached as Respondent's Exhibit 6.)

PROCEDURAL HISTORY

3. Crockett appealed his involuntary manslaughter conviction to the Court of Appeals of Virginia, which granted his petition for appeal. (Record No. 0119-13-1.) By memorandum opinion entered July 15, 2014, the Court of Appeals affirmed Crockett's conviction. Crockett v. Commonwealth, Record No. 0119-13-1, 2014 Va. App. LEXIS 259 (July 15, 2014). Crockett filed a petition for rehearing *en banc*, and the Court denied the petition on August 12, 2014. (Denial order attached as Respondent's Exhibit 7.)

4. Crockett appealed to the Supreme Court of Virginia, and on April 7, 2015, that Court refused Crockett's petition for appeal. (Record No. 141354; refusal order attached as Respondent's Exhibit 8.) Crockett filed a petition for rehearing, and the Court denied the petition on October 15, 2015. (Denial order attached as Respondent's Exhibit 9.)

5. Crockett subsequently appealed to the United States Supreme Court, and that Court denied his petition for a writ of certiorari on February 29,

2016. (Record No. 15-7507; February 29, 2016 letter from clerk of court attached as Respondent's Exhibit 10.)

6. On April 2, 2016, Crockett timely filed a petition for a writ of habeas corpus in the trial court, asserting the following claims for relief:

I(A) Crockett alleges a substantive violation of his constitutional privilege against self-incrimination;

I(B) Counsel is alleged to have rendered ineffective assistance in failing to adequately investigate and present a motion to suppress the petitioner's statements on the basis that his constitutional privilege against self-incrimination was violated;

II(A) Petitioner amounts a substantive attack upon the voluntariness of his confession;

II(B) Counsel is alleged to have rendered ineffective assistance in failing to adequately investigate and present a motion to suppress the petitioner's statements on the basis that his statement to law enforcement was not voluntarily given;

III Counsel is alleged to have rendered ineffective assistance in failing to adequately investigate and present evidence related to the driver's seatbelt mechanism;

IV Counsel failed to interview Jacob Palmer and Tori Miranda, and failed to present testimony at trial from Palmer, Miranda, and Nicole Vaughan;

V(A) Petitioner maintains the prosecution withheld material, exculpatory evidence or that which would be of benefit for impeachment purposes from the defense;

V(B) Counsel rendered ineffective assistance in failing to preserve for appellate review the petitioner's substantive argument in reference to the alleged

withholding of material, exculpatory evidence or that which would be of benefit for impeachment purposes;

VI The petitioner asserts a substantive claim alleging his actual innocence of the offense of involuntary manslaughter;

VII The petitioner raises a claim of cumulative prejudice resulting from his collective individual claims of ineffective assistance of counsel;

VIII The petitioner contends that the prejudice inherent in the alleged non-disclosures of the prosecution coupled with the claimed inadequacies of counsel served to prejudice him at trial.

(Case No. CL1-2016; state habeas petition, *without* exhibits, attached as Respondent's Exhibit 11.)

7. The respondent moved to dismiss Crockett's petition, relying in part on an affidavit proffered by Crockett's trial counsel. (Motion to dismiss, with affidavit, attached as Respondent's Exhibit 12.) The trial court dismissed the petition by order entered August 22, 2016. (Final order attached as Respondent's Exhibit 13.)

8. Crockett appealed that decision to the Supreme Court of Virginia, which granted his petition for appeal on three assignments of error and held that, "although the circuit court correctly denied and dismissed Crockett's petition, the court relied on the wrong reasons for dismissing claims I(B), II(B), and III." (Record No. 161572; Supreme Court of Virginia order entered November 3, 2017, attached as Respondent's Exhibit 14, at 1-2.) Accordingly, the Supreme Court "affirm[ed] the circuit court's decision, albeit for a different reason." (Id. at 2.)

PRESENT PETITION

9. On February 28, 2018, Crockett timely filed his federal petition for a writ of habeas corpus alleging the following grounds for relief:

I Crockett is actually innocent;

II Trial counsel was ineffective for failing to investigate and present exculpatory evidence involving the driver's seat belt mechanism;

III The police violated Miranda v. Arizona when they questioned Crockett in a custodial setting without advising him of his rights against self-incrimination;

IV Crockett's statements to the police were involuntarily given;

V The Commonwealth suppressed material exculpatory evidence in violation of Brady v. Maryland;

VI The prejudice resulting from the Commonwealth's nondisclosures should be weighed cumulatively with the prejudice resulting from trial counsel's ineffectiveness; and

VII The Commonwealth violated Batson v. Kentucky when it struck two African-American women from the venire, and the trial court should have required the prosecution to give race-neutral reasons for its strikes because the defense stated a prima facie case of discrimination.

10. On April 6, 2018, Crockett timely filed an amendment to his petition for a writ of habeas corpus. In the amendment, Crockett adds the following ground for federal habeas corpus relief:

VIII Crockett's prosecuting attorney harbored a conflict of interest that violated his federal constitutional right to a fair trial by an impartial prosecution.

CLAIMS III, IV, V, AND VIII ARE DEFAULTED

11. Claims III, IV, V, and VIII are defaulted due to Crockett's failure to exhaust them in state court. Absent a valid excuse, a state prisoner must exhaust his remedies in state court before seeking habeas corpus relief in federal court. 28 U.S.C. § 2254(b). The petitioner bears the burden of proving exhaustion. See Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998).

12. Because the exhaustion requirement of 28 U.S.C. § 2254(b) "refers only to remedies still available at the time of the federal petition, it is satisfied if it is clear that [the habeas petitioner's] claims are now procedurally defaulted under [state] law." Gray v. Netherland, 518 U.S. 152, 161-62 (1996) (internal quotation marks and citations omitted). "However, the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." Id. at 162; see also Bassette v. Thompson, 915 F.2d 932, 937 (4th Cir. 1990).

13. Importantly, "[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." Breard, 134 F.3d at 619. This is true "whenever a state court finds procedural default, regardless of whether [the state court] alternatively discussed the merits." Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985).

14. In claims III and IV, Crockett alleges a Miranda violation and that his statements to Wallace were involuntary due to his mental, physical, and emotional condition and due to Wallace's allegedly coercive conduct. When Crockett attempted to raise claims III and IV for the first time in his state habeas petition (as claims I(A) and II(A)), the trial court dismissed the claims because Virginia law prohibits petitioners from raising claims on this nature for the first time in habeas corpus.[2] (Respondent's Exhibit 13 at 5-6.) In Virginia, "[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, 205 S.E.2d 680, 682 (1974). And this rule constitutes an independent and adequate state law ground which precludes federal review absent a showing of cause and prejudice or actual innocence to overcome the default. Reid v. True, 349 F.3d 788, 805 (4th Cir. 2003); Wright v. Angelone, 151 F.3d 151, 159-60 (4th Cir. 1998).

