No. 97-6999
A-408

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

THOMAS H. BEAVERS, JR.,

Petitioner-Appellant,

versus

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S MOTION TO SUPPLEMENT THE RECORD

Mark Evan Olive
Attorney at Law
2014 Lee Avenue
Tallahassee, FL 32312
(904) 531-0119

Counsel of Record for Petitioner

December 8, 1997

PETITIONER'S MOTION TO SUPPLEMENT THE RECORD

Comes the Petitioner, by and through undersigned appointed counsel, and respectfully requests that the Court enter an Order allowing supplementation of the record, and for cause shows as follows:

1. One of the claims made by Petitioner is that he has brain damage and that trial counsel and his pre-trial "expert" unreasonably failed to note and present strong evidence of this damage at guilt/innocence and sentencing, in violation of the Sixth, Eighth, and Fourteenth Amendments.

2. In the district court, counsel for Petitioner filed a report that was generated pre-trial and which explained that an MRI film of Petitioner's brain showed brain damage. J.A. 38. Petitioner also submitted two reports--generated during post-conviction proceedings--which discussed the same MRI and the fact that it showed brain damage. J.A. 336-354. Petitioner claimed, inter alia, that the failure of trial counsel and their expert to recognize and present this brain damage, clearly evidenced on film, violated the Constitution.

3. While reports about the film were submitted with the petition below, the actual film was not submitted. Counsel anticipated that a hearing of some sort would be allowed, if only on Respondent's motion to dismiss, and that the actual film could be proffered then. However, no hearing of any sort was allowed,

and no opportunity for submitting the actual film arose. Relief was summarily denied.

4. Before the circuit court, counsel for Petitioner filed a notice of intent to rely upon the film, and to exhibit it during oral argument before the panel, but counsel ultimately did not press to use the film as an exhibit during oral argument.

5. After the decision of the panel issued, Petitioner sought to supplement the record with the actual film, but permission was denied by the Circuit Court. See Attachment B, Petition for Writ of Certiorari, p. 3.

6. Petitioner believes that it would aid the Court in considering the petition for writ of certiorari if the actual film of Petitioner's brain, and a normal brain, is in the record.

7. The expert who submitted reports about the film in the district court has actually marked on the film where the brain damage is, and has submitted a letter/report to undersigned counsel verifying that the picture of the brain upon which he has marked is the same picture upon which his reports below were based.

8. Filed as an attachment hereto is a sealed envelope containing the film with typing on it showing where the brain damage is, and the report about these markings submitted by the expert. The envelope is sealed so that the Court can strike it, if the Court is so inclined, without looking at what is not in the record as of yet.

9. However, Petitioner urges the Court to allow this supplementation of the record. Petitioner is not seeking to change any claim heretofore submitted. **Petitioner seeks only to have before the Court the actual brain scan from which three reports, already in the record below, were derived. In other words, three "word pictures" of the report are in the record; the actual picture is not.**

10. The picture is material, and the interests of justice warrant this requested supplementation. Under these circumstances, supplementation is allowable. See Jones v. White, 992 F.2d 1548 (11th Cir. 1993); Lesko v. Lehman, 925 F.2d 1527, 1538 n. 8 (3d Cir.), cert. denied, 112 S. Ct. 273 (1991); Fed. R. App. P. 10(e).

WHEREFORE, Petitioner respectfully requests that the Court enter an order allowing supplementation of the record.

Respectfully Submitted,

Mark E. Olive
Attorney At Law
2014 Lee Avenue
Tallahassee, Florida 32312
(904) 531-0119

Counsel for Petitioner

December 8, 1997

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

Case No. 97-6999

THOMAS H. BEAVERS, JR.,

Petitioner,

v.

SAMUEL V. PRUETT, Warden
Mecklenburg Correctional Center
Boydton, Virginia,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

CERTIFICATE OF SERVICE

I, Robert Lee, a member of the Bar of this Court, do hereby certify that the foregoing motion to supplement the record was sent, first-class postage prepaid, to Katherine P. Baldwin, Assistant Attorney General for the Commonwealth of Virginia, 900 East Main St., Richmond, VA 23219, and via facsimile at (804) 786-0142 this 5th day of December, 1997.

R. Lee

12/97

Note * FYI

A cover letter was Attached to the Cert. Petition + A motion to Supplement THE RECORD and Sent to the Governor in regard to A "Clemency" The letter stated the claims that was being raised in the Cert. ~~petition~~ petition

MARK EVAN OLIVE
ATTORNEY AT LAW
2014 LEE AVENUE
TALLAHASSEE, FLORIDA 32312
(904) 531-0119 OFFICE
(904) 531-0319 FACSIMILE

Mark C. Christie, Esq.
Office of the Governor
State Capitol, 3rd Floor
Richmond, Virginia 23219

Via Hand Delivery

Re: Clemency Petition of Thomas H. Beavers, Jr.; execution scheduled for December 11, 1997

Dear Mr. Christie:

I intend to meet with you on Wednesday, December 10, 1997, to discuss why the Governor should grant clemency to Mr. Beavers. The primary reasons are that Mr. Beavers' brain does not and never has worked correctly, and that no court, judge, or juror, has been presented with or considered this fact.

Enclosed is a copy of a petition for writ of certiorari filed in Mr. Beavers' case. Also enclosed are the reports of Dr. James Merikangas identifying and explaining the effects of Mr. Beavers' brain damage. These materials set forth the bases for my request for clemency for Mr. Beavers.

I look forward to meeting with you on Wednesday.

Sincerely,

Mark Evan Olive

Counsel for Thomas H. Beavers, Jr.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

THOMAS H. BEAVERS, JR.,

Petitioner-Appellant,

versus

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Mark Evan Olive

Attorney at Law
2014 Lee Avenue
Tallahassee, FL 32312
(904) 531-0119

Counsel of Record for Petitioner

December 4, 1997

This is a capital case.

QUESTIONS PRESENTED

Petitioner's claim a.) that expert trial assistance with respect to his mental state was "integral to the building of an effective defense," Ake v. Oklahoma, 470 U.S. 68, 83 (1985), but that b.) his appointed defense expert failed "to conduct a *professional* examination on issues relevant to the defense," id. (emphasis added), 470 U.S. at 82, in violation of the Sixth, Eighth, and Fourteenth Amendments, was not addressed in state habeas corpus proceedings because the Virginia courts ruled that the claim should have been raised on direct appeal. The United States Court of Appeals for the Fourth Circuit held that Petitioner's claim was procedurally barred from review under 28 U.S.C. Section 2254 and dismissed Petitioner's attempt to appeal the district court's judgment denying habeas corpus relief.

This case presents the following questions:

Whether a state court post-conviction ruling that a claim must have been raised on direct appeal, when the claim dehors the record on appeal, provides an adequate basis for the state court not to address the federal constitutional merits of the claim, and whether that ruling can foreclose federal court review of the claim under 28 U.S.C. Section 2254?

If the claim that an appointed defense mental health expert failed to perform an appropriate evaluation must be raised on direct appeal, does the Sixth Amendment require that defense counsel create the record at trial and on appeal that will allow the Ake issue to be raised?

Does this Court have jurisdiction to consider this petition for a writ of certiorari when the lower court denied a certificate of appealability? (See Hohn v. United States, No. 96-8986.)

Did the lower court apply the certificate of appealability/ certificate of probable cause to appeal standard of Barefoot v. Estelle, 463 U.S. 880 (1983), properly?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

THOMAS H. BEAVERS, JR.,

Petitioner-Appellant,

versus

SAMUEL V. PRUETT, Warden,
Mechlenburg Correctional Center,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Thomas H. Beavers, Jr., a Virginia death-sentenced inmate, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit denying a certificate of appealability and dismissing by unpublished opinion Petitioner's attempt to appeal the decision of the United States District Court for the Eastern District of Virginia denying habeas corpus relief.

OPINIONS BELOW

The unpublished opinion of the circuit court entered September 23, 1997, is attached as Appendix A to this petition.

The Order entered November 4, 1997, denying rehearing and suggestion of rehearing en banc is attached as Appendix B. The opinion of the district court is attached as Appendix C.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254(1) and Title 28 U.S.C. Section 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

I. Introduction

Mr. Beavers was convicted and sentenced to death for a murder that occurred because Mr. Beavers' brain did not, does not, and never has worked right. It does not work correctly because

> Mr. Beavers has a congenital malformation of the brain and a tumor of the pineal gland in the brain. Both of these neuroanatomic abnormalities are of

> significance to his mental state at the time of the offenses .... The cerebellum of the brain which, in the case of Mr. Beavers is malformed, has complex relationships with the rest of the brain primarily of an inhibitory nature. The cerebellum is important to cognition and there is a great deal of literature regarding the importance of the cerebellum to such psychiatric illnesses as autism, violent behavior and mental retardation.
>
> The pineal gland is involved in sexual development and may be producing hormones which have adverse effects on Mr. Beavers' sexual behavior.

J.A. 339-40.[1]

The jurors who judged Mr. Beavers were not told about Mr. Beavers' handicap despite the fact that it was documented on film at the time of trial. The jurors' ignorance was not brought about as a matter of strategy on defense counsel's part, nor was it because brain damage was a "theory" that was rejected by some pre-trial expert. The defective brain simply was not shown to the jurors because it went unnoticed by counsel and by the defense "expert." Consequently, the jurors did not know that "because of neurological and psychiatric forces, Beavers was impaired at the time of his offense and this impairment would provide either a defense or powerful evidence in mitigation of punishment." J.A. 366 (district court opinion).

In post-conviction proceedings, counsel for Petitioner discovered that the expert who had been appointed to assist the defense at trial, Dr. Gwaltney (a psychologist), did not perform

---

[1]Pursuant to 21 U.S.C Section 848, the district court judge appointed an expert psychiatrist, Dr. James Merikangas, who conducted an appropriate evaluation of Petitioner. J.A. 336-344, 345-354. The above-quoted information is taken from Dr. Merikangas' report.

a competent or appropriate evaluation of Petitioner. Dr. Gwaltney's files documented, in his own words, that he did not have sufficient information to, and so could not, diagnose Petitioner. Information essential for a proper evaluation included that Mr. Beavers' mother was extremely mentally ill. Readily available psychiatric hospital records document that *she attempted to kill him by drowning when he was a few months old.* Life with this schizophrenic mother, who was in and out of mental hospitals all of her life, was so dysfunctional, threatening, and chaotic for Mr. Beavers that *he planned suicide from the time he was five years old, and tried to kill himself as a child and as an adolescent.*[2] The jurors did not know this, did not know that social service agencies and medical professionals had documented Petitioner's childhood abuse at the hands of his mother and father, and did not know the psychiatric forensic consequences of this history--all because the expert appointed to assist Mr. Beavers at trial did not have the information.[3]

As set forth in section II, c, of the statement of the case, infra, the only defense to the crime for which Mr. Beavers was convicted, and to the state's evidence introduced to show future dangerousness at capital sentencing, was Mr. Beavers' mental

---

[2]Mr. Beavers' mother has been treated all of her life for paranoid schizophrenia and bipolar disorder. Her illness rendered her chronically psychotic, and she was involuntarily committed many times.

[3]Mr. Beavers was involuntarily hospitalized in a psychiatric hospital six months before the offense. He was taking prescribed anti-psychotic medication during his trial.

illnesses and defects. Even a non-independent psychiatrist opined pre-trial that the issue of insanity was a serious one. Thus, the need for a *defense* mental health expert .

In state habeas corpus proceedings, the Petitioner raised the claim that his expert had not performed. The Virginia Supreme Court ruled that the claim should have been raised on direct appeal. The United States Court of Appeals for the Fourth Circuit held that this state ruling barred federal review of Petitioner's challenge. Beavers v. Pruett, No. 97-4 (4th Cir. September 23, 1997)(unpublished)(Wilkins, J., joined by Luttig, J., and Williams, J.).

In this Petition, Petitioner shows that under the circumstances presented by the state court's and the federal court's orders, Ake does not provide an enforceable federal due process right in Virginia.

II. Facts Relevant to Arguments Presented

a. What was known by counsel on direct appeal: there was a serious question regarding Petitioner's state of mind, but an unhelpful "diagnosis" by the defense expert

By pre-trial court order, Petitioner was evaluated by Don H. Killian, Ph.D., for competency and sanity. Dr. Killian found petitioner competent, *but had serious questions about Mr. Beavers' mental state at the time of the crime*. On June 18, 1991, he wrote to the Commonwealth's Attorney about these

concerns[4] and indicated that "further studies" were needed, stating: "I do not think that these further studies can be conducted on an outpatient basis here (the Riverside Center for Psychological Services)." Dr. Killian recommended that the studies occur at Central State Hospital. J.A. 009. Defense counsel was provided a "cc" of this letter.

Killian also wrote to defense counsel on June 18, 1991, and elaborated on his letter to the Commonwealth's Attorney. Killian discussed his concerns about Petitioner's mental state at the time of the offense, and stated that "these concerns would be better addressed at Central State Hospital."[5]

---

[4]In his letter to the Commonwealth's Attorney, Killian said:

> The Mental Status at the Time of the Offense evaluation is considerably more complex. Without getting into any kind of detail, and based upon my examination, **I do think that there are some major issues and questions here which need further study and clarification.** These questions and issues are I believe particularly important and pertinent because of the gravity of the charges against him and because of the role of possible psychiatric or psychological factors in the case of such a grave charge.

J.A. 009 (emphasis added).

[5]In the letter to defense counsel, Killian stated:

> I think that there are two issues which Central State Hospital is in a better position to explore than I am. The first is a straightforward one, and surrounds Mr. Beavers' contention that he was extremely intoxicated on both cocaine and alcohol at the time of the alleged offense. As I understand it, self-induced intoxication can be an issue in capital murder. The second is a more difficult point. Mr. Beavers **gives a fairly good description of at least a partial dissociative**

(continued...)

Defense counsel was thus aware that outpatient evaluation was not sufficient, and that inpatient evaluation at Central State Hospital might adequately assess Mr. Beavers' mental state at the time of the offense. Defense counsel also was aware that inpatient help was not going to occur. On July 18, 1991, one defense counsel wrote to his co-counsel:

> The people at the jail seem to think that Central State would call for Beavers to be sent up, but that they might not be keeping him overnight. I've never known this to be the case. Everyone that I had that Dr. Killian thought needed further study were looked at as inpatients.

J.A. 010.

On August 8, 1991, Petitioner was seen, on an out-patient basis, at Central State Hospital, by two state psychiatrists. These two state psychiatrists (Scott and Kasper) reported to the trial court, to the Commonwealth, and to defense counsel that Petitioner was "taking a psychotropic medication," and that, "given the defendant's history of impulsive behavior with poor

---

[5](...continued)
experience during some of the events which led to his arrest. He, for example, describes himself as 'like outside of myself, looking at my hand, real weird, like someone else controlling me, like I was in shock.' He goes on to say 'like I was looking, like someone had me, like looking at me and at her both.' I cannot determine exactly how much credibility to assign to this report, and I can additionally not determine how significant in degree his alteration of consciousness may have been. **I do think that the staff at Central State Hospital would be able to evaluate him more thoroughly on this ...**

J.A. 008.

judgment ... we would recommend that Mr. Beavers continue to receive close psychiatric observation and treatment while incarcerated." J.A. 014

These two psychiatrists also reported that Petitioner was not insane at the time of the offense. Their diagnosis was that Petitioner suffered from polysubstance abuse, had an antisocial personality disorder, and had no major mental illnesses. J.A. 024

Thereafter, on November 26, 1991, counsel for Petitioner sought, and the trial court ordered, a defense mental health evaluation "as required pursuant to 19.2-169.5." See Motion for Psychiatric Assistance, filed November 8, 1991; see also J.A. 26-27 (court order that evaluation "shall be performed pursuant to Virginia Code Section 19.2-169.5 ..."). Virginia Code Section 19.2-169.5 applies when "there is probable cause to believe that the defendant's sanity will be a significant factor in his defense and that the defendant is financially unable to pay for expert assistance." By the same motion and order, a defense expert was sought and granted "for the purpose of evaluating the defendant and to assist in his defense in the preparation and presentation of information concerning the Defendant's history, character, or mental condition." Id.

Henry O. Gwaltney, Jr., Ed.D., worked at Central State Hospital. He was appointed as a **defense** psychologist under Virginia Code § 19.2-264.3:1. Instead of independently evaluating Petitioner, Gwaltney evaluated him with Dr. Scott, who had earlier evaluated Petitioner for the Court by Court order, with

respect to competency and sanity, not mitigation. In other words, Gwaltney evaluated Petitioner with one of the persons whose evaluation he was supposed to be critiquing for defense counsel.

Gwaltney reported to defense counsel that the scan of Petitioner's brain "revealed nothing relevant," that he agreed with the non-independent experts' diagnosis of "anti-social personality disorder,"[6] and that there was nothing that could be presented in mitigation of punishment--it would be "fruitless." J.A. 045.

b. What was learned in post-conviction proceedings:

Trial counsel handled Petitioner's appeal to the Virginia Supreme Court. They did not attempt, either at trial or on appeal, to learn the bases for their defense expert's report, or to provide the expert with sufficient information to make a diagnosis.

1. The defense expert, Gwaltney, was unable to perform, and was incompetent

a. Gwaltney wrote in his files that he could not diagnose the defendant because he had no information about him

Post-conviction counsel obtained Gwaltney's files. In his notes, Gwaltney documented that he had insufficient information

[6]Gwaltney could not form his own diagnosis because he had inadequate information, as he acknowledged in notes to his file. Thus, he simply agreed with the diagnosis of a non-independent expert.

to evaluate and diagnose Petitioner. Gwaltney's file contains a typed document entitled "Statistical Release Note," which recites that

> [Beavers] was admitted into the Forensic Unit on an overnight, out-patient basis. A complete work-up is not done in such cases pursuant to Hospital Instruction #5150.5A.

J.A. 041. Despite the fact that Mr. Beavers was sent to Central State Hospital specifically because outpatient evaluation was insufficient, an outpatient "evaluation" was what he received, not a "complete work-up."

Psychiatric and psychological diagnoses are made on five "Axes." See American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Washington, D.C., American Psychiatric Association, 1994, pp. 25-31. With respect to Axis I and Axis II, Gwaltney "deferred diagnosis." With respect to Axis III, Gwaltney stated "None." With respect to Axis IV and V, Gwaltney wrote "Unspecified," id., because of "[i]nadequate Information." Id. J.A. 040.

Thus, because of hospital protocol and because he had inadequate information, Gwaltney made no diagnosis at all regarding Petitioner.

b. a pre-trial radiologist's report stated that a scan of the defendant's brain revealed brain damage; Gwaltney saw the report but inaccurately told defense counsel that the brain scan revealed nothing

In addition to having "inadequate information," Gwaltney ignored the evidence that he did have. He wrote that film of Petitioner's brain[7] "revealed nothing relevant to the purpose of our examination." J.A. 044. In fact, the radiologist who reviewed the film wrote the following about Petitioner's brain:

> [p]rominent cisterna magna, arachnoid cyst [which] would be a consideration in the differential diagnosis. There is intense enhancement of the pituitary, normal finding. There is intense enhancement of the pineal, although there is no mass effect, **pinealoma needs to be considered in the differential diagnosis.**

J.A. 038.

Thus, a brain defect was identified, it "would be a consideration in the" multi-axial, differential, DSM-IV diagnosis, and Gwaltney, who is not a medical doctor, stated that the brain scan showed "nothing relevant."

Having insufficient information to diagnose Petitioner, and having failed to read or understand the radiologist's report, Gwaltney wrote that he agreed with the diagnoses made earlier by

---

[7]An EEG, skull X-ray, and MRI were performed on Petitioner. Only the skull X-ray report was present in Dr. Gwaltney's file when undersigned counsel reviewed it.

the non-independent psychiatrists, Scott and Casper.[8]

> 2. Petitioner has had significant brain damage from birth, and a properly conducted neurological and psychiatric examination shows that "because of neurological and psychiatric forces, Beavers was impaired at the time of his offense and this impairment would provide either a defense or powerful evidence in mitigation of punishment." J.A. 366

An expert, Dr. James Merikangas, funded pursuant to 21 U.S.C. Section 848, conducted an evaluation of Petitioner and provided the district court with diagnoses. One diagnosis was derived from film available to the defense psychologist pre-trial.

a. Brain Defect

According to Dr. Merikangas:

> A review of his MRI scans indicated that he has a malformation of the Dandy-Walker complex type with atrophy of the cerebellum and enlargement of the subarachnoid space by a cyst. The pineal gland is also enlarged and had increased its size between the scan of January, 1992 and October, 1995.
>
> Clearly Mr. Beavers has a congenital malformation of the brain and a tumor of the pineal gland in the brain. Both of these neuroanatomic abnormalities are of significance to his mental state at the time of the

---

[8]Gwaltney stated that "I believe that Mr. Beavers' history, mental condition and behavior as related to the offenses is well presented in the report of August 8, 1991 by Dr. Scott and Dr. John A. Kasper, Jr. I agree with their diagnosis presented in that report, i.e. Polysubstance Dependence and Anti-social Personality Disorder." J.A. 045.

Drs. Scott and Kasper did not know about the brain damage--the film of Petitioner's brain was not obtained until January 27, 1997, over five months after their reports, upon which Gwaltney relied.

> offenses and it is evident that their significance was unknown to his previous examiners. The cerebellum of the brain which, in the case of Mr. Beavers is malformed, has complex relationships with the rest of the brain primarily of an inhibitory nature. The cerebellum is important to cognition and there is a great deal of literature regarding the importance of the cerebellum to such psychiatric illnesses as autism, violent behavior and mental retardation.
>
> The pineal gland is involved in sexual development and may be producing hormones which have adverse effects on Mr. Beavers' sexual behavior. This has not been fully evaluated.

J.A. 338-39.

b. An Appropriate Evaluation

Dr. Merikangas also conducted "a proper mental health evaluation [which] includes the taking of a social and clinical history, documentation of the history through records and witnesses, a thorough physical and neurological examination, diagnostic testing, and a mental status exam." J.A. 337. Dr. Merikangas concluded that Dr. Gwaltney did not perform an appropriate evaluation, and that an appropriate evaluation provided significant forensic results: "[a] proper evaluation and diagnosis reveals the existence of brain damage, major mental illnesses and other extenuating and mitigating factors." J.A. 343.

1. Social and Clinical History--
Insane, Abusive Home

Dr. Merikangas provided the following snapshot of the Petitioner's social and clinical history, a history not compiled by Gwaltney, pre-trial.

> Mr. Beavers' family and clinical history provides

a compelling genetic and environmental cause for the mental illnesses and mental defect from which he suffers.

Mr. Beavers grew up in a chaotic, dysfunctional, and very harmful and threatening environment. He was subjected to continuous mental abuse by his mother who has a long-standing diagnosis of chronic psychosis. By all accounts she attempted to murder him when he was several months old by drowning him. There is clearly a familial diathesis to drug and alcohol abuse and mental illness in the background of Mr. Beavers. Being raised by an emotionally unstable and, frankly, psychotic mother and having a father who was unable to provide proper parenting resulted in a lifetime of mental illness of Mr. Beavers.

Mr. Beavers first experienced drugs at a very early age when he sniffed or "huffed" some kind of inhalant at age five or six. At about the same age Mr. Beavers first experienced suicide ideation, which is an alarmingly young age for such thoughts. Beginning in elementary school Mr. Beavers developed a serious drug and alcohol problem, due mainly to his home environment and self medication for chronic headaches. He has suffered from headaches and blackouts, starting at a very early age. He is himself a victim of abuse, both sexual abuse by homosexuals at age 9 or 10, and at age

16 or 17, and verbal and physical abuse.

Mr. Beavers was 18 at the time of his offenses and he is presently very remorseful and regrets what happened. He has compassion for his victims and makes no excuse for his behavior. I believe that he was under extreme emotional disturbance at the time of the offenses, as he was going through the separation and loss of his wife and child. I believe he very clearly would not have committed these crimes had he not been under the influence of drugs and alcohol.

Six months prior to the death of Mrs. Lowery, Mr. Beavers was involuntarily committed to Peninsula Psychiatric Hospital because of suicidal ideation. He had tried to hang himself. He was receiving antipsychotic medication at the time of his trial.

J.A. 337-338.

2. Physical, Neurological, and Diagnostic Evaluation--Brain Damage

Dr. Merikangas' conclusion that Petitioner is brain-damaged, and has been from birth, is based upon his review of the brain photograph that was available to the pre-trial expert. Dr. Merikangas' physical and neurological examination of Petitioner also revealed brain damage.

[Mr. Beavers] is a well-developed, well-nourished young man who is left handed. His blood pressure is 120/80. He indicated that he suffers from migraine headaches which are primarily right sided. These are

accompanied by blurred vision and nausea. He is getting no treatment for these and never has had any treatment.

In brief, his neurological examination was abnormal. His deep tendon reflexes were symmetrically overactive at 4+. Plantar response was down going but he had positive palmomental reflexes bilaterally. The examination of the cranial nerves revealed that cranial nerve I was intact to cloves and vanilla. II, pupils were round regular equal reactive to light and accommodation. Optic discs and fundi appeared normal. Cranial nerves III, IV and VI, extraocular movements were full without nystagmus. Cranial nerves V and VII were symmetrical. Cranial nerve VIII, weber lateralized to the left. Air conduction was greater than bone conduction bilaterally. Cranial nerves IX, X, XI and XII were normal but it was noted that he had a mid-line defect in his palate which was high and arched.

J.A. 338-339.

3. Incompetent Prior Evaluations

Dr. Merikangas concluded that Gwaltney "incompetently performed in conflict with proper standards" in that he "did not obtain a complete clinical history, did not perform proper physical and neurological examinations, and ignored important diagnostic testing results." J.A. 340-341.

Dr Merikangas noted that Dr. Killian's admonition--that "[t]he mental status at the time of the offense evaluation is considerably more complex. Without getting into any kind of detail, and based upon my examination, I do think there are some major issues and questions here which need further study and clarification"--did not have its desired effect. The mental status issue was not in fact properly studied later or clarified. Examiners Scott and Jasper saw Petitioner before the brain scan occurred. Gwaltney--the defense psychologist--saw Petitioner after the brain scan, but failed to understand the scan.

Petitioner's "background is of a childhood at home with a psychotic and abusive mother and with his own ongoing severe depression and marital discord," which was not taken into account. According to Merikangas:

> Gwaltney indicated "Mr. Beavers was admitted into the Forensic Unit on an overnight, outpatient basis. A complete work-up is not done in such cases pursuant to hospital instruction number 5150-5A." Despite having not done a complete workup, Dr. Gwaltney, a doctor of education, came to the conclusion that he would defer the diagnosis on Axis I and Axis II and that Mr. Beavers had no diagnosis on Axis III of the DSM system. He then discharged Mr. Beavers to the jurisdiction of the court despite having an MRI scan that showed a malformation of the posterior fossa of the brain including a tumor of the pineal gland. He stated: "in addition to record reviews and interviews he received a skull x ray and electroencephalogram and magnetic imagery of the head (MRI). The results of the latter three consultations revealed nothing relevant to the purpose of our examination."
>
> This is, of course, on the face of it, incorrect.

J.A. 341-42.

4. Forensic conclusions

Dr. Merikangas concluded:

Mr. Beavers has a congenital malformation of the brain and an acquired tumor of the pineal gland of the brain, a diagnosis of major affective disorder depressed, history of drug and alcohol abuse during the developmental period of his adolescence, and a family history, both genetic and environmental, of major mental illness. The preponderance of evidence both neurological and psychiatric forces the conclusion that Mr. Beavers was impaired at the time of the offenses for which he stands convicted, and that this impairment would provide either a defense to the crimes charged (insanity, absence of intent, or otherwise) and powerful evidence in mitigation of punishment. Mr. Beavers was actively intoxicated at the time of the events in question. A long history of drug and alcohol abuse clearly had an influence upon Mr. Beavers' behavior which cannot be considered fully voluntary as Mr. Beavers was suffering from serious depression including psychiatric hospitalization for a suicide attempt prior to the crimes for which he has been convicted. He obviously was not fully responsible for his own mental state.

The psychologists and the doctor of education who expressed opinions in his case are simply not qualified

to evaluate a complex neuropsychiatric situation and several of them did, in their reports, admit that fact. It is medically false to state that Mr. Beavers was not impaired at the time of the offense. It is apparent even to a layman that the actions of a brain damaged, psychiatrically ill, intoxicated young man suffering from an extreme emotional disturbance at age 18, are not free and voluntary.

The evaluations provided for Mr. Beavers before his trial in this case were professionally inadequate. A proper evaluation and diagnosis reveals the existence of brain damage, major mental illnesses and other extenuating and mitigating factors.

J.A. 343-44.

c. Petitioner Needed Expert Assistance; A Mental Health Defense Was Critical

The offenses for which Petitioner was convicted and sentenced to death were bizarre and unexplainable, absent a mental disease or defect.[9]

Police went to the home of Maguerite Lowery when they found her car abandoned and ablaze. When no one answered the doorbell at Mrs. Lowery's house, an officer entered through a side door which was slightly ajar.

Inside the house, the officer was confronted with weird and

---

[9]See Cowley v. Stricklin, 929 F.2d 640, 644 (11th Cir. 1991)(Ake rights of critical importance when, "given the overwhelming evidence of his guilt, [the petitioner's] only viable defense was that of insanity.").

baffling scenes as he moved from room to room. He first entered the kitchen, where one of the stove burners was on, pills were scattered across the stove and counter, and a charred photograph of Mrs. Lowery and a male friend was on the stove or floor. The officer followed a trail of white powder leading down the hallway to the bedroom.

In the bedroom, he found the nude, lifeless body of Mrs. Lowery, an elderly woman. The room was in great disarray. There were pills scattered all over. An opened Bible lay on Mrs. Lowery's abdomen. An oily liquid had been applied to her body and cleaning powder had been sprinkled over her. Pills were meticulously lined up on her body and a red waxy material -- apparently Close-Up toothpaste -- was smeared around her breasts, thighs, and vagina.

A year passed without any arrest being made in the Lowery case. Police did not suspect Beavers of the crimes against Mrs. Lowery until receiving a report of another crime in which he was involved. The facts of that crime are no less bizarre.

Beavers knew the victim, who was his next-door neighbor. According to the victim, Shirley Hodges, one night while he was at her house Beavers grabbed her from behind and put his hand over her mouth. When she became frightened and began to breathe rapidly as a result, Beavers got a piece of paper and tried to fan her to help her catch her breath. Once she had settled down, he told her to take off her clothes. She did not do what he told her, but asked him what was wrong. Beavers explained to her that

he did not want to do this to her. They sat together on the couch and she comforted him, patting him on the shoulder and listening to his despair over his wife's plan to leave him and take their son away. She offered to take him to meet with her lawyer about the matter the next day. Mrs. Hodges' daughter telephoned and Mrs. Hodges told her that she did not feel well but would call her back.

Ultimately Beavers did have had sex with Hodges. Afterwards, Mrs. Hodges got up and washed herself in the bathroom. When she returned to the bedroom, she found Beavers sitting on the bed, looking as though he was in a trance. Again she comforted him, patting him on the shoulder. She told Beavers that if he agreed to fix her broken window, she would not tell anyone what had happened. She also agreed to meet him at her lawyer's office the next day as she had proposed earlier. When her daughter called back, Hodges told her that she was feeling better. Beavers measured the window that needed to be fixed, and promised to return to repair it. Mrs. Hodges later told police that Beavers smelled of alcohol, that his eyes looked like "somebody high," and that he had never threatened her with physical violence.