15. Even assuming arguendo that Crockett could establish "cause" for his failure to raise this claim properly in state court, he cannot show prejudice for the reasons stated by the Virginia Supreme Court in concluding that Crockett was not prejudiced by counsel's failure to raise these issues at trial. (Respondent's Exhibit 14 at 3-7.) Both arguments are without merit. (Id.) First, Crockett was not in custody during the unwarned interview. (Id. at 4-5.) Second, the circumstances surrounding Wallace's questioning of Crockett

[2] And the Supreme Court of Virginia did not disturb that ruling on appeal. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

demonstrated that his statements were voluntarily given and his Fifth Amendment rights were not violated. (Id. at 6-7.)

16. Moreover, Crockett has not shown he was prejudiced by his default of these claims because, as the Supreme Court concluded, even if Crockett could have succeeded in having his statements suppressed, "there is no reasonable probability, based on this record, that a reasonable jury would have had a reasonable doubt as to whether Crockett was the driver." (Id. at 5-7.) Accordingly, Crockett cannot demonstrate that any alleged error "had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776 (1946). Finally, for the reasons stated below, Crockett's actual innocence claim also fails. Accordingly, this Court should dismiss claims III and IV because they are defaulted.

17. Similarly, when Crockett raised his first Brady claim on direct appeal, the Court of Appeals noted that "the trial court did not rule on any Brady challenge, and counsel never sought such a ruling." Crockett, 2014 Va. App. LEXIS 259, at *5. In cases where "the trial court does not rule on an objection," the Court continued, "'there is no ruling for [the Court] to review on appeal.'" Id. (quoting Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 489 (1998), citing Rule 5A:18, Virginia's contemporaneous objection rule). "Hence, the objection was not saved for [the Court's]

consideration." Id. (quoting Taylor v. Commonwealth, 208 Va. 316, 324, 157 S.E.2d 185, 191 (1967)).[3]

18. Rule 5A:18, like its counterpart Rule 5:25, "constitutes 'an independent and adequate state procedural bar precluding [habeas] review of errors [not raised] at trial.'" Kent v. Kuplinski, 702 F. App'x 167, 169 (4th Cir. 2017) (quoting Weeks v. Angelone, 176 F.3d 249, 270 (4th Cir. 1999)). Accordingly, Crockett "has procedurally defaulted [this portion of] his federal habeas claim." Breard, 134 F.3d at 619.

19. "In any case," the Court of Appeals further held that Crockett's Brady argument was without merit because the allegedly withheld witness statements "would not meet the Brady requirement of materiality." Id. "The statements offered minor variations in the details in [the witnesses'] testimony but did not touch on the issue in dispute: was someone other than the defendant driving." Id. at *5-*6.

20. When Crockett subsequently filed his state habeas petition in the trial court, he reiterated the Brady claim he had raised on direct appeal, but he added a second layer to his Brady claim based on materials that he had purportedly discovered in 2014 while his direct appeal was pending. (Respondent's Exhibit 11 at 46-49.) The trial court dismissed Crockett's Brady claim in its entirety, noting that the first portion of the claim was non-cognizable in habeas corpus because it had been raised and decided on direct appeal, and the second portion of the claim was barred under Parrigan, which

[3] And the Supreme Court of Virginia did not disturb that ruling on appeal. See Ylst, 501 U.S. at 803.

precludes federal review absent a showing of cause and prejudice or actual innocence.[4] (Respondent's Exhibit 13 at 6-8.) Reid, 349 F.3d at 805; Wright, 151 F.3d at 159-60.

21. The trial court further held that, in the alternative, the new portion of Crockett's Brady claim also was "without merit." (Id. at 8.) Specifically, the court held that Crockett had failed to carry his burden to demonstrate that any of the witness statements he allegedly had obtained in 2014 were "material" because "testimony identical to that which he claims was suppressed was adduced at trial" through cross-examination. (Id. at 10-11.) Likewise, the court held that the three supplemental police reports Crockett claimed he discovered in 2014 were not inconsistent with the officers' trial testimony. (Id. at 12-13.)

22. At trial, one of the officers had testified that Crockett's feet had remained under the steering wheel after the accident. (Id. at 13.) And "[d]espite [Crockett's] effort to characterize the memoranda as inconsistent with this testimony, the supplemental police reports uniformly agree[d] that the lower half of Crockett's body remained in the driver's seat" after the crash. (Id.) The officer's "trial testimony simply asserted the same facts with greater specificity." (Id.) "Accordingly," the trial court concluded that "Crockett [had] failed to demonstrate either the impeachment value of these memoranda or

[4] And the Supreme Court of Virginia did not disturb that ruling on appeal. See Ylst, 501 U.S. at 803.

their materiality," and the court dismissed the claim in its entirety for this additional reason.[5] (Id. at 14.)

23. Crockett concedes that the Court of Appeals "held [his first] Brady claim [was] procedurally defaulted." (ECF No. 3-1 at 139 of 179.) He further concedes that, when he supplemented his Brady claim for the first time in habeas corpus, the trial court "held that any Brady challenge based on [evidence he allegedly discovered in 2014] was also procedurally defaulted." (ECF No. 3-1 at 140 of 170.)[6] Crockett states that he "takes *no issue* with the ruling of procedural default." (Id. (emphasis added).)[7]

24. "Instead, [Crockett] tenders his showing of actual innocence as his rite of passage to have the merits of his Brady claim reviewed de novo." (Id.) Crockett's Brady claim would fail on the merits for the reasons stated by the Court of Appeals and the trial court even if he had not defaulted it in its entirety in state court, and the state courts' alternative rulings on the merits are entitled to deference in this Court under the AEDPA. But Crockett defaulted the claim in state court, he would be barred from raising it there again,[8] and his actual innocence "gateway" claim fails for the reasons stated

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[5] The Supreme Court of Virginia did not disturb these rulings on appeal. See Ylst, 501 U.S. at 803.
[6] See also Respondent's Exhibit 13 at 8.
[7] Crockett also has not attempted to show "cause and prejudice for the default." Gray, 518 U.S. at 162.
[8] See Va. Code § 8.01-654(B)(2).

below. Accordingly, this Court should dismiss claim V without addressing its merits.[9]

25. Crockett also concedes that he did not raise claim VIII in his state habeas corpus petition. (ECF No. 6 at 14 of 17.) Indeed, he admits that "[n]onexhaustion would seem a natural defense for this claim given that [he] did not present the conflict of interest issue as an actual 'claim,' or substantive basis for relief, in his state habeas petition." (Id.) Crockett states that while he raised the issue in his pre-filing application for financial assistance—in which he requested funds to investigate the "prospective" conflict claim—he ultimately "elected not to include the conflict of interest as a 'claim' during the usual course of state post-conviction review . . . because he felt he was left with insufficient evidence to prove the claim." (Id.)

26. Crockett further concedes he would be barred from raising claim VIII in a new state habeas corpus petition because any new petition would be barred under Virginia law as successive. (ECF No. 6 at 15 of 17.) Specifically, Crockett acknowledges that "Virginia Code § 8.01-654(B)(2) prohibits him from returning to state court to raise this claim because he should have raised it when he filed his state habeas petition in 2016." (Id.) Accordingly, claim VIII is simultaneously exhausted and defaulted. Gray, 518 U.S. at 162.

27. Because claim VIII is only exhausted by operation of a procedural default in state court, not because Crockett has previously presented it in state court, federal habeas review is precluded unless Crockett can demonstrate

[9] The respondent stands prepared to address this claim on the merits if the Court directs.

cause and prejudice or actual innocence to overcome the default. Gray, 518 U.S. at 162; Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Teague v. Lane, 489 U.S. 288, 298 (1989); Bassette, 915 F.2d at 937.

> Federal habeas review of a state prisoner's claims that are procedurally defaulted under independent and adequate state procedural rules is barred unless the prisoner can show cause for the default and demonstrate actual prejudice as a result of the alleged violation of federal law, or prove that failure to consider the claims will result in a fundamental miscarriage of justice.

McCarver v. Lee, 221 F.3d 583, 588 (4th Cir. 2000) (citing Coleman, 501 U.S. at 750). "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him . . . ." Coleman, 501 U.S. at 753. "'[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule.'" Farabee v. Johnson, 129 Fed. Appx. 799, 802 (4th Cir. 2005) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986), and applying the test enunciated in Carrier to a procedural default caused by a petitioner while unrepresented by counsel). For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause under this standard." Carrier, 477 U.S. at 488 (internal quotation marks and citations omitted).

28. Crockett concedes that he did not raise claim VIII in his state habeas corpus petition. (ECF No. 6 at 14 of 17). And he has not attempted to show cause to overcome his default—nor can he—because Crockett "elected"

not to raise claim VIII in state court. (Id.) Manifestly, that decision is fairly attributable to him, and this Court should dismiss claim VIII without addressing the merits.[10] Coleman, 501 U.S. at 753.

29. Finally, Crockett cannot establish cause for any of his defaults under the "narrow exception" created by Martinez v. Ryan, 566 U.S. 1, 9 (2012). In Martinez, the United States Supreme Court held that "[i]nadequate assistance of counsel," or the absence of counsel, "at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of *ineffective assistance* at trial." Id. at 9, 14 (emphasis added). In claims III, IV, V, and VIII, Crockett does not allege ineffective assistance of trial counsel. Accordingly, Martinez does not cure Crockett's defaults. And because Crockett's actual innocence "gateway" claim fails for the reasons stated below, this Court also should dismiss claims III, IV, V, and VIII because they are defaulted.

CROCKETT'S ACTUAL INNOCENCE CLAIM FAILS

30. Crockett attempts to avail himself of the "actual innocence" or "fundamental miscarriage of justice" exception to avoid the consequences of his defaults in state court.[11] (ECF No. 3-1 at 37, 140 of 179; ECF No. 6 at 16 of

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[10] The respondent stands prepared to address this claim on the merits if the Court directs.

[11] Crockett also attempts to raise a "freestanding" actual innocence claim that he hopes will "possibly merit [his] release on its own." (ECF No. 3-1 at 37, 79-81, 85 of 179.) The United States Supreme Court has "never held" that the fundamental miscarriage of justice exception "extends to freestanding claims of actual innocence." Herrera v. Collins, 506 U.S. 390, 404-05 (1993); see also McQuiggin v. Perkins, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding

17.) That exception applies where "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Carrier, 477 U.S. at 495-96. "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar [or] expiration of the statute of limitations." McQuiggin, 569 U.S. at 386. "[T]enable actual-innocence gateway pleas," however, "are rare." Id.

31. "[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" House, 547 U.S. at 536-37 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324.

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claim of actual innocence."). And even if he could raise such a claim, it would be without merit for the reasons stated below. See House v. Bell, 547 U.S. 518, 555 (2006) (noting that the standard for proving a "hypothetical freestanding innocence claim" necessarily would be higher than for a "gateway" claim). Finally, Crockett failed to exhaust any such claim in state court because, while he improperly tried to raise the claim in his state habeas petition, he has not filed a petition for a writ of actual innocence in state court. See Teleguz v. Commonwealth, 279 Va. 1, 1, 688 S.E.2d 865, 868-69 (2010) (holding claims of actual innocence are barred from review in habeas corpus); Lovitt v. Warden, 266 Va. 216, 259, 585 S.E.2d 801, 826-27 (2003) ("[A]n assertion of actual innocence is outside the scope of habeas corpus review, which concerns only the legality of the petitioner's detention."); Va. Code §§ 19.2-327.10 *et seq.* Simply put, even if a "freestanding" actual innocence claim were cognizable in this Court, as a matter of comity Crockett should be required to exhaust it in a "freestanding" actual innocence petition in state court.

32. But "the habeas court's analysis is not limited to such evidence." House, 547 U.S. at 537. Instead, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" Id. at 538 (quoting Schlup, 513 U.S. at 327-28). "Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" Id. (quoting Schlup, 513 U.S. at 329). This standard is "demanding and permits review only in the 'extraordinary' case." Id. at 538 (quoting Schlup, 513 U.S. at 327). This is not such a case.

33. First, most of the new evidence Crockett relies upon does not constitute "new *reliable* evidence" under Schlup. 513 U.S. at 324 (emphasis added). For example, Crockett proffers affidavits and recorded statements from jurors from each of Crockett's trials in an effort to prove the effect that certain pieces of evidence had or could have had on the juries' deliberations and ultimate decisions to find Crockett guilty. (ECF No. 3-1 at 48-49, 51, 72-75 of 179.) But this is not the type of evidence that this Court can or should consider in determining whether Crockett should be permitted to attack his conviction through claims that he defaulted in state court. See Johnson v. Giles, 2011 U.S. Dist. LEXIS 122389, at *9-*10 (M.D. Ala. Sep. 14, 2011) (questioning "whether an affidavit by which a juror seeks to impeach her own or the jury's verdict—a generally disfavored tactic—could ever meet Schlup's

requirement that *factual*—as opposed to legal—innocence be demonstrated when one asserts his 'actual innocence'").[12]

34. Crockett also relies on "evidence" contained in his own affidavit. (ECF No. 3-1 at 49, 58, 66, 77-78 of 179.) But a habeas petitioner's self-serving affidavit is inherently unreliable and insufficient to support a claim of "actual innocence." See Freeman v. Trombley, 483 F. App'x 51, 58 (6th Cir. 2012) (noting that a habeas petitioner's "self-serving affidavit must be reviewed with great skepticism"); Saunders v. Clarice, Civil Action No. 3:16CV113, 2017 U.S. Dist. LEXIS 41696, at *27 (E.D. Va. Mar. 22, 2017) (accepting the magistrate's report and recommendation, which concluded that the petitioner's own "affidavit does not qualify as the sort of new reliable evidence described by the Supreme Court" in Schlup); Perry v. Virginia, Civil Action No. 3:13CV327-HEH, 2013 U.S. Dist. LEXIS 122795, at *11 (E.D. Va. Aug. 27, 2013) (holding

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[12] See also Pena-Rodriguez v. Colorado, __ U.S. __ , 137 S. Ct. 855, 869 (2017) (discussing the history, development, and scope of the "no-impeachment rule," which "evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations"); Tanner v. United States, 483 U.S. 107, 119 (1987) (discussing the "[s]ubstantial policy considerations support[ing] the common-law rule against the admission of jury testimony to impeach a verdict"); McDonald v. Pless, 238 U.S. 264, 269 (1915) (acknowledging "what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict"); Summers v. Dretke, 431 F.3d 861, 873 (5th Cir. 2005) (holding that a juror's affidavit regarding the "most influential testimony" from the penalty phase of a trial was "inadmissible" and could not be considered under Rule 606(b) of the Federal Rules of Evidence); Williams v. Collins, 16 F.3d 626, 636 (5th Cir. 1994) (rejecting a habeas petitioner's claim that "the federal district court abused its discretion by not allowing testimony from trial jurors at the evidentiary hearing" because the "post-verdict inquiry of jury members, as live witnesses or by affidavit, is inappropriate and precluded by Federal Rules of Evidence 606(b)").

that the petitioner's affidavit was not "trustworthy" and did not "constitute 'new reliable evidence' of innocence sufficient to support a claim of actual innocence").