The prosecution also presented a third, unadjudicated incident of rape by Thomas Beavers of a woman named Mary Stallings that was equally strange. In this incident Beavers insisted that his victim identify him; when she could not do so, he identified himself. Although he grabbed her in a totally dark

room, he immediately asked her if she knew who he was. When she said, "No," he said, "I live behind you; now do you know who I am?" When she again said, "No," he told her, "I'm Tommy, Junior." Then he turned on the lights and asked, "Do you know me now?" Finally, she said, "Yes." Beavers asked her whether she was afraid of him, and she told him no. She got him some Kool-Aid to drink, and they talked about his job, his wife and son, and Mrs. Stallings' son. Finally, she said, "Whatever you are going to do, go on and do it now." She said that Beavers' "voice got real heavy-like; this is an order. He was changing." Afterward she told him she would not turn him in, but she asked him to get help. She told him he had not hurt her. He began to cry. He asked her to drive him to the store to buy cigarettes and she agreed to do so. Mrs. Stallings did not go to the police.

When police arrested and interrogated Beavers about Mrs. Lowery's death, he stated that he had been high on cocaine and drunk on beer, and tried to break into Mrs. Lowery's house to steal something to get back the money he had spent on cocaine. When Mrs. Lowery woke up, he ran up to her and grabbed her, putting his hand over her mouth to keep her quiet.

Petitioner stated that he felt like someone else took over and was telling him what to do and making him feel evil and angry. His voice got extremely deep, "like the devil was talking for me," and he did not know what he was doing. She kept screaming, so he put a pillow over her face until she stopped.

When he removed the pillow, she began to scream again. Beavers pulled off her clothes and tried to have sex with her. She continued screaming. He put the pillow over her face again and removed it again when she stopped screaming. After he removed it she began to gasp violently for air. He stopped having sex with her. She continued to gasp for air then stopped moving.[10] He said he "lost it" at that point. He went into the bathroom but the reflection in the mirror "wasn't me." He had a memory of the Bible being placed on Mrs. Lowery, and Ajax cleaning powder and perfume sprinkled around the room. He thought that he may have done other things but could not remember. He drove Mrs. Lowery's car to a nearby shopping center but panicked when a woman parked near him because he believed she somehow knew what he had done. He set the car on fire and walked home.

This is all a very bizarre story. When Petitioner was first evaluated, these circumstances led a non-independent psychiatrist to conclude that insanity was a real issue in the case. See Section II, a, Statement of the Case, supra.

d. The Default in the Lower Court

In its opinion denying permission to appeal from the denial of habeas corpus relief, the Court of Appeals treated as a procedural default the Virginia Supreme Court's habeas corpus ruling that the Ake claim should have been raised on direct

---

[10]A subsequent autopsy of Mrs. Lowery revealed that Mrs. Lowery had a very restricted blood flow due to a heavy plaque build-up on the inside walls of her arteries. This made her unusually susceptible to a heart attack in the event of an oxygen disruption.

appeal. With respect to Petitioner's claim that counsel was ineffective under Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984), for failing to enforce Petitioner's Ake rights, the Court of Appeals denied relief, commenting that

> [a]ttorneys need not be mental health experts or medical doctors, and they are not held to a standard of competence requiring them to be. Pursuant to defense counsel's request .... Dr. Henry O. Gwaltney, Jr., a forensic clinical psychologist was appointed. .. Beavers' attorneys did not perform unprofessionally in relying on his court-appointed mental health expert.

Beavers v. Pruett, Slip opinion, p. 8.

On rehearing and suggestion of rehearing en banc, Petitioner alleged, as he had in his petition and in his briefs, that the Ake claim could not have been raised on direct appeal. The panel ruling that a lawyer ought not be faulted for "relying on his court-appointed mental health expert" demonstrates why the claim was not in the direct appeal record--the panel ruled that trial counsel cannot be expected to know what the expert knows, to question what the expert is doing, or to look in the expert's files to determine what the expert relied upon. If a lawyer is to rely on the expert to the degree held by the panel, then what the expert actually did and did not do will not appear in the direct appeal record.

On rehearing, the panel contradicted its opinion, and added some absurdity. The panel wrote:

> *Beavers* admittedly knew or should have known of the type of mental examination to which he was subjected and of his court appointed expert's qualifications. Obviously, this information was available to Beavers prior to trial.

Order on Petition for Rehearing With Suggestion for Rehearing En Banc, p. 2. If by this the lower court meant that a brain damaged defendant is responsible for knowing how he or she has been examined, the qualifications of the examiner, and what a picture of his brain revealed, then the court's comment is absurd.

If the comment means that defense counsel should have known these things, then the panel opinion regarding defense counsel's right uncritically to "rely upon" the expert should have been withdrawn on rehearing, but it was not.

The panel went on to say:

> Indeed, Beavers recognized as much in his alternative argument that his trial attorney was constitutionally ineffective for not having a more complete evaluation performed and in failing to ensure that an expert with a medical degree examined him. Consequently, Beavers cannot be heard to complain that he could not have raised his Ake claim before the state trial court or on direct appeal.

Id.

Thus, the lower court

1. "defaulted" the Ake claim because it supposedly could have been raised on direct appeal;

2. then wrote that trial and appellate counsel have no ability or obligation to learn the facts that would support an Ake claim on direct appeal, because trial counsel should rely upon their mental health experts; and

3. then wrote, on rehearing, that because Petitioner alleged in the alternative that trial counsel was ineffective vis-a-vis the expert, Petitioner had conceded that the claim

should have been in the direct appeal record and hence it was properly defaulted.

III. Procedural History

The Petitioner was indicted in the City of Hampton, Virginia, for murder and other charges. On June 10, 1992, in the Circuit Court of the City of Hampton, Virginia, Part III, a jury found him guilty of one count of rape in violation of Va. Code § 18.2-61, one count of capital murder in violation of Va. Code § 18.2-31, one count of grand larceny in violation of Va. Code § 18.2-95, and one count of arson in violation of Va. Code § 18.2-81. The jury sentenced Petitioner to eight years imprisonment for the arson, ten years imprisonment for the grand larceny, and life imprisonment for the rape conviction. On June 11, 1992, the jury sentenced Petitioner to death for capital murder. At a sentencing hearing on July 7, 1992, the Honorable John D. Gray imposed the death sentence, and entered the jury's sentences of imprisonment for Petitioner's other convictions. Petitioner appealed his convictions and the death sentence to the Virginia Supreme Court. On February 26, 1993, the Virginia Supreme Court affirmed the judgment. Beavers v. Commonwealth, 427 S.E.2d 411 (Va.), cert. denied, 510 U.S. 859 (1993).

On March 25, 1994, the Circuit Court for the City of Hampton, Virginia, ordered Petitioner to file his petition for writ of habeas corpus pursuant to Va. Code § 8.01-654 by April 18, 1994, but allowed him until May 6, 1994 to amend his petition. Petitioner filed an original habeas corpus petition on

April 18, 1994, followed by an amended petition on May 6, 1994. Thereafter the trial court summarily granted the Attorney General's motion to dismiss the habeas petition. The court later adopted verbatim the findings of fact and conclusions of law proposed by the Virginia Attorney General.

On April 24, 1995, the Virginia Supreme Court denied Petitioner's petition for appeal. On July 11, 1995, the Chief Justice of the United States Supreme Court granted an extension of time until August 22, 1995, for Petitioner to file a petition for a writ of certiorari to the Supreme Court of the Commonwealth of Virginia.

On August 18, 1995, counsel for Respondent mailed a letter to Judge John D. Gray, requesting that an execution date be set. On August 22, 1995, Petitioner filed a petition for writ of certiorari in this Court. On August 25, 1995, Judge Gray entered an Order setting the Petitioner's execution for October 17, 1995. The Commonwealth filed a response to the petition for writ of certiorari on August 30, 1995. On October 2, 1995, this Court denied the petition. Beavers v. Netherland, 116 S. Ct. 268 (1995).

On October 11, 1995, Petitioner filed a motion for appointment of counsel and stay of execution in the district court. The Court stayed Petitioner's execution and appointed counsel. No further hearings were ordered or conducted in this case in the district court.

A petition for writ of habeas corpus was filed, and the

Respondent filed a motion to dismiss. Without allowing oral argument on the motion, the district court granted the motion by order entered November 19, 1997.

Because he was instructed to by the Clerk of the Circuit Court, counsel filed a request for a certificate of appealability in the circuit court. Thereafter, Petitioner filed a request for a certificate of probable cause to appeal. The Circuit Court denied the certificates.

After rehearing was denied on November 4, 1997, an execution date of December 11, 1997, was set. On December 3, 1997, the Circuit Court denied Petitioner's request for a stay of execution.

REASONS FOR GRANTING THE WRIT

I.

THE VIRGINIA STATE COURT'S REFUSAL TO ADDRESS PETITIONER'S AKE CLAIM BECAUSE IT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL IS AN INADEQUATE BASIS FOR FORECLOSING MERITS REVIEW--THE CLAIM COULD NOT HAVE BEEN RAISED ON APPEAL; THE LOWER COURT'S SUMMARY ADOPTION OF THE STATE COURT BAR IS INCONSISTENT WITH THIS COURT'S DECISIONS AND WILL RESULT IN AKE NOT BEING ENFORCED IN VIRGINIA

A. This Court's Precedent Requires that Petitioner Be Provided a Mental Health Expert Who Performs an Appropriate Evaluation

"[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake v. Oklahoma, 470 U.S. 68, 83 (1985). Additionally, if at capital sentencing the state relies upon future dangerousness as an aggravating circumstance and places psychiatric testimony before the jury on that issue, "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." Id., 470 U.S. at 84.[11]

---

[11]Lower courts have held that the testimony of a prosecution psychiatrist on future dangerousness is not a necessary predicate before the due process right to a competent and independent defense expert arises. See Castro v. Oklahoma, 71 F.3d 1502, 1513 (10th Cir. 1995)("An expert must be appointed if the State presents evidence, psychiatric or otherwise, of the defendant's (continued...)

Petitioner was entitled to a competent expert who would perform competently. See Ake v. Oklahoma, 470 U.S. 68, 82 (1985)(defense entitled to a psychiatrist "*to conduct a professional examination* on issues relevant to the defense.")(emphasis added); see also Nobles v. Johnson, 1997 WL 668254 *10 (5th Cir. 1997)("In assessing a due process claim based on ineffective psychiatric assistance, a court must inquire whether the defendant was provided access to a 'competent psychiatrist' and *whether that psychiatrist competently examined the defendant* and 'assist[ed] in evaluation, preparation and presentation of the defense.' Ake, 470 U.S. at 83")(emphasis added); Starr v. Lockhart, 23 F.3d 1280, 1289 (8th Cir. 1994)("As Ake explains, due process requires access to an expert who will conduct, not just any, but an appropriate examination."); Ford v. Gaither, 953 F.2d 1296, 1299 (11th Cir. 1992)("Ake ... requires *an appropriate psychiatric evaluation* and assistance in the evaluation, preparation, and presentation of the defense.")(emphasis added); Cowley v. Stricklin, 929 F.2d 640, 643, 645 (11th Cir. 1991)(Under Ake, "[w]e must ... determine ... whether Cowley received competent psychiatric

---

[11](...continued)
future dangerousness or continuing threat to society during the sentencing phase, and the indigent defendant establishes the likelihood his mental condition is a significant mitigating factor."); Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)("As applied at the penalty phases of a capital case, Ake requires a state to provide the capital defendant with such access to a competent psychiatrist upon a preliminary showing to the trial court that the defendant's mental status is to be a significant factor at sentencing.").

assistance for his defense. ... [T]he limited aid rendered by Dr. McMillan was not a sufficient substitute for the provision of an adequate defense psychiatrist."); Castro v. Oklahoma, 71 F.3d 1502, 1515 (10th Cir. 1995)("We believe a serious question whether Dr. Hamilton was competent to provide expert assistance exists. Dr. Hamilton's specialties in child and geriatric psychiatry probably rendered him unqualified to offer expert opinion on many of the issues raised in a capital murder trial.")(dicta)

B. This Court's Precedent Requires that an Evidentiary Hearing Be Conducted on Petitioner's Claim that He Was Denied the Assistance Required Under Ake

Petitioner's allegation, accepted as true because no fact-finding has occurred with respect to them, is that his right to a competent expert who performed competently was denied. His expert did not perform in a competent manner. Specifically: a.) the defense expert admitted in memoranda to his file (discovered in post-conviction proceedings) that he did not have the information necessary for a competent evaluation, and so he could not diagnose the Petitioner; and b.) the defense expert reviewed a radiologist's report which recited that the Petitioner's brain was damaged and that the damage was relevant to any diagnosis, but the defense expert incorrectly wrote that the report did not show anything relevant with respect to Petitioner's brain.

Petitioner also alleged, with supporting affidavits, that the Petitioner's brain indeed is damaged in significant and

forensically relevant ways, and that a competently performed evaluation reveals that, according to the district court, "because of neurological and psychiatric forces, Beavers was impaired at the time of his offense and this impairment would provide either a defense or powerful evidence in mitigation of punishment." J.A. 366.

Put as simply as possible, a competent defense expert performing competently would have noticed that Petitioner's brain was damaged from birth and that he suffered from several mental illnesses and defects, all of which had substantial forensic consequences. Petitioner contended in his petition that he was ill-served by his expert and by his defense counsel, all of whom failed to ensure that a competent and appropriate defense evaluation occurred. These allegations, if true, require that Petitioner be granted relief.[12] Because no evidentiary hearing has ever been conducted upon these allegations, an evidentiary

---

[12]In Starr v. Lockhart, 23 F.3d 1280, 1289 (8th Cir. 1994), the Court acknowledged that similar allegations provided a cognizable claim for relief:

> The inadequacy of the examination is illustrated by the testimony of the examining psychologist. The psychologist testified that Starr was mildly retarded, but was unable to explain to the jury the level of Starr's social and intellectual functioning because his tests had not dealt with that. Nor was he able to interpret or explain the results of previous mental health tests, which assigned Starr the mental age of a six or seven year old, because he was not familiar with the methodology of those tests. ... Thus, we find that Starr was denied the appropriate examination to which due process entitled him.

Id. at 1290.

hearing is now required. See Townsend v. Sain, 372 U.S. 293, 313 (1963)(hearings are mandatory and no presumption of correctness arises when "the merits of the factual dispute were not resolved in the state [court] hearing.")

C. The Lower Court's Ruling That This Ake Claim Was Subject to A Procedural Default is Inconsistent With This Court's Precedent and Removes a Class of Federal Constitutional Violations from Any Review Whatsoever

Under Ake, Petitioner had a federal constitutional right to an appropriate and competent defense mental health evaluation. The state court "default" ruling that an Ake claim like Petitioner's should have been raised on direct appeal, when combined with the Fourth Circuit's ruling that trial defense counsel has no obligation (or even ability) to place in the trial and direct appeal record any evidence that the Ake right was violated, leaves Ake as a meaningless, unenforceable, constitutional protection.

Ake is not an unenforceable mandate. Petitioner has claimed "denial of constitutional rights ... on the basis of facts which 'are *dehors* the record' ([hence] ... not open to consideration and review on [direct] appeal)." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142, 152 (1970)(quoting Waley v. Johnston, 316 U.S. 101, 104-05 (1942)). Habeas corpus hearings are intended, inter alia, specifically to address claims which do not appear in the direct appeal record. See Card v. Dugger, 911 F.2d 1494, 1519-20 (11th Cir. 1990) (trial court's determination that petitioner was

competent to stand trial does not obviate need for hearing on petitioner's extra-record allegations that psychiatric evaluations on which trial court relied were inadequate due to experts' "fail[ure] to conduct professionally adequate testing"); see also Blackledge v. Allison, 431 U.S. 63, 72-73 (1977) (guilty plea induced by clandestine prosecutorial promises); Beaulieu v. United States, 930 F.2d 805, 808 (10th Cir. 1991) (hearing required to assess federal prisoner's ineffective assistance of counsel claim, which alleged that counsel failed to prepare properly, and which accordingly relied on facts necessarily outside trial record and record of post-trial proceeding in trial court); United States v. Rodriguez-Rodriguez, 929 F.2d 747, 750 (1st Cir. 1991) (hearing on counsel's conflict of interest required because issue depends on matters outside record); Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) (because state trial court did not hold hearing on competence to stand trial, relying instead on statements of trial counsel and trial judge's own observations, evidentiary hearing on issue is required); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir.) (en banc), cert. denied, 497 U.S. 1011 (1990) (petitioner's allegation that he pled guilty based on erroneous parole eligibility advice requires federal hearing); United States v. Espinoza, 866 F.2d 1067, 1069-70 (9th Cir. 1988) (petitioner's allegation that he pled guilty based on attorney's representations about sentencing arrangement not thereafter carried out requires federal hearing (citing cases)).

An enforceable procedural default occurs only when a state court has invoked an adequate and independent state law basis for not entertaining a federal constitutional challenge to a judgment. While a state court may establish orderly procedures for assessing federal constitutional claims, see Ford v. Georgia, 498 U.S. 411, 423 (1991), if the procedures amount to a total, *de facto* refusal to entertain certain claims, then the state procedure is not "adequate" to foreclose later, federal court, review. See James v. Kentucky, 466 U.S. 341, 349 (1984)("As Justice Holmes wrote [over] 60 years ago: 'Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'")(quoting Davis v. Wechsler, 263 U.S. 22, 24 (1923)).[13]

The panel wrote the state court post-conviction holding that

---

[13]See also Ford v. Georgia, 498 U.S. 411, 423 (1991)(state's power to establish "local rules governing the timeliness of a constitutional claim" and to render judgments based upon the violation of those rules does not automatically trump federal jurisdiction but instead is "subject to our standards for assessing the adequacy of independent state procedural grounds to bar all consideration of claims under the national Constitution"); Osborne v. Ohio, 495 U.S. 103, 123-25 (1990)(acceptance of state's waiver claim "would 'force resort to an arid ritual of meaningless form,' ... and would further no perceivable state interest." (citing and quoting James v. Kentucky and Davis v. Wechsler, supra); Michel v. Louisiana, 350 U.S. 91, 93 (1955)(state rule "raised an insuperable barrier to" vindication of federal rights); Williams v. Lockhart, 873 F.2d 1129, 1131-32 (8th Cir.), cert. denied, 493 U.S. 942 (1989) ("new [state] rule designed to thwart the assertion of federal rights" is not adequate, and its violation will not be allowed to defeat federal jurisdiction).

Petitioner's Ake claim had to be raised on direct appeal served as a default that barred federal review of the claim. On rehearing, petitioner again explained that the evidence of the claim was not in the direct appeal record and so the claim could not be raised on direct appeal.

In its order denying rehearing, the Fourth Circuit cited James v. Kentucky, supra, but wrote that "Beavers admittedly knew or should have known of the type of mental examination to which he was subjected and of his court appointed expert's qualifications. Obviously, this information was available to Beavers prior to trial." Order on rehearing, Attachment B, hereto, p. 2. If this is taken literally, it is absurd--the panel could not expect a brain-damaged defendant to know this information, to put it in a record, and to formulate a claim based upon it.

Indeed, the panel wrote that not even a non-brain-damaged, educated, trained, experienced, lucid, competent *defense attorney* had the ability or responsibility to know what their expert had done. Slip opinion, at 7-8.

Petitioner's claim is that his appointed expert could not and did not perform competently. The evidence of this claim was not in the direct appeal record,[14] and Petitioner himself had no

---

[14]The direct appeal record did not contain a.) the evidence from the expert's (Gwaltney's) file showing that he had no information upon which to diagnose petitioner, see J.A. 39-42, or b.) a report revealing that Petitioner had brain damage. Id. at 38.

way of knowing of the existence of this evidence.[15]

Petitioner raised the claim at his first opportunity. If a state court does not allow a claim to be raised at the first opportunity that a petitioner has to raise it, then any purported default is excused. The constitutional claim would, as a practicable matter, be "unavailable" to the petitioner. Thus, there would be an "'external impediment'" – something *external* to the petitioner – impeding him from raising the claim, and the claim could be raised in federal court notwithstanding the supposed state court bar. Coleman v. Thompson, 501 U.S. 722, 753 (1991).

D. Given the Lower Court's Ruling that Defense Counsel Cannot Be Expected to Understand or Monitor What a Defense Expert Does, the Ake Right Cannot be Enforced under the Rubric of Effective Assistance of Counsel

If the Ake claim can be defaulted, cause for the default can be established by showing that counsel's actions violated the Sixth Amendment. Coleman v. Thompson, 501 U.S. 722 (1991). Unreasonable omissions by counsel which prejudice the defendant violate the Sixth Amendment and, if the ineffectiveness involves the attorney's failure to protect a defendant's Ake rights, then

---

[15]Murray v. Carrier, 477 U.S. at 488 (cause is present if "factual ... basis for a claim was not reasonably available to counsel"); Reed v. Ross, 468 U.S. at 14 ("reasonably unknown" facts); Price v. Johnston, 334 U.S. 266, 291 (1948) (petitioner was "unaware of the significance of relevant facts"); United States ex rel. Duncan v. O'Leary, 806 F.2d 1307, 1314 (7th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (petitioner's default under state law of conflict of interest claim was invalid as matter of federal law because "he could not waive that of which he had no knowledge").

cause for the state court default is established and a federal court must address the merits of an Ake claim.

If Petitioner's right to the protections afforded by Ake depends upon whether the defendant raises the Ake issue on direct appeal, then reasonably competent counsel must produce the record which will allow the claim to be raised and preserved. The lower court's opinion, however, relieves trial and appellate counsel of this duty. Slip opinion, p. 8.[16]

The Ake right must be protected somehow. A defendant must either be allowed to raise it when counsel has failed to, or must be allowed to challenge counsel's ineffectiveness for not raising it. The lower court opinion prohibits both challenges. The result is that there is no Ake right in Virginia--there is no remedy for its violation.

---

[16]The lower court held:

> [a]ttorneys need not be mental health experts or medical doctors, and they are not held to a standard of competence requiring them to be. Pursuant to defense counsel's request .... Dr. Henry O. Gwaltney, Jr., a forensic clinical psychologist was appointed. .. Beavers' attorneys did not perform unprofessionally in relying on his court-appointed mental health expert.

Slip opinion, p. 8.

II.

FROM THIS COURT'S GRANT OF CERTIORARI IN HOHN V. UNITED STATES, NO. 96-8986, THERE ARISES THE FOLLOWING ISSUE IN PETITIONER'S CASE:

> IN LIGHT OF THE FACT THAT THE COURT OF APPEALS DENIED THE PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY, DOES THIS COURT HAVE JURISDICTION TO ENTERTAIN THIS PETITION FOR WRIT OF CERTIORARI?

In Hohn v. United States, No. 96-8986, this Court granted certiorari to determine the following:

> In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General?

The petitioner in Hohn is a federal inmate proceeding under 28 U.S.C. Section 2255; petitioner is proceeding pursuant to 28 U.S.C. Section 2254.

Mr. Hohn's Section 2255 action was filed before the effective date of the Anti-terrorism And Effective Death Penalty Act of 1996 (AEDPA); Mr. Beavers' Section 2254 action was also filed before the effective date of the AEDPA.

Mr. Hohn was denied a certificate of appealability; Mr. Beavers' was denied a certificate of appealability.[17]

---

[17]Respondent has contended throughout these proceedings that the AEDPA, with its certificate of appealability requirements, applies to this case. The district court applied the AEDPA. The Fourth Circuit denied Petitioner the right to appeal because of its view that Petitioner had not satisfied the substantive standard for a certificate of appealability under the AEDPA, which was the same standard as for a certificate of probable cause to appeal under pre-Act law. See Argument III, infra.

It would appear that the Court's decision in Mr. Hohn's case will have a substantial impact on whether Mr. Beavers is entitled to review. See Davis v. Jacobs, 454 U.S. 911 (1981). Accordingly, Petitioner requests that his petition for writ of certiorari be granted.

III.

THE LOWER COURT'S REFUSAL TO GRANT PETITIONER PERMISSION TO APPEAL FROM THE DENIAL OF HABEAS CORPUS RELIEF IS INCONSISTENT WITH THIS COURT'S DECISION IN BAREFOOT V. ESTELLE, 463 U.S. 880 (1983)

Before a petitioner can receive circuit court review via a full appeal from the denial of relief under either section 2254 or section 2255, the Petitioner must make a substantial showing of the denial of a federal right. In Barefoot, this Court "caution[ed] that the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous, and that a court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous." Barefoot, 463 U.S. at 894.

Under this standard, the decision by the lower court was error. It cannot be said that Petitioner's claims for relief presented in this petition are frivolous or are not debatable among reasonable jurists.

The panel denied permission to appeal and dismissed the appeal because in the view of the panel Petitioner was not

entitled to relief:

> We conclude that the district court correctly held that Beavers was not entitled to habeas relief. Accordingly, we deny Beavers' application for a certificate of probable cause to appeal and dismiss the petition.

Slip opinion, at 2-3. This is not the appropriate standard. A certificate of probable cause must be granted whenever a petitioner has made "a substantial showing of the denial of [a] federal right." Barefoot v. Estelle, 463 U.S. 880, 883 (1983). "'[O]bviously the Petitioner need not show that he should prevail on the merits. He already has failed in that endeavor.'" Id. at 893 n 4. Rather, a Petitioner need only show that any one of his or her claims is "debatable among jurists of reason," or is "[not] lacking *any* factual basis in the record." Id. (emphasis added).

On rehearing, Petitioner suggested that the lower court had applied an incorrect standard for the issuance of a certificate of probable cause to appeal. The court responded by writing that "Beavers' assertion is utterly frivolous. The final paragraph of the decision of this court, where we addressed Beavers' motion for certificate of probable cause to appeal, states that Beavers 'failed to make the substantial showing of the denial of a constitutional right necessary for the grant' of a certificate of probable cause to appeal.'" Order on Rehearing, p. 3.

If the lower court in fact did apply the correct Barefoot test, the court applied it incorrectly. Petitioner contends that the facts of this case satisfy Barefoot, and that the lower

court's application of Barefoot presents dangerous and troubling issues.

Death sentenced inmates in Virginia never receive relief from the Virginia Supreme Court during habeas corpus proceedings. The United States Court of Appeals for the Fourth Circuit is almost as tight-fisted when it comes to addressing state court violations of the federal constitution.[18]

---

[18]Even when the federal district courts in Virginia award relief, the Fourth Circuit takes the relief away. The following is a list of death penalty cases in which the district courts of Virginia granted relief but the Fourth Circuit reversed the grant of relief and re-instituted the judgment and death sentence:

A. Barnes v. Thompson, Civil Action No. 3:92CV90 (E.D. Va. 1994)(Spencer, J.)(unreported order), rev'd, 58 F.3d 971 (4th Cir. 1995)(Luttig and Williams, majority; Murnaghan, concurring)

B. Boggs v. Bair, 695 F. Supp. 864 (E.D. Va. 1988)(Williams, J.), rev'd, 892 F.2d 1193 (4th Cir. 1989)(Widener, Sprouse, and Dupree (E.D.N.C.))

C. Correll v. Thompson, 872 F. Supp. 282 (W.D. Va. 1994)(Turk, J.), rev'd, 63 F.3d 1279 (4th Cir. 1995)(Wilkins, Wilkinson, and Phillips)

D. Edmonds v. Thompson, No. CA-89-727-12 (W.D. Va.)(Turk, J.)(unreported order), rev'd, 17 F.3d 1433 (4th Cir. 1994)(unpublished)

E. Gray v. Netherland, Civil Action No. 3:91CV693 (E.D. Va. 1994)(Spencer, J.)(unreported order), rev'd sub nom, Gray v. Thompson, 58 F.3d 59 (4th Cir. 1995)(Wilkinson and Wilkins, majority; Hall concurring), remanded, Gray v. Netherland, 116 S. Ct. 2074 (1996), relief denied on remand, 99 F.3d 158 (4th Cir. 1996).

F. Hoke v. Thompson, 852 F. Supp. 1310 (E.D. Va. 1995)(Merhige, J.)(initially denying the petition but then granting relief after motion to alter or amend judgement), rev'd sub nom Hoke v.

(continued...)

The treatment of Petitioner's case is consistent with, but even worse than, this pattern. Here, we have a case in which the circuit court did not grant a certificate of probable cause to appeal and did not even publish the result. Petitioner contends that he has presented substantial federal constitutional issues. No state or federal court has seriously addressed them, and now Petitioner faces the specter of not receiving Supreme Court review. See Argument II, supra.

Under such circumstances it was critically important that

---

[18](...continued)
Netherland, 92 F.3d 1350 (4th Cir. 1996)(Luttig and Russell; Hall, dissenting)

G. O'Dell v. Thompson, No. CL89-1475 (E.D. Va. Sept. 6, 1994)(Spencer, J.), rev'd sub nom O'Dell v. Netherland, 95 F.3d 1216 (4th Cir. 1996)(en banc by 7-6 vote)

H. Satcher v. Netherland, 944 F. Supp. 1222 (E.D. Va. 1996)(Payne, J.), rev'd sub nom Satcher v. Pruett, 126 F.3d 561, Nos. 96-22, 23 (4th Cir. Sept. 18, 1997)(Michael, Widener, and Williams)

I. Stout v. Thompson, CA-91-719-R (W.D. Va.)(Turk, J.), rev'd, 95 F.3d 42 (4th Cir. Sept. 3, 1996)(unpublished)(Wilkinson, Hamilton, and Williams)

J. Tuggle v. Thompson, 854 F. Supp. 1229 (W.D. Va. 1994)(Turk, J.), rev'd, 57 F.3d 1356 (4th Cir. 1995)(Chapman, Widener, and Hamilton)

K. Pope v. Netherland, CA-91-591-3 (E.D. Va. 1996)(Merhige, J.)(unpublished order), rev'd 113 F.3d 1364 (4th Cir. 1997)(Butzner, Wilkinson, and Hall)

L. Clanton v. Bair, 638 F. Supp. 1090 (E.D. Va. 1986)(Merhige, J.), rev'd 826 F.2d 1354 (4th Cir. 1987)(Haynsworth, Hall, and Wilkinson).

the Circuit Court have applied Barefoot correctly. Because the Circuit Court failed to do so, certiorari ought to be granted.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant this petition for writ of certiorari.

Respectfully submitted:

Mark Evan Olive

Attorney at Law
2014 Lee Avenue
Tallahassee, FL 32312
(904) 531-0119

Counsel of Record for Petitioner

December 4, 1997

ATTACHMENT A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS H. BEAVERS, JR.,
Petitioner-Appellant,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,
Respondent-Appellee.

No. 97-4

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-95-837-3)

Argued: July 10, 1997

Decided: September 23, 1997

Before WILKINS, LUTTIG, and WILLIAMS, Circuit Judges.

Dismissed by unpublished opinion. Judge Wilkins wrote the opinion, in which Judge Luttig and Judge Williams joined.

COUNSEL

ARGUED: Mark Evan Olive, Tallahassee, Florida, for Appellant. Katherine P. Baldwin, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. **ON BRIEF:** Michele J. Brace, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, INC., Richmond, Virginia, for Appellant. James S. Gilmore, III, Attorney General of Virginia, OFFICE

OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

WILKINS, Circuit Judge:

Thomas H. Beavers, Jr. appeals an order of the district court dismissing his petition for a writ of habeas corpus,[1] which challenged his Virginia conviction for capital murder and resulting death sentence. *See* 28 U.S.C.A. § 2254 (West 1994).[2] We conclude that the district

---

[1]Beavers named J. D. Netherland, former Warden of the Mecklenburg Correctional Center where Beavers is incarcerated, as Respondent in his petition. Subsequently, Samuel V. Pruett succeeded Netherland as Warden at that institution. For ease of reference, we refer to Respondent as "the Commonwealth" throughout this opinion.