35. Crockett also relies on numerous statements allegedly made to investigators and other individuals both before and after Crockett's two trials. (ECF No. 3-1 at 50-58, 70, 72-73 of 179.) For the vast majority of these statements, the alleged speakers did not swear to, sign, or otherwise acknowledge that the statements attributed to them were true and accurate. Many of the statements contain hearsay, and some even contain hearsay within hearsay. (See, for example, petitioner's Federal Habeas Exhibit #2 and State Habeas Exhibit #409, discussed at ECF No. 3-1 at 56 of 179.)

36. Such unsworn and unsigned statements are "not new, reliable evidence." Milton v. Sec'y, Dep't of Corr., 347 F. App'x 528, 531 (11th Cir. 2009) ("The alleged 'Oath Statement' of the victim's mother is not new, reliable evidence because it is not sworn to or signed by the purported author."); see also Melson v. Allen, 548 F.3d 993, 1003 (11th Cir. 2008) (concluding that a witness's purported statements were "unreliable because [he] did not make them in an affidavit," and the petitioner "instead [had] submitted an affidavit by a defense investigator recounting her interview with [the witness]"), cert. granted and judgment vacated on other grounds, 561 U.S. 1001 (2010); Fields v. Vaughn, Civil Action No. 3:08cv844, 2009 U.S. Dist. LEXIS 83934, at *25 (E.D. Va. Sep. 15, 2009) (holding that "unsigned and unsworn" letters could not be "considered *reliable* evidence"). And this Court should not consider

them in determining whether Crockett has met his burden to produce "new reliable evidence" of his innocence. Schlup, 513 U.S. at 324.

37. Likewise, Crockett goes to great lengths to impeach various witnesses and other individuals, including Jacob Palmer,[13] the man Crockett claims was driving the car when the crash occurred. (ECF No. 3-1 at 51-63.) But evidence that is merely impeaching, rather than exonerating, does not constitute "new reliable evidence" under Schlup. See Calderon v. Thompson, 523 U.S. 538, 562-63 (1998); Wadlington v. United States, 428 F.3d 779, 784 (8th Cir. 2005) (rejecting the petitioner's claim that an affidavit constituted "new reliable evidence" where the affidavit was "at best, impeachment evidence and [did] not exonerate" the petitioner); Vega v. Johnson, 149 F.3d 354, 364 (5th Cir. 1998) (noting that "newly discovered evidence demonstrating actual innocence" must be "material, not merely cumulative or impeaching") (internal quotation marks omitted).

38. Similarly, Crockett proffers a notarized letter from a psychologist named John Fabian in an effort to impeach Crockett's own statements to police after the accident. (ECF No. 3-1 at 67-69 of 179; petitioner's State Habeas Exhibit #411.) In the letter, Dr. Fabian admits that he has not had an opportunity to interview Crockett, but he nonetheless expresses his "professional concerns as to [Crockett's] mental state at the time of the offense and [his] ability to have understood [his] legal situation and the consequences, specifically of understanding and appreciating any Miranda rights that were

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[13] Jacob Palmer did not testify at trial, but Crockett attempts to impeach statements that Palmer made to the police and others.

given to [him].” (Petitioner’s State Habeas Exhibit #411 at 3 of 5.) Dr. Fabian also expresses his “concern[] about the usefulness and utility of any of the statements [Crockett] made at that time due to [his] fragile mental state that was affected by not only alcohol but also the effects of a concussion.” (Id.)

39. Crockett claims that Dr. Fabian’s report “strips Crockett’s [incriminating] statements of any real substance” and “goes a long way toward neutralizing what the Commonwealth leaned on as its best evidence at trial.” (ECF No. 3-1 at 68 of 179.) Again, though, this kind of impeachment evidence does not constitute “new reliable evidence” under Schlup. See Wadlington, 428 F.3d at 784; Vega, 149 F.3d at 364.

40. Moreover, psychological evaluations of this sort should rarely be sufficient to place a case like Crockett’s “into the class of extraordinary instances where the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting an fundamentally unjust incarceration.” Harris v. Vasquez, 949 F.2d 1497, 1515 (9th Cir. 1990) (internal quotation marks omitted). “Because psychiatrists disagree widely and frequently on what constitutes mental illness, a defendant could, if [Crockett’s] argument were adopted, always provide a showing of factual innocence by hiring psychiatric experts who would reach a favorable conclusion.” Id. (internal citation and quotation marks omitted); see also Griffin v. Johnson, 350 F.3d 956, 965 (9th Cir. 2003). Accordingly, Dr. Fabian’s letter does not constitute the type of “new reliable evidence” required to support a claim of “actual innocence” under Schlup, particularly in light of

the fact that he admits he has never examined Crockett and states his conclusions only in general terms.

41. Crockett also has not met his burden to establish that, "in light of new evidence, 'it is more likely than not that no reasonable juror would have found [Crockett] guilty beyond a reasonable doubt.'" House, 547 U.S. at 537 (quoting Schlup, 513 U.S. at 327). In its memorandum opinion, the Court of Appeals summarized the evidence and the primary contested issue of fact at Crockett's trial:

> The charge arose on December 28, 2008 when a car slammed into a tree in the 2100 block of Wolfsnare Road, Virginia Beach, killing Korte, who was in the front passenger seat. The defendant was also found in the car. Numerous residents of that area heard the sounds as the car slid out of control and struck the tree, but Pamela Patrick, Antoine Smith, and James Reid were the primary witnesses. They described seeing the car speed down Wolfsnare Road, lose control, and wreck. They explained what they observed about the car and its occupants immediately after impact. The police arrived at the scene about ninety seconds after the wreck.
>
> The Commonwealth maintained the defendant was the driver and the only other person in the car. The defendant maintained a third person, Jacob Palmer, was the driver and fled from the wreck without being seen by anyone at the accident scene. The factual issue at trial was the identity of the driver.

Crockett, 2014 Va. App. LEXIS 259, at *2-*3.