[2]Because Beavers' petition for a writ of habeas corpus was filed on October 11, 1995, prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amendments to chapter 153 of Title 28 effected by the AEDPA do not govern our resolution of this appeal. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2067 (1997). We have not yet decided whether the provisions contained in § 107 of the AEDPA apply to Beavers, who filed his state habeas petition on April 18, 1994. *See Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (declining to decide whether the procedures established by the Commonwealth for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfy the statutory opt-in requirements of § 107, which would render those provisions applicable to indigent Virginia prisoners seeking federal habeas relief from capital sentences if an initial state habeas petition was filed after July 1, 1992), *cert. denied*, 117 S. Ct. 503 (1996). However, we need not address this issue because we conclude that habeas relief is inappropriate under the more lenient standards in effect prior to the recent amendments. *See O'Dell v. Netherland*, 95 F.3d 1214, 1255 n.36 (4th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1969 (1997).

court correctly held that Beavers was not entitled to habeas relief. Accordingly, we deny Beavers' application for a certificate of probable cause to appeal and dismiss this appeal.

I.

On the night of May 1, 1990, Beavers broke into the home of Marguerite Lowery, a 60-year-old widow, and murdered her by suffocating her with a pillow while raping her. Beavers subsequently was convicted of capital murder and sentenced to death on the basis that he posed "a continuing serious threat to society."[3] Va. Code Ann. § 19.2-264.2 (Michie 1995). The Supreme Court of Virginia affirmed on direct appeal, and the United States Supreme Court denied certiorari. *See Beavers v. Commonwealth*, 427 S.E.2d 411 (Va.), *cert. denied*, 510 U.S. 859 (1993). Thereafter, a state habeas court denied Beavers postconviction relief without conducting an evidentiary hearing, reasoning that Beavers' allegations of constitutionally ineffective assistance of counsel lacked merit and that his remaining claims were barred by *Hawks v. Cox*, 175 S.E.2d 271, 274 (Va. 1970) (precluding, absent changed circumstances, consideration in state habeas proceedings of claims considered on their merits during direct review), or were defaulted under *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974) (holding that issues not properly raised on direct appeal will not be considered on state collateral postconviction review). The Supreme Court of Virginia denied review.

Beavers then filed this action raising a plethora of issues. Without conducting an evidentiary hearing, the district court denied habeas relief and dismissed his petition. With respect to those issues that Beavers presses on appeal, the district court held federal habeas review to be foreclosed as to four of them because they were procedurally defaulted. Beavers' defaulted claims are as follows: (1) his appointed mental health expert was constitutionally ineffective in violation of the Eighth and Fourteenth Amendments; (2) the refusal of the state trial court to permit one of his trial attorneys to withdraw from representation violated the Sixth, Eighth, and Fourteenth

[3]Beavers was also convicted of rape, grand larceny, and arson, and was sentenced separately on these counts to life, ten years, and eight years respectively.

Amendments; (3) the refusal of the state trial court to remove for cause a prospective juror who stated during voir dire that she would impose the death penalty if the jury returned a capital conviction violated the Eighth and Fourteenth Amendments; and (4) the failure of the state trial court to guide adequately the discretion of the jurors in considering the mitigating evidence violated the Sixth, Eighth, and Fourteenth Amendments. The district court ruled that the three remaining claims that Beavers presents—that (1) trial counsel was constitutionally ineffective under the Sixth Amendment with respect to the handling of issues relating to Beavers' mental health and in the investigation and presentation of mitigating evidence; (2) the trial court violated the Eighth and Fourteenth Amendments by refusing to grant a mistrial; and (3) the trial court denied Beavers protections guaranteed by the Eighth and Fourteenth Amendments by refusing during voir dire to question prospective jurors concerning whether they would automatically impose the death penalty—lacked merit.

II.

Absent cause and prejudice or a miscarriage of justice, a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). The Supreme Court of Virginia expressly relied on the procedural default rule set forth in *Slayton* in refusing to consider Beavers' claims that his court-appointed mental health expert was constitutionally ineffective; that the trial court erred in refusing to permit one of his attorneys to withdraw; that the trial court erred in qualifying a juror who stated that she would impose the death penalty if the jury returned a capital murder conviction; and that the instructions failed to guide adequately the discretion of the jury in considering the mitigating evidence. Thus, we may not consider these claims on their merits,[4] *see Smith v. Murray*, 477 U.S. 527, 533 (1986); *Bennett v.*

[4]Beavers maintains that his claim relating to the adequacy of the instructions to guide the discretion of the jury in considering the mitigating evidence is not procedurally defaulted. He asserts that he raised that claim in his petition for appeal to the Supreme Court of Virginia from the denial of state postconviction relief. The referenced portion of the petition states:

Angelone, 92 F.3d 1336, 1343 (4th Cir.), *cert. denied*, 117 S. Ct. 503 (1996), unless Beavers can demonstrate that cause and prejudice exist to excuse the default or that the failure of the court to consider the claim would amount to a fundamental miscarriage of justice, *see Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

> Trial counsel failed to request *any* mitigating instructions at the sentencing phase of Beavers' capital murder trial.... Trial counsel's failure to request, and the trial court's failure to give, these instructions prejudiced Beavers because the jury may have imposed the death penalty on an improper, inadequate or arbitrary basis.

Appellant's Pet. for Appeal at 52, *Beavers v. Netherland*, No. 950146 (Va. Apr. 24, 1995). And, he contends, the Supreme Court of Virginia denied relief on this claim on the basis that the ineffective assistance claims raised were without merit.

The claim Beavers presented to the Supreme Court of Virginia, however, was one of ineffective assistance of counsel. The petition omitted reference to any other constitutional right to additional instruction concerning the mitigating evidence and failed to provide any argument concerning why the referenced instructions were constitutionally required. Thus, Beavers failed to properly exhaust this claim. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam); *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (explaining that in order for federal claim to be exhausted, the substance of the federal right must be presented to the highest state court), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. May 27, 1997) (No. 96-9163); *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994) (noting that exhaustion requires that petitioner do more than apprise state court of the facts; he must "explain how those alleged facts establish a violation of his constitutional rights"); *id.* at 995 (explaining that exhaustion requires "more than scatter[ing] some makeshift needles in the haystack of the state court record" (internal quotation marks omitted)). Because presentation to the state court at this juncture would be fruitless, the claim is properly considered to be procedurally barred. *See George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996) ("A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."), *cert. denied*, 117 S. Ct. 854 (1997). Therefore, we hold this claim to be procedurally defaulted.

Beavers does not assert that cause and prejudice exist to excuse the default. *See Teague v. Lane*, 489 U.S. 288, 298 (1989) (possible cause and prejudice not considered when petitioner fails to argue that any exist); *Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir. 1995) (same), *cert. denied*, 116 S. Ct. 688 (1996). But, he maintains that the failure to consider his claims would amount to a miscarriage of justice because the evidence he proffered to the district court concerning his organic brain disorder and brain tumor demonstrate his actual innocence.

It is undisputed, however, that Beavers actually murdered Lowery, and the additional evidence to which Beavers points does not demonstrate that he was not criminally responsible for his conduct. Thus, Beavers has not demonstrated that a constitutional error probably resulted in the conviction of one who is actually factually innocent. *See Schlup v. Delo*, 513 U.S. 298, 323-27 (1995). Further, Beavers has not presented "'clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty,'" and thus he has not demonstrated that he is "'actually innocent of the death penalty.'" *Id.* at 323 (emphasis omitted) (quoting *Sawyer v Whitley*, 505 U.S. 333, 336 (1992)). Consequently, Beavers has not established a fundamental miscarriage of justice to excuse his default of these claims.

III.

The first of Beavers' undefaulted claims is his argument that his trial counsel was constitutionally ineffective. In order to be entitled to relief on this claim, Beavers bears the burden of demonstrating that his attorneys' "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). In assessing counsels' performance, we bear in mind that our review is "highly deferential." *Id.* at 689. Indeed, we afford a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. *See id.* And, to eliminate the deceptive effects of hindsight on our consideration, we look to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct." *Id.* at 690. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. *See id.* at 691-92. Therefore, deficiencies in Beavers' attorneys' conduct would warrant reversal only if he convinces us that in the absence of unprofessional errors by his attorneys there is a reasonable probability—*i.e.*, one adequate to undermine our confidence in the result—that "the result of the proceeding would have been different." *See id.* at 694. We review de novo Beavers' claim that counsel was ineffective. *See id.* at 698.

Beavers maintains that the performance of his trial counsel fell below an objective standard of reasonableness in two areas—the handling of issues relating to Beavers' mental health and the investigation and presentation of mitigating evidence. More specifically, Beavers asserts that counsel failed: (1) to communicate effectively with his mental health expert; (2) to ensure that he obtained a psychiatric evaluation on an in-patient basis; (3) to obtain a full social and clinical history for use by his court-appointed mental health expert; and (4) to present the testimony of mitigation witnesses during the sentencing phase of trial, including family and friends who could have testified about Beavers' upbringing by a schizophrenic mother.

With respect to counsel's handling of the mental health issues, Beavers maintains that the district court erred in denying this claim based on our repeated admonitions that counsel is not obligated to "shop around" to find an expert that will provide a different or better expert opinion. *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Roach v. Martin*, 757 F.2d 1463, 1477 (4th Cir. 1985). Beavers contends that this is not the basis for his claim and that his argument, instead, "is that he was entitled to one, competently arrived at, opinion, which he did not receive." Initial Brief of Appellant at 48. This argument, however, only serves to highlight the deficiency in Beavers' position.

Attorneys need not be mental health experts or medical doctors, and they are not held to a standard of competence requiring them to be. *See Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993). Pursuant to defense counsel's request that Beavers be examined by a mental health expert, Dr. Henry O. Gwaltney, Jr., a forensic clinical

psychologist, was appointed. Dr. Gwaltney's subsequent opinion provided Beavers' attorneys with little support for an insanity defense or evidence in mitigation. Beavers does not assert that counsel was informed by Dr. Gwaltney or others that more information concerning Beavers' social and medical history, further testing, or additional expert assistance was required in order for Dr. Gwaltney to properly evaluate Beavers. And, Dr. Gwaltney's opinion was consistent with that of two psychiatrists who had evaluated Beavers to determine his mental state at the time of the murder. In short, Beavers' attorneys did not perform unprofessionally in relying on his court-appointed mental health expert. *See Jones v. Murray*, 947 F.2d 1106, 1112-13 (4th Cir. 1991) (rejecting argument that counsel was ineffective for relying on the psychological assessment of Dr. Gwaltney).

With regard to Beavers' claim that counsel should have engaged in further investigation to discover additional mitigating evidence from his past, we again conclude that counsel's performance was not professionally deficient. Beavers does not dispute that trial counsel contacted a number of Beavers' family members, including his wife, his mother and father, and his uncle in an effort to obtain mitigating background evidence. Nor does he dispute that it was the professional judgment of his attorneys that the testimony of these witnesses potentially would have been more damaging than beneficial because of aggravating information they possessed that counsel did not wish to risk disclosing. Beavers does not attack this strategic decision on the part of counsel, but rather proffers affidavits from family members, neighbors, and former coworkers who indicate that Beavers' mother was schizophrenic and that her bizarre conduct had an extremely adverse effect on her child-rearing skills and that, as a result, Beavers was subjected to a very difficult and abusive childhood.

Although "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691, counsel is not constitutionally required to interview every family member, neighbor, and coworker in the search for constitutionally mitigating evidence. Because Beavers' trial counsel conducted a reasonable investigation for mitigating evidence with Beavers' closest family members and found nothing that, in the professional judgment of the attorneys,

could be employed in Beavers' defense, we conclude that counsel did not perform unprofessionally in failing to investigate further.

Moreover, even if Beavers had overcome the presumption that counsel's performance was within the broad range of professionally acceptable conduct, we are not convinced that he would have satisfied the prejudice prong of *Strickland*. The mental health evidence that Beavers argues would have been obtained if counsel had performed competently does not undermine our confidence in the verdict at the guilt phase of his trial. And, although "evidence of a defendant's mental impairment may diminish his blameworthiness for his crime," it also may "indicate[ ] that there is a probability that he will be dangerous in the future." *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir. 1995) (internal quotation marks omitted). Thus, this evidence is a two-edged sword, and "the sentencing authority could well have found in the mitigating evidence of mental illness or history of abuse, sufficient evidence to support a finding of future dangerousness." *Id.* at 981. In sum, Beavers was not deprived of constitutionally adequate assistance of counsel.[5]

IV.

Beavers next contends that the state trial court violated the Eighth and Fourteenth Amendments by refusing to grant a mistrial after it struck a witness' testimony. During Beavers' trial, a state law enforcement officer, Deputy Lam, testified. At the beginning of his testimony, the Commonwealth presented him with a document to refresh his memory. Beavers objected to Deputy Lam reading from the document in answering two questions and sought a mistrial. Deputy Lam then testified that Beavers had told him that "'he had no

[5]Beavers also argues that he was entitled to an evidentiary hearing in district court to develop the facts underlying his ineffective assistance of counsel claim and his ineffective assistance of court-appointed mental health expert claim. We review a decision of a district court denying an evidentiary hearing for an abuse of discretion. *See Pruett*, 996 F.2d at 1577. We conclude that the district court did not abuse its discretion because Beavers did not demonstrate that the additional facts he alleges, if true, would entitle him to relief. *See, e.g., Beaver v. Thompson*, 93 F.3d 1186, 1190 (4th Cir.), *cert. denied*, 117 S. Ct. 553 (1996).

other choice but to do what he had done because [Mrs. Lowery] could identify him.'" *Beavers*, 427 S.E.2d at 419 (alteration in original). Deputy Lam subsequently equivocated regarding the accuracy of his memory of portions of the statement, and when Beavers once again objected, the trial court sustained the objection and ordered the jury to disregard the officer's testimony in its entirety. On direct appeal, the Supreme Court of Virginia held that the trial court had not erred in refusing to grant a mistrial rather than give a cautionary instruction. *See id.* Beavers now asserts that the instruction given by the trial court was insufficient to cure the prejudice caused by Deputy Lam's statement and that the failure of the trial court to grant a mistrial created an impermissible risk that Beavers' conviction and sentence were the product of passion, prejudice, and arbitrary factors.

We disagree. Even if we were to conclude that Beavers is correct that the failure to grant a mistrial under these circumstances was an error of constitutional dimension, relief would not be appropriate. Beavers points to no clearly established rule of constitutional law in existence in October 1993, when his conviction became final, that would have compelled a state court to reverse his conviction; hence this argument is barred by the new rule doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *See O'Dell v. Netherland*, 117 S. Ct. 1969, 1973 (1997). Accordingly, this argument does not provide a basis for relief.

V.

Finally, Beavers contends that the state trial court deprived him of the guarantees of the Eighth and Fourteenth Amendments by refusing to ask prospective jurors during voir dire, "Do you believe that if one is convicted of taking another's life, the proper penalty is loss of your own life?" Initial Brief of Appellant at 59. Again, we disagree.

"[T]he requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment," prohibits "[a] juror who will automatically vote for the death penalty in every case" from sitting on a capital jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). A corollary of the right to an impartial jury is the requirement of a voir dire sufficient to permit identification of unqualified jurors because without an adequate voir dire, a trial judge will not be able to remove

unqualified jurors and the defendant will not be able to exercise challenges for cause. *See id.* at 729-30. Thus, a capital defendant must be allowed on voir dire to ascertain whether prospective jurors are unalterably in favor of the death penalty in every case, regardless of the circumstances, rendering them unable to perform their duties in accordance with the law. *See id.* at 735-36. Questions directed simply to whether a juror can be fair, or follow the law, are insufficient. *See id.* at 734-36.