42. Although no one could testify that they saw who was driving at the time of the accident, the Commonwealth produced overwhelming

circumstantial evidence proving that Crockett was the driver.[14] For example, the Commonwealth introduced the following evidence at Crockett's trial:

- Antwon Smith testified that she was walking across Wolfsnare Road when she heard the sound of a car engine accelerating, turned and saw Crockett's car spin off the roadway and strike a tree, and then stood there watching the car until a woman who lived nearby came out and approached the car. (2/28/12 Tr. at 256-59.)
    - Smith testified she never saw anyone get out of the car. (Id. at 259.) And from the time she saw the car strike the tree until neighbors ran up to the car, Smith only took her eyes off the car for "[m]aybe five seconds, if that." (Id. at 274.)
- Another witness, Paula Patrick, testified that she heard the car from inside her house, walked outside and watched as it lost control and began to slide sideways. (Id. at 279-81.) After hearing the impact of the car striking the tree, Patrick walked down the steps, located the car, and walked quickly across the street towards it, arriving at the car less than a minute after the crash. (Id. at 282-84, 297-99, 302.)
    - Patrick testified that as she was walking across the street to the car, she did not see anyone get out of the car. (Id. at 284.)
    - When Patrick got to the car, she noticed that a boy's legs were sticking up in the front driver's side window, which was open. (Id. at 284, 286, 306-08.) This person was later determined to be Crockett. (Id. at 389.) Crockett was not moving or talking. (Id. at 285.)
    - Patrick added that she thought Crockett's legs were on top of the driver's seat, and his body was curved around so that his upper body was in the rear window with his arm protruding

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[14] Crockett has attached copies of the trial transcripts as exhibits to his state habeas petition, and he has filed digital copies of these exhibits in this Court on a CD. (ECF No. 10.) Accordingly, in the interest of conserving paper and other resources, the respondent has not attached copies of the trial transcripts as exhibits.

through the window onto the top of the car. (Id. at 286, 307-09, 313.)[15]

- Another witness, Bill Daniels, heard the crash, went outside and found the car wrapped around a tree. (Id. at 341-42.)
    - Daniels testified that he saw someone—whom he called the driver—laying with his legs in the front seat and his head in the backseat. (Id. at 343-44.)
    - Daniels did not see anyone get out of the car or running or walking away from the area. (Id. at 346.)
- Another witness, Holly Dickson, testified that she heard the crash, went outside, immediately walked up to the car which had crashed in her front yard, and saw a person—whom she called the driver[16]—laying across the driver's seat with his feet "where the steering wheel would be." (Id. at 358, 362-63.)
    - When defense counsel asked if someone could have escaped out the driver's window before she got to the vehicle, Dickson responded, "What I saw was someone passed out in that driver's seat, so it didn't seem likely to me." (Id. at 360.)
- Another witness, Kellen Dickson, testified that he heard the crash, looked out the front door, and saw a car wrapped around a tree in his front yard. (Id. at 366-67.) Dickson did not see anyone moving inside the car or getting out of the car or walking away from the car. (Id. at 367.)
    - Dickson called 911 and then walked outside to the car a few minutes later. (Id. at 373.) In the car, he "saw someone laying there on top of the driver's seat." (Id. at 368.) The seat "looked like it had just flattened out in the wreck." (Id.) And the headrest was at the person's "middle back and the rest of their lower body was on the driver's seat." (Id.)

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[15] For some reason, Crockett argues in his petition that the presence of *his* jacket on the ground at the scene of the accident proves that the jacket "could only have been left there by a third person who had been in the vehicle with Crockett and Korte but escaped." (ECF No. 3-1 at 45 of 179.) But it is far more plausible that the jacket was thrown out of the rear window when the window was shattered in the crash. (2/28/12 Tr. at 308.)

[16] Defense counsel objected when Daniels and Dickson called the person in the front seat—who turned out to be Crockett—the "driver," but the trial court did not rule on either objection. (Id. at 343, 358.)

- Officer Kenneth Buechner testified that he arrived at the scene approximately three-and-a-half minutes after the call came in to 911. (Id. at 395-96.) When he got there, he found Crockett positioned "on what remained of the driver's side of the vehicle in the front seat." (Id. at 389.) "[Crockett's] feet were under the steering wheel. His waist was where the center console would be." (Id.) And his shoulders "were behind the passenger seat." (Id.)
  - Officer Buechner added that the driver's seat had broken, so Crockett "wasn't in what would be considered a seated position in the seat, but he was still in the area that was the driver's position." (Id. at 389-90.)
  - When Officer Buechner arrived, Crockett was moving "[s]lightly, but he was unconscious." (Id. at 390.) Officer Buechner noticed that the passenger's head "was up against Mr. Crockett's waist area." (Id.)
  - As Crockett began to wake up, he began moving around and kicking inside the car, causing the passenger's head to move around "aggressively." (Id. at 391.) Officer Buechner and another police officer were forced to physically subdue Crockett, who continued fighting them and yelling at them to get off him. (Id.)
  - The passenger, Jack Korte, was pronounced dead at the scene. (Id. at 446.)
  - Officer Buechner noticed a strong odor of alcohol coming from the car. (Id. at 393.) When Crockett's blood was tested approximately a half-hour later, it revealed a blood alcohol content level between .14 and .15 percent. (Id. at 525-27.)
- Crockett was taken to the hospital, where he was examined and interviewed as part of a "routine, neurologic exam." (Id. at 685, 693.) The doctor who examined him determined that he was "alert, oriented, knew where he was, [and] was communicating properly." (Id. at 693-94.)
- Officer Fitz Wallace testified that he interviewed Crockett three times at the hospital. (Id. at 470-71, 496.) An audio recording of the first interview was introduced into evidence at trial. (Id.)
  - During the interviews, Wallace never directly asked Crockett if he had been driving the car, and Crockett never directly told Wallace that he was driving the car. At the end of the

first interview, though, Crockett asked Officer Wallace, "I mean, did I hit someone or I mean?" (Petitioner's State Habeas Exhibit #430 at 5:43-45.)

- Before the second interview, Officer Fitz read Crockett his Miranda rights, and Crockett agreed to talk. (Id. at 474-75.) At first Crockett denied that anyone else had been in the car with him, but he eventually admitted that his friend, Jack Korte, was also in the car. (Id. at 475-76.) When the officer told Crockett that Korte had not survived the accident, Crocket responded, "That figures." (Id. at 476.)

43. Against this backdrop of overwhelming circumstantial evidence, Crockett cannot establish that, "in light of new evidence, 'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'" House, 547 U.S. at 537 (quoting Schlup, 513 U.S. at 327). Setting aside the evidence chronicled earlier that cannot be considered "new reliable evidence" under Schlup, Crockett's most reliable new evidence includes a report prepared by David A. Pape, an expert engineer retained post-trial by Crockett's sentencing counsel to examine the front driver's side seatbelt, and an affidavit prepared by Ronald Kirk, an engineer who consulted with defense counsel about the accident. (ECF No. 3-1 at 69-71 of 179; petitioner's State Habeas Exhibits #407 and #412.)

44. In his report, Dr. Pape states that upon examining the front driver's side seatbelt, he discovered "cupping" on the seatbelt that was "consistent with loading from occupant forces during the collision and suggested that the seatbelt was being worn by the driver at the time of the collision." (Exhibit #407 at 2.) According to the report, "If the seatbelt was not in use during the collision one would not expect this cupping." (Id. at 3.) Dr.

Pape also added that, during his testing, there was "no indication that any of the seat belt components malfunctioned during the collision." (Id. at 2.)

45. First of all, while the cupping "suggested" that the seatbelt was being worn at the time of the accident, the report does not state conclusively that it was in use.[17] It remains possible that the seatbelt was not being worn by the driver at the time of the accident, and that some other explanation exists for the "cupping" that Dr. Pape believes he observed.

46. Moreover, even assuming Dr. Pape's conclusion is correct, that does not prove that Crockett was not the driver. While none of the witnesses who testified at trial remembered seeing Crockett wearing a seatbelt, none of them testified conclusively that he was *not* wearing a seatbelt either. For example, Kellen Dickson testified that he did not remember anything about the seatbelt. (2/28/12 Tr. at 381.) He could not say that he knew whether Crockett was wearing a seatbelt "one way or the other." (Id.) Similarly, Officer Buechner testified that he did not *recall* seeing a seatbelt on Crockett. (Id. at 398.) And Patrick, Daniels, and another witness merely testified that they did not see a seatbelt on Crockett either. (Id. at 320, 337, 351.)

47. That testimony does not foreclose the possibility that Crockett was wearing a seatbelt at the time of the accident and slipped out of it when the crash occurred—causing the front airbag to deploy, bending or breaking the driver's seat backwards towards the backseat, and apparently knocking

[17] The Supreme Court of Virginia cited the qualified nature of this conclusion in holding that it could not be said that there was a "reasonable probability that the result of the proceeding would have been different had this evidence been obtained and admitted before the jury." (Respondent's Exhibit 14 at 7-8.)

Crockett backwards and towards the rear window at the same time. (Id. at 308, 368, 409.) It also does not foreclose the possibility that the seatbelt malfunctioned, notwithstanding Dr. Pape's statement that he saw "no indication" it had malfunctioned when he tested it later. (Exhibit #407 at 2.)

48. Indeed, at least one witness who examined the vehicle at the scene concluded that Crockett was the driver and that he was wearing a seatbelt at the time of the accident. (Respondent's Exhibit 5, at Exhibit B page 1 of 2.) Officer Thomas Kellogg, a member of the "fatal crash team" at the Virginia Beach police department, testified that he was the lead investigator assigned to investigate the crash at issue. (2/28/12 Tr. at 575-76.) Officer Kellogg inspected the vehicle and apparently prepared a "crash scene worksheet" documenting his findings. (Respondent's Exhibit 5, at Exhibit B.)

49. The worksheet was not introduced into evidence at trial, but this Court still should consider the worksheet in resolving Crockett's actual innocence claim because, in resolving such a claim, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" House, 547 U.S. at 538 (quoting Schlup, 513 U.S. at 327-28).

50. The worksheet states that the suspect, Cameron Paul Crockett, was the vehicle's driver, and that he was "BELTED." (Respondent's Exhibit 5, at Exhibit B page 1 of 2.) The worksheet does not explain the basis for that conclusion, and Officer Kellogg was not asked to testify about the conclusion at

trial. Nonetheless, considered together with the fact that none of the other witnesses could testify conclusively about whether or not Crockett was wearing a seatbelt at the time of the accident, the apparent presence of "cupping" on the seatbelt is not enough to make it "more likely than not that no reasonable juror would have found [Crockett] guilty beyond a reasonable doubt" in light of Dr. Pape's report. Schlup, 513 U.S. at 327.

51. This is particularly true in light of the other evidence in the record making it extremely improbable that anyone other than Crockett was driving the vehicle at the time of the accident. Antwon Smith testified that she saw the accident happen and then kept her eyes on the vehicle for all but approximately five seconds until neighbors came outside of their homes and approached the car. (2/28/12 Tr. at 256-59, 274.) In less than a minute, at least two people had reached the wrecked vehicle, and more soon arrived. (Id. at 282-84, 297-99, 302, 323.) None of these witnesses saw anyone exiting the vehicle or leaving the scene. (Id. at 259, 284, 346, 367.) And multiple witnesses testified that they observed Crockett's lower body, including his feet and his legs, in the driver's compartment and in the driver's seat immediately after the crash occurred. (Id. at 284, 286, 306-08, 343-44, 358, 360, 362-63, 368.) Paula Patrick, apparently the first person to arrive at the vehicle, saw Crockett's legs sticking up in the driver's side window when she got to the car. (Id. at 284, 286, 306-08.)

52. To believe that someone other than Crockett was driving, a jury would have to believe that this other driver survived the fatal crash, extricated

himself from his seatbelt, the deployed airbag, and out from under Crockett—whose feet and legs somehow had been thrown forward and upward from the backseat into the front seat during the accident—and then climbed out the driver's side window—the same window where Crockett's feet had settled after the crash—and disappeared into the night unseen and unhurt, all within the few seconds that Antwon Smith's attention was directed away from the car and during the less than a minute that it took neighbors to begin arriving at the car. A jury also would have to believe that Crockett forgot that he had been riding in the backseat—not driving—when he asked Officer Wallace if he had "hit someone," and when he denied anyone else was in the car. (Exhibit #430 at 5:43-45.) Seatbelt or no seatbelt, a reasonable jury could have rejected that theory of the case and convicted Crockett in light of all the evidence.

53. Ronald Kirk's affidavit does not support a different conclusion. Mr. Kirk states that, based on his viewing of the vehicle and the accident site, he is "confident, to a reasonable degree of engineering certainty, that Mr. Crockett could not have been found where he was by the first witness to respond to the accident if he had been the belted driver." (Exhibit #412 at 1.) But Mr. Kirk did not observe where Crockett's body came to rest inside the vehicle after the accident, and he does not explicitly state which witness's testimony he is relying on, which portion of that witness's testimony he is relying on, or even whether he is relying on witness testimony at all as opposed to some third party's recollection or representation of a witness's statements or testimony. Accordingly, Kirk's assumption that Crockett was not wearing a seatbelt—even

coupled with Dr. Pape's report—does not make it "more likely than not that no reasonable juror would have found [Crockett] guilty beyond a reasonable doubt." Schlup, 513 U.S. at 327.

54. Perhaps recognizing the limitations of Kirk's affidavit, Crockett attempts to bolster it using what he describes as trial counsel's "studious notes of Kirk's mental impressions." (ECF No. 3-1 at 72 of 179.) Crockett attached these notes to his state habeas petition as Exhibit #143. But because the notes contain statements allegedly attributed to Kirk and Kirk has not vouched for them in any way, the notes do not constitute "new reliable evidence" under Schlup. See Milton, 347 F. App'x at 531; Melson, 548 F.3d at 1003 Fields, 2009 U.S. Dist. LEXIS 83934, at *25.

55. Moreover, while the notes do appear to reflect portions of trial counsel's conversation with Kirk, they are written in shorthand and are difficult to decipher. And Crockett overstates them in key respects.

56. For example, Crockett claims that the notes reflect Kirk's belief "that the tree's penetration into the passenger side of the vehicle would have forced the driver towards the driver's door and somewhat towards the front—not into the back." (ECF No. 3-1 at 72 of 179.) But while the notes do appear to state this hypothesis, it is unclear whether this was Kirk's theory or counsel's. (Exhibit #143 at 2.)