Although it declined to ask Beavers' proposed question, the state trial judge asked prospective jurors, "'[I]f the jury should convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?'" *Beavers*, 427 S.E.2d at 418. This question is adequate to identify those who would automatically vote for the death penalty. Thus, Beavers' argument lacks merit.

VI.

In sum, we conclude that Beavers procedurally defaulted his claims that (1) his appointed mental health expert was constitutionally ineffective in violation of the Eighth and Fourteenth Amendments; (2) the refusal of the state trial court to permit one of his trial attorneys to withdraw from representation violated the Sixth, Eighth, and Fourteenth Amendments; (3) the refusal of the state trial court to remove for cause a prospective juror who stated during voir dire that she would impose the death penalty if the jury returned a capital conviction violated the Eighth and Fourteenth Amendments; and (4) the state trial court failed to guide adequately the discretion of the jurors in considering the mitigating evidence in violation of the Sixth, Eighth, and Fourteenth Amendments. And, Beavers' remaining claims lack merit.

Prior to the decision of the Supreme Court in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), Beavers sought a certificate of appealability in this court pursuant to 28 U.S.C.A. § 2253(c)(1) (West Supp. 1997) (providing in pertinent part that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court"). Following the *Lindh* decision, *see Lindh*, 117 S. Ct.

at 2067 (concluding that generally the amendments to chapter 153 of Title 28 do not apply to petitions, like Beavers', filed prior to the effective date of the AEDPA), Beavers sought a certificate of probable cause to appeal from the district court. The district court denied the certificate, reasoning that Beavers had not made a substantial showing of denial of a constitutional right. Beavers subsequently petitioned this court for a certificate of probable cause to appeal.

We need not decide whether, strictly speaking, Beavers was correct in seeking a certificate of appealability under amended § 2253 or a certificate of probable cause to appeal because he has failed to make the substantial showing of the denial of a constitutional right necessary for the grant of either. *See Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991) (per curiam) (explaining that to warrant the grant of a certificate of probable cause to appeal, a habeas petitioner must "make a substantial showing of the denial of [a] federal right" and that to satisfy this showing, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further" (internal quotation marks & emphasis omitted; alterations in original)); *Murphy v. Netherland*, 116 F.3d 97, 101 (4th Cir. 1997) (denying certificate of appealability under § 2253 in habeas corpus action seeking relief from death sentence where petitioner failed to make a substantial showing of the denial of a constitutional right). Accordingly, we dismiss Beavers' appeal.

DISMISSED

ATTACHMENT B

FILED: November 4, 1997

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 97-4

THOMAS H. BEAVERS, JR.,

Petitioner - Appellant,

versus

SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Center,

Respondent - Appellee.

ORDER

Beavers filed a petition for rehearing with suggestion for rehearing en banc and a motion to supplement the record on appeal.

In support of his petition for rehearing and suggestion for en banc consideration, Beavers argues that we erred in holding that federal review of his claim under Ake v. Oklahoma, 470 U.S. 68

(1985)--that his court-appointed expert was incompetent--was procedurally defaulted. He contends that he could not have raised his Ake claim before the state trial court or on direct appeal because he could not have known that his court-appointed expert lacked the information from a more complete mental health evaluation and the medical degree necessary to have performed competently. And, he continues, since he could not have raised his Ake claim before his state post-conviction proceedings, the procedural bar relied upon by the Supreme Court of Virginia is not adequate to foreclose federal habeas review. See James v. Kentucky, 466 U.S. 341, 348-49 (1984). We disagree.

Beavers admittedly knew or should have known of the type of mental examination to which he was subjected and of his court-appointed expert's qualifications. Obviously, this information was available to Beavers prior to trial. Indeed, Beavers recognized as much in his alternative argument that his trial attorney was constitutionally ineffective for not having a more complete evaluation performed and in failing to ensure that an expert with a medical degree examined him. Consequently, Beavers cannot be heard to complain that he could not have raised his Ake claim before the state trial court or on direct appeal.

Beavers also claims that this court applied an incorrect standard in denying him a certificate of probable cause to appeal, relying on language taken from the introductory paragraph of the opinion. Beavers asserts that "[a] certificate of probable cause must be granted whenever a petitioner has made a `substantial showing of the denial of [a] federal right[,]' Barefoot v. Estelle, 463 U.S. 880, 883 (1983)" and accordingly that we should have applied this standard in ruling on the appropriateness of a certificate of probable cause to appeal. Beavers' Pet. for Reh'g, Sugg. for Reh'g En Banc at 13. Beavers' assertion that this court applied an incorrect standard is utterly frivolous. The final paragraph of the decision of this court, where we addressed Beavers' motion for certificate of probable cause to appeal, states that Beavers "failed to make the substantial showing of the denial of a constitutional right necessary for the grant of" a certificate of probable cause to appeal. Beavers v. Pruett, No. 97-4, slip op. at 12 (4th Cir. Sept. 23, 1997).

Therefore, Beavers' petition for rehearing is denied.

No member of the Court requested a poll on the suggestion for rehearing en banc.

The Court denies Beavers' motion for leave to supplement the record on appeal.

Entered at the direction of Judge Wilkins with the concurrences of Judge Luttig and Judge Williams.

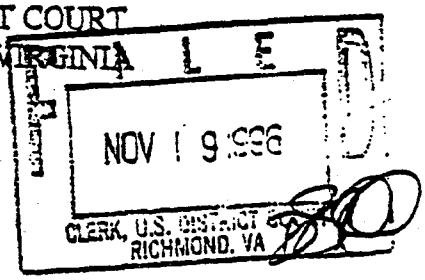
FOR THE COURT,

/s/ Patricia S. Connor

Clerk

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



THOMAS H. BEAVERS, JR.

Petitioner,

v.

J.D. NETHERLAND, WARDEN

Respondent.

Civil Action Number 3:95CV837

FINAL ORDER

THIS MATTER is before the Court on petitioner Beavers' request for habeas corpus relief pursuant to 28 U.S.C. § 2254 and on respondent's motion to dismiss Beavers' petition. For the reasons outlined in the accompanying Memorandum Opinion, the Court will DENY Beavers' petition for a writ of habeas corpus and GRANT respondent's motion to dismiss the petition.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

It is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

NOV 19 1996
DATE

57

minutes, Beavers covered her face with a pillow. Mrs. Lowery began kicking, and Beavers again ordered her to be quiet. When she quieted down, Beavers removed the pillow. Mrs. Lowery again began to scream and struggled with Beavers. During the struggle, her clothes were ripped. Beavers tore off her clothes, ripping her nightgown completely down the side seams and across the right shoulder in front, and ripping the entire front of her underpants. Beavers was nineteen years old, six feet tall, and weighed 205 pounds at the time of the attack. Mrs. Lowery was five feet, five and one-half inches tall, and weighed 175 pounds.

Beavers then raped Mrs. Lowery and when, once more, she started to scream, Beavers held a pillow over her face until she stopped screaming. When he removed the pillow, Mrs. Lowery made a few gasping noises, then stopped moving. According to the testimony of Dr. Faruk Presswalla, the deputy chief medical examiner for the region, Mrs. Lowery died as a result of cardiac arrhythmia caused by lack of oxygen.

After killing Mrs. Lowery, Beavers placed an open Bible on her chest, took a powdered kitchen cleanser from the bathroom and scattered it over the room and her body, and spread toothpaste on Mrs. Lowery's vagina and breasts. Beavers removed four rings from Mrs. Lowery's dresser, scattered pills around the kitchen, partially burned a photograph of Mrs. Lowery on the stove, and left the house in complete disarray, with one of the gas stove's burners still burning. When Beavers left Mrs. Lowery's house, he stole her car. After parking the car in a public place, Beavers set it afire by lighting newspapers on the interior floor.

A Hampton police officer found the burning car and traced it to Mrs. Lowery. Officer Banwell of the Hampton police department went to Mrs. Lowery's house in the early morning hours of May 2, 1990. Receiving no answer to his knock, he left. He returned to the home later that morning and, still receiving no answer, entered the home through a side door that was slightly ajar. Entering through the kitchen, the officer found the stove burner on, the burnt photograph, and the house in general disarray. He found Mrs. Lowery's nude body lying on the floor near her bed.

Approximately one year later, on May 14, 1991, and with the Lowery murder still unsolved, Beavers broke into the house of his next door neighbor, 50-year-old Shirley Hodges. He was still in the house

The Circuit Court for the City of Hampton, Virginia dismissed defendant's habeas petition. The Virginia Supreme Court subsequently denied Beavers' appeal. The United States Supreme Court again denied certiorari on October 2, 1995. Beavers v. Netherland, 116 S.Ct. 268 (1995).

On August 25, 1995, the Circuit Court of Hampton set Beavers' execution for October 17, 1995. On October 12, 1995, this Court stayed the execution pending the appointment of counsel and the filing of a federal habeas petition. On October 26, 1995, the Court appointed counsel for the petitioner and ordered that the petition be filed by March 15, 1996. On March 7, 1996, the Court amended its October 26 order, making the petition due by March 25, 1996. On March 22, 1996, the Court granted petitioner an extension of time until March 29, 1996.

Petitioner attacks the validity of his conviction based on the following allegations:

I. The Commonwealth did not prove the elements of capital murder beyond a reasonable doubt;

II. Petitioner was denied the assistance of competent, independent, and confidential mental health experts;

II. The trial court failed to grant trial defense counsel's motion to withdraw;

IV. Beavers was denied effective assistance of counsel:

- A. Counsel were ineffective in communicating with the psychiatric expert;
- B. Counsel failed to call additional witnesses at sentencing;
- C. Counsel conceded the issue of guilt/innocence in their opening statement;
- D. Counsel were ineffective at the post-sentencing hearing;
- E. Counsel were ineffective during closing argument at sentencing;
- F. Counsel failed to request a meaningful lesser-included offense instruction;
- G. Counsel failed to object to prosecutorial misconduct in closing argument at the guilt phase;
- H. Counsel were ineffective in closing argument at the guilt phase;
- I. Counsel ineffectively cross-examined witnesses at the sentencing phase;
- J. Counsel ineffectively examined defense witnesses at the sentencing phase;
- K. Counsel failed to request any jury instructions to guide the jury in sentencing;
- L. Counsel's pretrial preparation was insufficient;

XIX. Beavers' death sentence was applied discriminatorily on the basis of gender and financial status;

XX. Imposition of the death penalty constitutes cruel and unusual punishment; and

XXI. Beavers is innocent because the killing was an accident.

Beavers argues that the Court should evaluate his claim under § 2254 as it stood before the new Anti-Terrorism and Effective Death Penalty Act ("the Act") was signed into law. Respondent contends that the new Act applies to this case because Beavers' petition was pending when the bill was signed into law. At any rate, respondent advances that the petition should be dismissed regardless of the analysis used by the Court.

The Court finds that the new Act applies in Beavers' case because his petition was pending when the bill was signed into law. In any event, the Court agrees that the outcome would be the same under both pre-Act and post-Act law, and relief should not be granted to Beavers.

ANALYSIS

I. APPLICABLE LAW

A. § 2254 UNDER THE OLD LAW

Section 2254 of Title 28 of the United States Code provides a means for persons in custody pursuant to a state court judgment to apply for a writ of habeas corpus in the federal system. A petitioner must have exhausted his remedies available in state court before being granted a writ of habeas corpus. 28 U.S.C. §2254(b). Any claim which has either not been presented to the Virginia Supreme Court or has been held by the state courts to be procedurally barred is also procedurally barred from consideration in a federal habeas action. Whitley v. Bair, 802 F.2d 1487, 1504 (4th Cir. 1986), cert. denied, 480 U.S. 951, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987).

the conviction of one who is actually innocent." Schlup v. Delo, 115 S.Ct. 851, 867 (1995) (quoting Murray v.Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)); See O'Dell v. Netherland, No. 94-4013, slip op. at 59 (4th Cir. Sept. 10, 1996).

B. THE NEW LAW: THE 1996 ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

The Antiterrorism and Effective Death Penalty Act of 1996, signed into law on April 24, 1996, adds special habeas corpus procedures for capital cases. Section 107(c) of the Act provides that the capital case habeas corpus provisions apply to "cases pending on or after the date of enactment of [the] Act."

New 28 U.S.C. § 2264(a) provides that the court shall only consider claims that have been raised and decided on the merits unless the default is based on—

> (1) the result of State action in violation of the Constitution or laws of the United States;
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
>
> (3) a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

Furthermore, § 2264(b) expressly incorporates the amendments to § 2254 into the new death penalty provisions. New § 2254(d) provides that the court may not grant relief with respect to any claim that was adjudicated on the merits in state court UNLESS (1) the state court determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as

§ 2264(a) and Bassette v. Thompson, 915 F.2d 932, 936-937 (4th Cir. 1990), cert. denied, 499 U.S. 982, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991). See Whitley v. Bair, 802 F.2d 1487, 1496, n.17 (4th Cir. 1986) (claims which were presented to state habeas corpus court but not appealed to the Virginia Supreme Court were barred), cert. denied, 480 U.S. 951 (1987).

Because defaulted claims are barred from federal habeas review under both the old law and the new law, Beavers cannot receive relief on these claims. Moreover, he cannot satisfy any of the exceptions which allow review of defaulted claims under the new law.

B. Claims Presented to the Virginia Supreme Court

Respondent declares that some of petitioner's claims are foreclosed from federal review because they were expressly held defaulted by the Virginia Supreme Court pursuant to the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1008, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975) (holding that petitioner lacked standing to raise on state habeas the question of whether an in-court identification was tainted because he neither advanced that defense at trial nor on appeal). See 28 U.S.C. § 2264(a); Whitley v. Bair. The defaulted claims are II, III, V, VIII, XI, XII, XIII, and XXI.

The old law explicitly provides that federal habeas review cannot proceed on claims which have been held by the state court to be procedurally barred. The new law provides exceptions for

---

Prisons. Claim IV.L.

(5) On appeal, defense counsel failed to adequately demonstrate that certain assignments of error were not procedurally barred from appellate review. Claim IV.Q.

(6) Virginia's death penalty was applied in a disproportionate and discriminatory manner. Claim XIX.

Hence, Beavers' appointed psychologist was constitutionally sufficient and Beavers cannot make a valid claim for habeas relief.

Beavers further asserts that the ineffective assistance of counsel was "cause" which excuses any defaulted claims, and he is therefore entitled to an evidentiary hearing regarding whether counsel was ineffective for failing to raise the following issues: Claims III, V, VIII, XI, XII, and XIII. The standard of review for ineffective assistance of counsel is discussed in detail below, but none of these claims meet the Strickland test because Beavers cannot show that the outcome of his case would have been different if counsel had raised any of the above claims. Additionally, Beavers is not entitled to an evidentiary hearing under the standards of both the old law and the new law. Therefore, the above defaulted claims must be dismissed.

III. The Remaining Claims

Claim I— Sufficiency of the Evidence

The standard of review for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original).

Beavers claims that the Commonwealth did not prove every element of the crime beyond a reasonable doubt, as is required under the Fourteenth Amendment. He further advances that in Virginia, to be convicted in a circumstantial evidence case, "all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence." Dukes v. Commonwealth, 227 Va. 119, 122, 313 S.E.2d 382, 383 (1984) (quoting Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 567 (1976)).

outcome of his case. This showing is absolutely necessary to succeed on an ineffective assistance claim. Thus, this Court will not grant relief on any of Beavers' ineffective assistance claims because he fails to satisfy the requirements of both the Strickland test and § 2254(d).