57. Crockett further states that the notes prove that Kirk told counsel that the passenger's movement toward the driver's compartment "would have kept the driver in the driver's seat and prevented him from sliding out." (ECF

No. 3-1 at 72 of 179.) But the notes merely appear to state that the passenger "conceivably" could have kept the driver in the driver's seat, and that hypothesis also is not explicitly attributed to Kirk. (Exhibit #143 at 2.)

58. Finally, Crockett asserts that the notes demonstrate that Kirk "opine[d] that the driver definitely could have escaped without significant injury because Mr. Korte's body would have shielded him from the brunt of the impact." (ECF No. 3-1 at 72 of 179.) But, again, the notes do not ascribe this hypothesis to Kirk. (Exhibit #143 at 3.) And the notes certainly do not ascribe to Kirk an opinion that the driver "definitely" could have escaped unharmed. (ECF No. 3-1 at 72 of 179.) Accordingly, even considering the notes together with Kirk's affidavit and Dr. Pape's report, Crockett has failed to demonstrate that it is "more likely than not that no reasonable juror would have found [Crockett] guilty beyond a reasonable doubt" in light of the new evidence Crockett has proffered. Schlup, 513 U.S. at 327. And that conclusion holds true even if the Court considers *all* the evidence—reliable and unreliable—that Crockett has proffered in support of his "actual innocence" claim.

59. For these reasons, Crockett has failed to demonstrate cause and prejudice or actual innocence to overcome his procedural default in state court, and this failure precludes federal habeas review of claims V and VIII. Gray, 518 U.S. at 162; Coleman, 501 U.S. at 750; Teague, 489 U.S. at 298; Bassette, 915 F.2d at 937. And claim I, Crockett's "actual innocence" claim, fails as a "freestanding" claim both because the Supreme Court has not recognized such

claims and because, even if it did, the claim would fail on the merits. Accordingly, claims I, III, IV, V, and VIII must be dismissed.

CROCKETT'S NON-DEFAULTED CLAIMS FAIL ON THE MERITS

60. Crockett's remaining claims fail on the merits. This Court's merits review is governed by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA standard requires deference to the state court's merits decision unless the decision was (1) contrary to, or an unreasonable application of, a clearly established United States Supreme Court decision, or (2) based on an unreasonable determination of facts. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 403-13 (2000); see also Booth-El v. Nuth, 288 F.3d 571, 575 (4th Cir. 2002) (same).

61. Section 2254(d) provides a "highly deferential standard for evaluating state court rulings . . . which demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted). "The question under AEDPA 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). "A state court's determination that a claim lacks merit *precludes* federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011) (emphasis added) (internal quotation marks omitted).

62. Finally, to prevail on a claim of ineffective assistance of counsel, the petitioner must show that his attorney's performance was both deficient and that he was prejudiced as a result. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In federal habeas corpus, however, "courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)." Richter, 562 U.S. at 105. "The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." Id. (internal citations and quotation marks omitted). Indeed, "[w]hen § 2254(d) applies, the question is *not* whether counsel's actions were reasonable," it is "whether there is *any reasonable argument* that counsel satisfied Strickland's deferential standard." Id. (emphasis added).

63. 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 second prong of the Strickland test, the "prejudice" inquiry, requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112.

64. An ineffective assistance of 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 also Strickland, 466 U.S. at 697.

65. In claim II, Crockett alleges that trial counsel was ineffective for failing to investigate and present exculpatory evidence involving the driver's seat belt mechanism. Specifically, Crockett asserts that while the defense identified an expert who could have examined the seatbelt, counsel failed to follow up with that expert to secure the examination before trial. Crockett claims that failure constitutes constitutionally deficient performance, and that he was prejudiced as a result. This claim is without merit.

66. As Crockett notes in his petition, when he raised this claim in his state habeas petition, the trial court held that it did not satisfy either prong of Strickland, but the Supreme Court of Virginia reached a different conclusion on the deficient performance prong on appeal. (Respondent's Exhibit 14 at 7.) "Notwithstanding counsel's deficient representation," though, the Supreme Court still held that "Crockett [had] failed to establish prejudice under Strickland." (Id. at 7.)

67. While the Supreme Court's conclusion on the deficient performance prong prevents this Court from giving any deference to the trial court's conclusion that counsel's performance was not deficient, this Court still can review the deficient performance prong *de novo* to determine whether Crockett met his burden to establish that counsel's performance was constitutionally deficient. See Daniels v. Lafler, 501 F.3d 735, 740 (6th Cir. 2007) (concluding that *de novo* review is appropriate in cases where, like here,

a state habeas court treats an issue "in a manner favorable to the petitioner but not dispositive of his claim for relief").

68. As the trial court held in this case, counsel's affidavit demonstrates that he "diligently pursued the possibility of obtaining the services of an expert to analyze the seat belt mechanism," but the individual identified to do the analysis reported that he was unable to perform the desired test, and counsel ultimately decided not to pursue the testing further for tactical reasons. (Respondent's Exhibit 13 at 25-26.) Counsel reasonably feared that such testing might prompt the Commonwealth to secure expert testimony of its own to help the Commonwealth establish that Crockett was the vehicle's driver. (Id. at 26.)

69. "Numerous choices affecting conduct of the trial, including the objections to make, *the witnesses to call*, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for trial." Gonzalez v. United States, 553 U.S. 242, 249 (2008) (emphasis added). "Good advocacy requires 'winnowing out' some arguments, witnesses, evidence, and so on, to stress others." Chandler v. United States, 218 F.3d 1305, 1319 (11th Cir. 2000) (en banc).

70. Accordingly, decisions that "primarily involve trial strategy and tactics, such as what evidence should be introduced," are "[d]ecisions that may be made without the defendant's consent." Sexton v. French, 163 F.3d 874, 885 (4th Cir. 1998) (internal quotation marks omitted). And such tactical

decisions may not be second-guessed on collateral review. See Strickland, 466 U.S. at 689, 699 (holding that counsel's decision not to seek out character witnesses to testify at the sentencing hearing was the result of a reasonable strategic choice); Williams v. Dixon, 961 F.2d 448, 451 (4th Cir. 1992) (refusing to engage in "excessive second-guessing" of counsel's decision not to seek out certain witnesses to testify at trial).[18]

71. Moreover, counsel also is not ineffective for eschewing a seemingly plausible trial strategy that "has the potential of being 'double-edged.'" Prieto v. Warden, 286 Va. 99, 114, 748 S.E.2d 94, 107 (2013) (quoting Lewis v. Warden, 274 Va. 93, 116, 645 S.E.2d 492, 505 (2007)). And counsel reasonably could have feared that the Commonwealth might counter any expert testimony about the seatbelt that the defense produced with expert testimony of its own demonstrating that Crockett was the driver. See Richter, 562 U.S. at 108 (noting that "the court failed to recognize that making a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on the blood pool's origins and composition; and once matters proceeded on this course, there was a serious risk that expert evidence could destroy [the defendant's] case"). For these

[18] See also Chandler v. United States, 218 F.3d 1305, 1314 n.14 (11th Cir. 2000) (noting that "calling some witnesses and not others is the epitome of a strategic decision," which "a court must not second-guess") (internal quotation marks omitted); United States v. Kozinski, 16 F.3d 795, 813 (7th Cir. 1994) (stating that "the decision whether to call a defense witness is a strategic decision," which must be afforded "enormous deference" on collateral review); Smith v. United States, 454 A.2d 822, 825 (D.C. 1983) (noting that "the decision to call witnesses is a judgment left almost exclusively to counsel") (internal quotation marks omitted).

reasons, this Court should hold that Crockett has failed to show that counsel's performance was constitutionally deficient, notwithstanding the Supreme Court of Virginia's holding to the contrary.