A. Counsel's Communication with Dr. Gwaltney

Beavers alleges that his appointed psychologist, Dr. Gwaltney, was unaware of the nature and scope of forensic psychiatric evidence and of what constitutes mitigating and aggravating evidence. Respondent contends that Beavers' claim is similar to a claim made by another Virginia death-row inmate over six years ago. In Jones v. Murray, 947 F.2d 1106, 1111-1112 (4th Cir.), cert. denied, 503 U.S. 973, 112 S.Ct 1591, 118 L.Ed.2d 308 (1992), the inmate faulted his trial attorney for improperly supervising the same appointed psychologist, Dr. Gwaltney. The Fourth Circuit rejected the claim and noted that Dr. Gwaltney is familiar with Virginia's statutory requirements regarding mitigating evidence. Id. Respondent further argues that counsel had no duty to "shop around" for another opinion. See Poyner v. Murray, 964 F.2d 1404, 1418-19 (4th Cir.), cert. denied, 506 U.S. 958, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992); Pruett v. Thompson, 996 F.2d 1560, 1574 (4th Cir.), cert. denied, 510 U.S. 984, 114 S.Ct. 487, 126 L.Ed.2d 437 (1993).

Thus, because Beavers has not shown any unprofessional errors on counsel's part, he has failed to satisfy any part of the Strickland test with respect to this claim.

B. The Omission of Sentencing-Stage Witnesses

Beavers faults his defense counsel for failure to call certain witnesses at the sentencing phase of the trial. He asserts that certain testimony would have made a difference in the jury's decision to give him the death penalty: (1) Beavers' parents could have testified that Beavers had a learning disorder, experienced abrupt mood swings, made several suicide attempts, and was treated for

appointed to determine whether Beavers suffered from any mitigating mental state. See Pruett, 996 F.2d at 1574. In response to the failure to put on additional psychiatric evidence, respondent argues that defense counsel was justified since the court-appointed psychologist had given counsel a highly unfavorable report of drug dependency and Antisocial Personality Disorder. See Barnes v. Thompson, 58 F.3d at 980-81; Pruett, 966 F.2d at 1574; Poyner, 964 F.2d at 1419; Whitley, 802 F.2d at 1494-96. Finally, respondent declares that Detective Browning could have testified that Beavers was only honest after he had been caught for the third rape and only after eluding the police for a year. The mitigating aspects of any evidence Detective Browning would have provided is clearly outweighed by the negative information that would have accompanied it. See Whitley v. Bair, 802 F.2d at 1495.

The Virginia Supreme Court's determination of these ineffective assistance claims was neither contrary to, nor an unreasonable application of, any United States Supreme Court case, and this Court must defer to the State court's ruling pursuant to § 2254(d), under both the old and new laws, and § 2254 (e)(1) of the new law.

C. Counsel's Alleged Concession of Guilt

Beavers complains that defense counsel conceded the issue of guilt in his opening statement when he remarked, "[W]hat you do here is very important. It quite frankly is a matter of life and death. Those are the choices you are probably going to be called upon to make sometime in the next day or two."

Counsel also told the jury that it would have to decide whether or not the killing was premeditated or a lesser crime. Respondent maintains that counsel's comments are all statements of fact and do not amount to ineffective assistance of counsel. See Clozza v. Murray, 913 F.2d 1092,

Respondent professes that this tactic was deliberate on counsel's part. Respondent explains that Beavers was the final witness at trial and his testimony, including a display of tears, was emotionally riveting and counsel decided to give a brief closing argument so as not to dispel the effect of Beavers' testimony. Because counsel must be given wide latitude to choose his trial tactics, the Court will deny relief on this ineffective assistance claim.

F. The Guilt-Stage Instructions

Beavers faults his trial counsel in two areas with respect to the jury instructions. First, counsel should have objected to the jury instructions on premeditation and malice because they were confusing. Second, counsel should have asked for instructions on second degree murder and voluntary or involuntary manslaughter.

Respondent replies that the jury instructions for capital murder and first degree murder were verbatim from the Virginia Model Jury Instructions, and therefore were not outside the range of competence required under Strickland. On the second assignment of error, respondent states that Beavers would not have been entitled to a second-degree murder instruction because the murder, even if not premeditated, occurred during a rape and was therefore first-degree murder under Virginia's felony-murder statute. See Va. Code § 18.2-33. Furthermore, respondent declares, Beavers can never show a reasonable probability of a different result in his case because the jury was given the choice between capital murder and first-degree murder and expressly rejected the lesser offense. See LeVasseur v. Commonwealth, 225 Va. 564, 592, 304 S.E.2d 644, 659 (1983) (harmless error in omitting second-degree instruction where jury rejected first-degree verdict in favor of capital murder), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).

H. Counsel's Guilt-Stage Closing Argument

Beavers claims that counsel did not make a persuasive argument to the effect that Mrs. Lowery's death was an accident and not willful, intentional or deliberate. He further declares that counsel's argument amounts to ineffective assistance because they did not mention the jury instructions. Respondent counters that counsel were entitled to make the argument they believed best and in the way they deemed best under the circumstances as they existed at the time of trial. Beavers' preference now for a different argument does not demonstrate ineffectiveness of counsel under the Strickland test.

I. Cross-Examination of Sentencing-Stage Witnesses

Beavers contends that counsel were ineffective when they either failed to cross-examine or did not ask certain questions on cross-examination of two witnesses who had also been raped by Beavers. Respondent argues that the handling of witnesses and method of cross-examination are matters individual to each attorney and generally cannot support habeas relief. See Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978), cert. denied, 441 U.S. 911, 99 S.Ct. 2009, 60 L.Ed.2d 383 (1979). Because much of what Beavers insists should have been brought out in cross-examination had been brought out in the witnesses' direct testimony, Beavers cannot show that counsel's acts or omissions changed the outcome of his case.

J. Defense Witnesses at the Sentencing Phase

Beavers claims that trial counsel ineffectively examined certain defense witnesses at the sentencing phase. As noted in the preceding section, an attorney's method of examining witnesses is a matter of tactics. Counsel's examination of these witnesses was not outside of the scope of

as a result of these failings. Therefore, this Court does not find that the omissions amount to ineffective assistance of counsel.

M. Change of Venue

Beavers contends that trial counsel were ineffective for failing to request that the trial be moved to another location based on the amount of pre-trial publicity about the case and the likelihood that jurors would be prejudiced against Beavers.

Respondent rebuts this claim with two points. First, Beavers' case was not so "rare" that publicity was so pervasive that prejudice was presumed. See Dobbert v. Florida, 432 U.S. 282, 302, 975 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Second, counsel did not make the motion because there was virtually no publicity since the murder occurred a year before Beavers was apprehended and because there was no difficulty in selecting an impartial jury. Counsel's actions were reasonable under the circumstances. See Tuggle v. Thompson, 57 F.3d at 1365-67 (no change of venue unless prejudice so widespread as to prevent fair and impartial trial and state court finding of no such prejudice entitled to presumption of correctness). Hence, the Court must reject this claim of ineffective assistance.

N. Jury Selection

Beavers makes the following complaints about his attorneys' handling of the jury selection: (1) Counsel did not object to the size of the jury pool; (2) Counsel failed to ask the first panel any questions; (3) Counsel allowed the jurors to remain non-responsive to the court's questions; (4) Counsel failed to object to the court's question about moral objections to the death penalty; (5) Counsel made little or no attempt to rehabilitate jurors; (6) Counsel failed to object to the court's question about following the law if the death penalty was appropriate; (7) Counsel failed to object

unobjectionable and therefore, counsel were not ineffective in failing to object to the prosecutor's statements.

Finally, in complaint #11, Beavers complains that counsel did not object to a juror, Henry, who stated at one point that her family's knowledge of the deceased would cause her some trouble. Respondent argues that this does not state a federal claim because Henry did not sit on Beavers' jury and, moreover, Henry was questioned extensively and swore repeatedly that she could sit impartially.

In sum, none of Beavers' claims regarding counsel's handling of the jury selection process amount to ineffective assistance under the Strickland standard.

O. Counsel's Omission of a Motion for Sequestration

Beavers contends that counsel were ineffective because they abandoned their efforts to have the jury sequestered due to the newspaper and television coverage of the trial. There is no showing of actual prejudice and there is no evidence to overcome the presumption that the jurors followed the court's instructions not to read or view anything about the case or talk to anyone about it. Therefore, the Court does not find that counsel rendered ineffective assistance.

P. The Prosecutor's Guilt-Stage Opening Statement

Beavers alleges that counsel were ineffective when they failed to object in a timely manner to certain remarks during the prosecutors opening statement. Counsel objected and made a motion for mistrial out of the presence of the jury at the conclusion of the prosecutor's opening statement. According to an affidavit by counsel, they did not object in the middle of the statement because they did not think they were required to do so. This belief is well within the range of competence reasonably expected of defense counsel

ineffective assistance claims on appeal is easily explained because (1) claims of ineffective assistance may not be brought on direct appeal, Walker v. Mitchell, 224 Va. 568, 571, 299 S.E.2d 698, 699 (1983), and (2) the decision about which claims to raise on direct appeal is left to the sound discretion of appellate counsel, even to the extent of refusing to raise non-frivolous claims suggested by the client. See Jones v. Barnes, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 1312 (1983). Under these standards, Beavers fails to state any ground for relief.

R. Cumulative Prejudice

Beavers claims that the errors of counsel, individually and cumulatively, prejudiced the outcome of his case. The finding of actual prejudice, however, is dependent upon a finding of unreasonable error of counsel; it is not a free-floating concept. Furthermore, this Court has rejected this argument as being "without a shred of legal validity." See Briley v. Bass, 584 F. Supp. 807, 845-46 (E.D. Va.), aff'd, 742 F.2d 155 (4th Cir.), cert. denied, 469 U.S. 893, 105 S.Ct. 270, 83 L.Ed.2d 206 (1984).

In summary, because Beavers' claims fail to satisfy the Strickland test, the Court will deny relief as to his ineffective assistance claims.

Claim VI— Deputy Lam's Testimony

At trial, deputy Lam seemed to be reading from a document instead of testifying from his own recollection. He was admonished not to read from the document, but continued to. The trial judge sustained defense counsel's objection and instructed the jury to disregard the testimony.[3] Beavers claims that Lam's statement was the only evidence that the crime was willful, deliberate,

[3] Respondent notes that the content of Lam's testimony was expressly held admissible in a pretrial hearing. Deputy Lam's inability to testify without his notes was solely due to nervousness.

Court's rejection of the claim was not contrary to or an unreasonable application of United States Supreme Court precedent. See Mu'Min v. Virginia, 500 U.S. 415, 425, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (rejecting challenge to judge's decision refusing to question jurors individually on the content of their exposure to pretrial publicity). Therefore, this claim must be dismissed pursuant to the old law and the new § 2254(d).

Claim X - Seizure of Jewelry

Beavers declares that the trial court erred in denying his motion to suppress the jewelry that was seized by the police during a search of his home. He contends, as he did on direct appeal, that the police exceeded the scope of the search warrant when they opened a small pouch discovered in a dresser drawer and found Mrs. Lowery's jewelry.

Respondent argues that this claim may not be considered in the proceeding before this Court because Beavers had a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. See Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Furthermore, pursuant to the new §§ 2254(d) and (e)(1), this Court must defer to the Virginia Supreme Court's reasonable determination of the federal issue on direct appeal. Respondent also contends that the same outcome would obtain even if the claim were not precluded under Stone v. Powell because a search extends to the entire area in which an object may be found. See United States v. Ross, 456 U.S. 798, 820-822, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). For all of these reasons, this claim must be dismissed.

Claim XIV - Commonwealth's Opening Statement

Beavers makes several complaints about the Commonwealth Attorney's opening statement made during the guilt phase of trial. He claims that the prosecution improperly (1) referred to the

already been given a full and fair hearing on the issue under the rule in Stone v. Powell. Therefore, as to both of Beaver's claims related to his confession, respondent correctly states that this Court must defer to the state court's reasonable determination of the issue.

Claim XVII - Proportionality

Beavers asserts that the Virginia Supreme Court erred in its determination on direct appeal that his sentence was proportional under Virginia Code § 17-110.1. Respondent posits that Beaver's claim fails to state a federal issue under long-standing Fourth Circuit precedent. See Turner v. Williams, 35 F.3d 872, 893 (4th Cir. 1994), cert. denied, 115 S.Ct. 1359 (1995) (citing Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); Peterson v. Murray, 904 F.2d 882, 887 (4th Cir.), cert. denied, 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990); Coleman v. Thompson, 895 F.2d 139, 146-47 (4th Cir. 1990), aff'd, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Because Beavers asks for review of a pure state-law issue, this Court must dismiss the claim.

Claim XX - Cruel and Unusual Punishment

Beavers asserts that the death penalty is cruel and unusual punishment under the Eighth Amendment. As support, he cites to Justice Brennan's concurring opinion in Furman v. Georgia, 408 U.S. 238, 291, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Beaver's claim is without merit under established precedent from the United States Supreme Court and the Fourth Circuit. Thus, this claim must be dismissed because the Virginia Supreme Court's rejection of this claim was not unreasonable or contrary to clearly established federal law.

cuit Judges.

ge Wilkins wrote the opinion,
Williams joined.

COUNSEL

ark Evan Olive, Tallahassee, Florida, for Appellant.
: Baldwin, Assistant Attorney General, OFFICE OF THE
NEY GENERAL, Richmond, Virginia, for Appellee. ON
EF: Michele J. Brace, VIRGINIA CAPITAL REPRESENTA-
TION RESOURCE CENTER, INC., Richmond, Virginia, for Appel-
lant. James S. Gilmore, III, Attorney General of Virginia, OFFICE

OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

WILKINS, Circuit Judge:

Thomas H. Beavers, Jr. appeals an order of the district court dismissing his petition for a writ of habeas corpus,[1] which challenged his Virginia conviction for capital murder and resulting death sentence. *See* 28 U.S.C.A. § 2254 (West 1994).[2] We conclude that the district court correctly held that Beavers was not entitled to habeas relief. Accordingly, we deny Beavers' application for a certificate of probable cause to appeal and dismiss this appeal.

[1]Beavers named J. D. Netherland, former Warden of the Mecklenburg Correctional Center where Beavers is incarcerated, as Respondent in his petition. Subsequently, Samuel V. Pruett succeeded Netherland as Warden at that institution. For ease of reference, we refer to Respondent as "the Commonwealth" throughout this opinion.

[2]Because Beavers' petition for a writ of habeas corpus was filed on October 11, 1995, prior to the April 24, 1996 enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amendments to chapter 153 of Title 28 effected by the AEDPA do not govern our resolution of this appeal. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2067 (1997). We have not yet decided whether the provisions contained in § 107 of the AEDPA apply to Beavers, who filed his state habeas petition on April 18, 1994. *See Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (declining to decide whether the procedures established by the Commonwealth for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfy the statutory opt-in requirements of § 107, which would render those provisions applicable to indigent Virginia prisoners seeking federal habeas relief from capital sentences if an initial state habeas petition was filed after July 1, 1992), *cert. denied*, 117 S. Ct. 503 (1996). However, we need not address this issue because we conclude that habeas relief is inappropriate under the more lenient standards in effect prior to the recent amendments. *See O'Dell v. Netherland*, 95 F.3d 1214, 1255 n.36 (4th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1969 (1997).

I.

On the night of May 1, 1990, Beavers broke into the home of Marguerite Lowery, a 60-year-old widow, and murdered her by suffocating her with a pillow while raping her. Beavers subsequently was convicted of capital murder and sentenced to death on the basis that he posed "a continuing serious threat to society."[3] Va. Code Ann. § 19.2-264.2 (Michie 1995). The Supreme Court of Virginia affirmed on direct appeal, and the United States Supreme Court denied certiorari. *See Beavers v. Commonwealth*, 427 S.E.2d 411 (Va.), *cert. denied*, 510 U.S. 859 (1993). Thereafter, a state habeas court denied Beavers postconviction relief without conducting an evidentiary hearing, reasoning that Beavers' allegations of constitutionally ineffective assistance of counsel lacked merit and that his remaining claims were barred by *Hawks v. Cox*, 175 S.E.2d 271, 274 (Va. 1970) (precluding, absent changed circumstances, consideration in state habeas proceedings of claims considered on their merits during direct review), or were defaulted under *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974) (holding that issues not properly raised on direct appeal will not be considered on state collateral postconviction review). The Supreme Court of Virginia denied review.