72. Additionally, the Supreme Court of Virginia's holding that Crockett had failed to prove Strickland prejudice, was neither contrary to nor based on an unreasonable application of United States Supreme Court precedent, nor was it based on an unreasonable determination of the facts. In reaching that conclusion, the Supreme Court of Virginia noted that Dr. Pape's report "only 'suggest[ed]' the driver's seatbelt was in use at the time of the crash based on 'cupping' on the belt." (Respondent's Exhibit 14 at 7.) "Thus, based on this report," the Supreme Court continued, "it cannot be said there is a reasonable probability that the result of the proceeding would have been different had this evidence been obtained and admitted before the jury." (Id. at 7-8.)

73. Factfinders are not required to believe expert testimony. See CVD, Inc. v. Raytheon Co., 769 F.2d 842, 853 (1st Cir. 1985) (noting that "the jury was not required to believe" the expert testimony proffered by the defense); Hall v. Tex. & N. O. R. Co., 307 F.2d 875, 880 (5th Cir. 1962) ("Juries are not required to believe every expression of opinion by an expert or any other witness."); Street v. Street, 25 Va. App. 380, 389, 488 S.E.2d 665, 669 (1997) ("The trial court was not required to believe or to give weight to the expert opinions.").

74. And a state habeas court can reasonably conclude that expert testimony that merely suggests possible conflicts in the evidence is not

sufficient to create a substantial likelihood of a different result at trial.[19] See Richter, 562 U.S. at 112 (holding that it "would not have been unreasonable for the California Supreme Court to conclude [the petitioner's] evidence of prejudice fell short," given that the petitioner's "expert's claim about the size of [a] blood pool could be taken to suggest only that the wounded and hysterical [victim] erred in his assessment of time or that he bled more profusely than estimated").

75. This is particularly true in cases where, as here, there is "sufficient conventional circumstantial evidence pointing to [the petitioner's] guilt." Id. at 113. Multiple witnesses testified that they saw Crockett positioned with the lower portion of his body still in the driver's seat moments after the fatal crash, and none of the multiple witnesses saw anyone exit the vehicle and flee the scene. Moreover, Crockett's position in the driver's seat with his legs sticking up at the driver's side window would have made it extremely difficult, and perhaps even impossible, for a belted driver to have escaped out from under Crockett and the deployed airbag and out the window before onlookers arrived. Finally, the seatbelt evidence does not explain Crockett's inquiry after the accident whether he had "hit someone." (Exhibit #430 at 5:43-45.) Here, as in

[19] Crockett argues in his petition that Dr. Pape would have gone significantly further in his trial testimony had he been called to testify. (ECF No. 3-1 at 90-93 of 179.) But he has not proffered an affidavit or sworn statement from Dr. Pape to support that claim, relying instead on sentencing counsel's proffer at the trial level and on an unsigned, unsworn email sent from Dr. Pape stating only that he was confident about the conclusions contained in his report to a reasonable degree of engineering certainty. (Id.; Exhibit #407 at 10 of 15.) Even allowing for the possibility that Dr. Pape might have gone further if he had been called to testify, the Virginia Supreme Court cannot have been unreasonable for relying on the plain language contained in Dr. Pape's report.

Richter, there was "ample basis for the [Virginia] Supreme Court to think any real possibility of [Crockett's] being acquitted was eclipsed by the remaining evidence pointing to guilt." 562 U.S. at 113.[20] For these reasons, claim II should be dismissed because it is without merit.

76. In claim VI, Crockett alleges that the prejudice resulting from the Commonwealth's nondisclosures should be weighed cumulatively with the prejudice resulting from trial counsel's ineffectiveness. For the reasons stated its order, the trial court reasonably rejected this argument when Crockett raised it in his state habeas petition. (Respondent's Exhibit 13 at 14-15 (citing Lenz v. Warden, 267 Va. 318, 340, 593 S.E.2d 292, 305 (2004); Mueller v. Angelone, 181 F.3d 557, 586 n.22 (4th Cir. 1999); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998).) The Supreme Court of Virginia did not disturb that ruling on appeal. See Ylst, 501 U.S. at 803. And claim VI therefore does not entitle Crockett to relief and should be dismissed.

77. In claim VII, Crockett alleges that the Commonwealth violated Batson v. Kentucky when it struck two African-American women from the venire, and the trial court should have required the prosecution to give race-neutral reasons for its strikes because the defense stated a prima facie case of discrimination. The Court of Appeals reasonably rejected this argument when Crockett raised it in on direct appeal. Crockett, 2014 Va. App. LEXIS 259, at *10 (noting that the "defendant made no attempt to identify facts and

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[20] Crockett relies heavily on two juror affidavits in an effort to prove Strickland prejudice. (ECF No. 3-1 at 104-06.) Such reliance is improper and misplaced. See Pena-Rodriguez, 137 S. Ct. at 869; Tanner, 483 U.S. at 119; McDonald, 238 U.S. at 269; Summers, 431 F.3d at 873; Williams, 16 F.3d at 636.

circumstances that would raise the inference that the Commonwealth struck the two [African-American] females based upon their race"). The Supreme Court of Virginia did not disturb that ruling on appeal. See Ylst, 501 U.S. at 803. And claim VII therefore does not entitle Crockett to relief and should be dismissed.

78. Every allegation not expressly admitted should be taken as denied.

79. Crockett's claims can be disposed of on the basis of the record alone, and an evidentiary hearing in this Court is unnecessary. See 28 U.S.C. § 2254(e)(1) and (e)(2). Crockett also has not shown good cause to demonstrate that he should be entitled to discovery, and this Court should deny his motion for discovery.

80. The respondent has requested transfer of the state court records.

WHEREFORE, the respondent prays that the petition for a writ of habeas corpus be denied and dismissed with prejudice, without an evidentiary hearing, and without discovery.

Respectfully submitted,

HAROLD W. CLARKE,
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CERTIFICATE OF SERVICE

I certify that on May 10, 2018, I electronically filed the foregoing Brief in Support of Rule 5 Answer and Motion to Dismiss with the Clerk of the Court using the CM/ECF system; and I certify that I have mailed the document, with exhibits, and a copy of the Notice of Electronic Filing (NEF) to the *pro se* petitioner, Mr. Cameron Paul Crockett, No. 1464770, Indian Creek Correctional Center, P. O. Box 16481, Chesapeake, VA 23328-6481.

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