Beavers then filed this action raising a plethora of issues. Without conducting an evidentiary hearing, the district court denied habeas relief and dismissed his petition. With respect to those issues that Beavers presses on appeal, the district court held federal habeas review to be foreclosed as to four of them because they were procedurally defaulted. Beavers' defaulted claims are as follows: (1) his appointed mental health expert was constitutionally ineffective in violation of the Eighth and Fourteenth Amendments; (2) the refusal of the state trial court to permit one of his trial attorneys to withdraw from representation violated the Sixth, Eighth, and Fourteenth

[3]Beavers was also convicted of rape, grand larceny, and arson, and was sentenced separately on these counts to life, ten years, and eight years respectively.

Amendments; (3) the refusal of the state trial court to remove for cause a prospective juror who stated during voir dire that she would impose the death penalty if the jury returned a capital conviction violated the Eighth and Fourteenth Amendments; and (4) the failure of the state trial court to guide adequately the discretion of the jurors in considering the mitigating evidence violated the Sixth, Eighth, and Fourteenth Amendments. The district court ruled that the three remaining claims that Beavers presents—that (1) trial counsel was constitutionally ineffective under the Sixth Amendment with respect to the handling of issues relating to Beavers' mental health and in the investigation and presentation of mitigating evidence; (2) the trial court violated the Eighth and Fourteenth Amendments by refusing to grant a mistrial; and (3) the trial court denied Beavers protections guaranteed by the Eighth and Fourteenth Amendments by refusing during voir dire to question prospective jurors concerning whether they would automatically impose the death penalty—lacked merit.

II.

Absent cause and prejudice or a miscarriage of justice, a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). The Supreme Court of Virginia expressly relied on the procedural default rule set forth in *Slayton* in refusing to consider Beavers' claims that his court-appointed mental health expert was constitutionally ineffective; that the trial court erred in refusing to permit one of his attorneys to withdraw; that the trial court erred in qualifying a juror who stated that she would impose the death penalty if the jury returned a capital murder conviction; and that the instructions failed to guide adequately the discretion of the jury in considering the mitigating evidence. Thus, we may not consider these claims on their merits,[4] *see Smith v. Murray*, 477 U.S. 527, 533 (1986); *Bennett v. Angelone*, 92 F.3d 1336, 1343 (4th Cir.), *cert. denied*, 117 S. Ct. 503 (1996), unless Beavers can demonstrate that cause and prejudice exist to excuse the default or that the failure of the court to consider the claim would amount to a fundamental miscarriage of justice, *see Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

[4]Beavers maintains that his claim relating to the adequacy of the instructions to guide the discretion of the jury in considering the mitigating evidence is not procedurally defaulted. He asserts that he raised that claim in his petition for appeal to the Supreme Court of Virginia from the denial of state postconviction relief. The referenced portion of the petition states:

> Trial counsel failed to request *any* mitigating instructions at the sentencing phase of Beavers' capital murder trial.... Trial counsel's failure to request, and the trial court's failure to give, these instructions prejudiced Beavers because the jury may have imposed the death penalty on an improper, inadequate or arbitrary basis.

Appellant's Pet. for Appeal at 52, *Beavers v. Netherland*, No. 950146 (Va. Apr. 24, 1995). And, he contends, the Supreme Court of Virginia denied relief on this claim on the basis that the ineffective assistance claims raised were without merit.

The claim Beavers presented to the Supreme Court of Virginia, however, was one of ineffective assistance of counsel. The petition omitted reference to any other constitutional right to additional instruction concerning the mitigating evidence and failed to provide any argument concerning why the referenced instructions were constitutionally required. Thus, Beavers failed to properly exhaust this claim. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam); *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (explaining that in order for federal claim to be exhausted, the substance of the federal right must be presented to the highest state court), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. May 27, 1997) (No. 96-9163); *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994) (noting that exhaustion requires that petitioner do more than apprise state court of the facts; he must "explain how those alleged facts establish a violation of his constitutional rights"); *id.* at 995 (explaining that exhaustion requires "more than scatter[ing] some makeshift needles in the haystack of the state court record" (internal quotation marks omitted)). Because presentation to the state court at this juncture would be fruitless, the claim is properly considered to be procedurally barred. *See George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996) ("A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."), *cert. denied*, 117 S. Ct. 854 (1997). Therefore, we hold this claim to be procedurally defaulted.

Beavers does not assert that cause and prejudice exist to excuse the default. *See Teague v. Lane*, 489 U.S. 288, 298 (1989) (possible cause and prejudice not considered when petitioner fails to argue that any exist); *Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir. 1995) (same), *cert. denied*, 116 S. Ct. 688 (1996). But, he maintains that the failure to consider his claims would amount to a miscarriage of justice because the evidence he proffered to the district court concerning his organic brain disorder and brain tumor demonstrate his actual innocence.

It is undisputed, however, that Beavers actually murdered Lowery, and the additional evidence to which Beavers points does not demonstrate that he was not criminally responsible for his conduct. Thus, Beavers has not demonstrated that a constitutional error probably resulted in the conviction of one who is actually factually innocent. *See Schlup v. Delo*, 513 U.S. 298, 323-27 (1995). Further, Beavers has not presented "'clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty,'" and thus he has not demonstrated that he is "'actually innocent of the death penalty.'" *Id.* at 323 (emphasis omitted) (quoting *Sawyer v Whitley*, 505 U.S. 333, 336 (1992)). Consequently, Beavers has not established a fundamental miscarriage of justice to excuse his default of these claims.

III.

The first of Beavers' undefaulted claims is his argument that his trial counsel was constitutionally ineffective. In order to be entitled to relief on this claim, Beavers bears the burden of demonstrating that his attorneys' "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). In assessing counsels' performance, we bear in mind that our review is "highly deferential." *Id.* at 689. Indeed, we afford a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance. *See id.* And, to eliminate the deceptive effects of hindsight on our consideration, we look to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct." *Id.* at 690. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. *See id.* at 691-92. Therefore, deficiencies in Beavers' attorneys' conduct would warrant reversal only if he convinces us that in the absence of unprofessional errors by his attorneys there is a reasonable probability—*i.e.*, one adequate to undermine our confidence in the result—that "the result of the proceeding would have been different." *See id.* at 694. We review de novo Beavers' claim that counsel was ineffective. *See id.* at 698.

Beavers maintains that the performance of his trial counsel fell below an objective standard of reasonableness in two areas—the handling of issues relating to Beavers' mental health and the investigation and presentation of mitigating evidence. More specifically, Beavers asserts that counsel failed: (1) to communicate effectively with his mental health expert; (2) to ensure that he obtained a psychiatric evaluation on an in-patient basis; (3) to obtain a full social and clinical history for use by his court-appointed mental health expert; and (4) to present the testimony of mitigation witnesses during the sentencing phase of trial, including family and friends who could have testified about Beavers' upbringing by a schizophrenic mother.

With respect to counsel's handling of the mental health issues, Beavers maintains that the district court erred in denying this claim based on our repeated admonitions that counsel is not obligated to "shop around" to find an expert that will provide a different or better expert opinion. *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Roach v. Martin*, 757 F.2d 1463, 1477 (4th Cir. 1985). Beavers contends that this is not the basis for his claim and that his argument, instead, "is that he was entitled to one, competently arrived at, opinion, which he did not receive." Initial Brief of Appellant at 48. This argument, however, only serves to highlight the deficiency in Beavers' position.

Attorneys need not be mental health experts or medical doctors, and they are not held to a standard of competence requiring them to be. *See Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993). Pursuant to defense counsel's request that Beavers be examined by a mental health expert, Dr. Henry O. Gwaltney, Jr., a forensic clinical

psychologist, was appointed. Dr. Gwaltney's subsequent opinion provided Beavers' attorneys with little support for an insanity defense or evidence in mitigation. Beavers does not assert that counsel was informed by Dr. Gwaltney or others that more information concerning Beavers' social and medical history, further testing, or additional expert assistance was required in order for Dr. Gwaltney to properly evaluate Beavers. And, Dr. Gwaltney's opinion was consistent with that of two psychiatrists who had evaluated Beavers to determine his mental state at the time of the murder. In short, Beavers' attorneys did not perform unprofessionally in relying on his court-appointed mental health expert. *See Jones v. Murray*, 947 F.2d 1106, 1112-13 (4th Cir. 1991) (rejecting argument that counsel was ineffective for relying on the psychological assessment of Dr. Gwaltney).

With regard to Beavers' claim that counsel should have engaged in further investigation to discover additional mitigating evidence from his past, we again conclude that counsel's performance was not professionally deficient. Beavers does not dispute that trial counsel contacted a number of Beavers' family members, including his wife, his mother and father, and his uncle in an effort to obtain mitigating background evidence. Nor does he dispute that it was the professional judgment of his attorneys that the testimony of these witnesses potentially would have been more damaging than beneficial because of aggravating information they possessed that counsel did not wish to risk disclosing. Beavers does not attack this strategic decision on the part of counsel, but rather proffers affidavits from family members, neighbors, and former coworkers who indicate that Beavers' mother was schizophrenic and that her bizarre conduct had an extremely adverse effect on her child-rearing skills and that, as a result, Beavers was subjected to a very difficult and abusive childhood.

Although "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland*, 466 U.S. at 691, counsel is not constitutionally required to interview every family member, neighbor, and coworker in the search for constitutionally mitigating evidence. Because Beavers' trial counsel conducted a reasonable investigation for mitigating evidence with Beavers' closest family members and found nothing that, in the professional judgment of the attorneys, could be employed in Beavers' defense, we conclude that counsel did not perform unprofessionally in failing to investigate further.

Moreover, even if Beavers had overcome the presumption that counsel's performance was within the broad range of professionally acceptable conduct, we are not convinced that he would have satisfied the prejudice prong of *Strickland*. The mental health evidence that Beavers argues would have been obtained if counsel had performed competently does not undermine our confidence in the verdict at the guilt phase of his trial. And, although "evidence of a defendant's mental impairment may diminish his blameworthiness for his crime," it also may "indicate[ ] that there is a probability that he will be dangerous in the future." *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir. 1995) (internal quotation marks omitted). Thus, this evidence is a two-edged sword, and "the sentencing authority could well have found in the mitigating evidence of mental illness or history of abuse, sufficient evidence to support a finding of future dangerousness." *Id.* at 981. In sum, Beavers was not deprived of constitutionally adequate assistance of counsel.[5]

IV.

Beavers next contends that the state trial court violated the Eighth and Fourteenth Amendments by refusing to grant a mistrial after it struck a witness' testimony. During Beavers' trial, a state law enforcement officer, Deputy Lam, testified. At the beginning of his testimony, the Commonwealth presented him with a document to refresh his memory. Beavers objected to Deputy Lam reading from the document in answering two questions and sought a mistrial. Deputy Lam then testified that Beavers had told him that "'he had no

[5]Beavers also argues that he was entitled to an evidentiary hearing in district court to develop the facts underlying his ineffective assistance of counsel claim and his ineffective assistance of court-appointed mental health expert claim. We review a decision of a district court denying an evidentiary hearing for an abuse of discretion. *See Pruett*, 996 F.2d at 1577. We conclude that the district court did not abuse its discretion because Beavers did not demonstrate that the additional facts he alleges, if true, would entitle him to relief. *See, e.g., Beaver v. Thompson*, 93 F.3d 1186, 1190 (4th Cir.), *cert. denied*, 117 S. Ct. 553 (1996).

other choice but to do what he had done because [Mrs. Lowery] could identify him.'" *Beavers*, 427 S.E.2d at 419 (alteration in original). Deputy Lam subsequently equivocated regarding the accuracy of his memory of portions of the statement, and when Beavers once again objected, the trial court sustained the objection and ordered the jury to disregard the officer's testimony in its entirety. On direct appeal, the Supreme Court of Virginia held that the trial court had not erred in refusing to grant a mistrial rather than give a cautionary instruction. *See id.* Beavers now asserts that the instruction given by the trial court was insufficient to cure the prejudice caused by Deputy Lam's statement and that the failure of the trial court to grant a mistrial created an impermissible risk that Beavers' conviction and sentence were the product of passion, prejudice, and arbitrary factors.

We disagree. Even if we were to conclude that Beavers is correct that the failure to grant a mistrial under these circumstances was an error of constitutional dimension, relief would not be appropriate. Beavers points to no clearly established rule of constitutional law in existence in October 1993, when his conviction became final, that would have compelled a state court to reverse his conviction; hence this argument is barred by the new rule doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *See O'Dell v. Netherland*, 117 S. Ct. 1969, 1973 (1997). Accordingly, this argument does not provide a basis for relief.

V.

Finally, Beavers contends that the state trial court deprived him of the guarantees of the Eighth and Fourteenth Amendments by refusing to ask prospective jurors during voir dire, "Do you believe that if one is convicted of taking another's life, the proper penalty is loss of your own life?" Initial Brief of Appellant at 59. Again, we disagree.

"[T]he requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment," prohibits "[a] juror who will automatically vote for the death penalty in every case" from sitting on a capital jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). A corollary of the right to an impartial jury is the requirement of a voir dire sufficient to permit identification of unqualified jurors because without an adequate voir dire, a trial judge will not be able to remove

unqualified jurors and the defendant will not be able to exercise challenges for cause. *See id.* at 729-30. Thus, a capital defendant must be allowed on voir dire to ascertain whether prospective jurors are unalterably in favor of the death penalty in every case, regardless of the circumstances, rendering them unable to perform their duties in accordance with the law. *See id.* at 735-36. Questions directed simply to whether a juror can be fair, or follow the law, are insufficient. *See id.* at 734-36.

Although it declined to ask Beavers' proposed question, the state trial judge asked prospective jurors, "'[I]f the jury should convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?'" *Beavers*, 427 S.E.2d at 418. This question is adequate to identify those who would automatically vote for the death penalty. Thus, Beavers' argument lacks merit.

VI.

In sum, we conclude that Beavers procedurally defaulted his claims that (1) his appointed mental health expert was constitutionally ineffective in violation of the Eighth and Fourteenth Amendments; (2) the refusal of the state trial court to permit one of his trial attorneys to withdraw from representation violated the Sixth, Eighth, and Fourteenth Amendments; (3) the refusal of the state trial court to remove for cause a prospective juror who stated during voir dire that she would impose the death penalty if the jury returned a capital conviction violated the Eighth and Fourteenth Amendments; and (4) the state trial court failed to guide adequately the discretion of the jurors in considering the mitigating evidence in violation of the Sixth, Eighth, and Fourteenth Amendments. And, Beavers' remaining claims lack merit.

Prior to the decision of the Supreme Court in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), Beavers sought a certificate of appealability in this court pursuant to 28 U.S.C.A. § 2253(c)(1) (West Supp. 1997) (providing in pertinent part that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court"). Following the *Lindh* decision, *see Lindh*, 117 S. Ct.

at 2067 (concluding that generally the amendments to chapter 153 of Title 28 do not apply to petitions, like Beavers', filed prior to the effective date of the AEDPA), Beavers sought a certificate of probable cause to appeal from the district court. The district court denied the certificate, reasoning that Beavers had not made a substantial showing of denial of a constitutional right. Beavers subsequently petitioned this court for a certificate of probable cause to appeal.

We need not decide whether, strictly speaking, Beavers was correct in seeking a certificate of appealability under amended § 2253 or a certificate of probable cause to appeal because he has failed to make the substantial showing of the denial of a constitutional right necessary for the grant of either. *See Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991) (per curiam) (explaining that to warrant the grant of a certificate of probable cause to appeal, a habeas petitioner must "make a substantial showing of the denial of [a] federal right" and that to satisfy this showing, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further" (internal quotation marks & emphasis omitted; alterations in original)); *Murphy v. Netherland*, 116 F.3d 97, 101 (4th Cir. 1997) (denying certificate of appealability under § 2253 in habeas corpus action seeking relief from death sentence where petitioner failed to make a substantial showing of the denial of a constitutional right). Accordingly, we dismiss Beavers' appeal.

DISMISSED