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Hedrick v. Warden 570 S.E.2d 840 (Va. 2002)

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Hedrick v. Warden 570 S.E.2d 840 (Va. 2002)

I. Facts

On May 10, 1997, Brandon Wayne Hedrick (“Hedrick”) and Trevor Jones (“Jones”) drove to an area in Lynchburg to find prostitutes. Hedrick and Jones met two prostitutes and the four went to Jones’s apartment to engage in sexual relations and smoke crack cocaine. Thereafter, Hedrick and Jones brought the prostitutes back to the area and met two other prostitutes and returned to Jones’ apartment to smoke marijuana, drink bourbon and engage in sexual relations. Hedrick and Jones drove these women back and Jones saw Lisa Yvonne Alexander Crider (“Crider”).¹

Hedrick and Jones, knowing that Crider’s boyfriend sold crack cocaine, picked up Crider to have sexual relations with her and rob her of any crack cocaine she had in her possession.² Jones asked Crider if she wanted to have sex.³ Hedrick, Jones and Crider drove to Jones’s apartment where Jones paid Crider fifty dollars to have sexual intercourse.⁴ After intercourse, Jones and Hedrick created a plan in which Hedrick would pretend to rob Jones and Crider.⁵ Jones instructed Hedrick to retrieve Jones’s shotgun from the truck.⁶ Hedrick entered the apartment, pumped the shotgun and signaled to Jones and Crider to go into a bedroom.⁷ Hedrick directed Jones to empty Crider’s pockets.⁸ Among other things, Jones took the fifty dollar bill he paid Crider earlier.⁹ Jones handcuffed Crider, duct taped her eyes and mouth, and placed a shirt over her face.¹⁰ Hedrick took Crider to the truck.¹¹ Hedrick, Jones and Crider left the apartment around 1:00 am.¹² Hedrick and Crider sat in the back seat while Jones

1. Hedrick v. Warden, 570 S.E.2d 840, 846 (Va. 2002).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Hedrick, 570 S.E.2d at 846.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

drove.¹³ Hedrick removed the duct tape from Crider.¹⁴ Jones stopped driving and got out of the truck while Hedrick raped Crider.¹⁵

Hedrick and Jones decided to kill Crider to avoid retaliation from Crider's boyfriend. Jones drove around to find a suitable location to commit the murder. Crider cried and pleaded for her life. She asked if there was anything she could do to prevent them from killing her. Hedrick replied that he would think about it if she would perform oral sex, which she did. In the morning, Jones drove to an area near the James River where the two men removed the handcuffs and duct taped Crider's hands together. They took Crider to the river and Jones positioned her so that her back was to the river. Hedrick shot Crider in the face with the shotgun.¹⁶

Hedrick was convicted of the capital murder of Crider in the commission of forcible sodomy, rape and robbery in violation of Virginia Code Sections 18.2-31(5) and 18.2-31(4); "robbery in violation of Code § 18.2-58; rape in violation of Code § 18.2-61; forcible sodomy in violation of Code § 18.2-67.1; abduction in violation of Code § 18.2-47; and use of a firearm in the commission of a murder in violation of Code § 18.2-53.1."¹⁷ The jury fixed the sentences for the non-capital crimes according to the appropriate statutory ranges and fixed the punishment for the capital crimes at death.¹⁸ The circuit court sentenced Hedrick according to the jury's recommendations and the Supreme Court of Virginia affirmed the judgment of the circuit court in *Hedrick v. Commonwealth*.¹⁹

Hedrick filed a petition for habeas relief alleging that his trial counsel were ineffective. The Supreme Court of Virginia ordered the Circuit Court of Appomattox County to conduct an evidentiary hearing on the issue of whether Hedrick was denied effective assistance of counsel. At the evidentiary hearing,

13. *Hedrick*, 570 S.E.2d at 846.

14. *Id.*

15. *Id.*

16. *Id.* at 846-47.

17. *Id.* at 845; see VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2002) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration"); VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2002) (defining "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery" as capital murder); VA. CODE ANN. § 18.2-58 (Michie 1996) (describing punishment for robbery); VA. CODE ANN. § 18.2-61 (Michie Supp. 2002) (defining what constitutes rape and the punishment for such a crime); VA. CODE ANN. § 18.2-67.1 (Michie Supp. 2002) (defining what constitutes forcible sodomy and the punishment for such a crime); VA. CODE ANN. § 18.2-47 (Michie Supp. 2002) (defining abduction and kidnapping and describing punishment); VA. CODE ANN. § 18.2-53.1 (Michie 1996) (defining when it is unlawful to use or display firearm in committing felony).

18. *Hedrick*, 570 S.E.2d at 845.

19. *Id.*; *Hedrick v. Commonwealth*, 513 S.E.2d 634, 634 (Va. 1999), *cert. denied*, 528 U.S. 952 (1999) (holding that there was no reversible error found in trial court's decision); see Kelly E.P. Bennett, Case Note, 11 CAP. DEF. J. 429 (1999) (analyzing *Hedrick v. Commonwealth*, Nos. 98-2055, 98-2056, 1999 WL 101079 (Va. Feb. 26, 1999)).

the circuit court concluded that Hedrick's allegations lacked merit. While Hedrick's petition was pending, he wrote numerous letters regarding his inability to decide whether to pursue the habeas petition. The circuit court decided that Hedrick did desire to pursue the petition. The Supreme Court of Virginia determined that the circuit court's conclusions of law involved mixed questions of fact and law and were therefore subject to its *de novo* review.²⁰

In this habeas proceeding, Hedrick claimed that his trial counsel provided ineffective assistance. Hedrick's claims of ineffectiveness included allegations that trial counsel: (1) failed to communicate with each other; (2) failed to investigate Hedrick's background and failed to prepare for trial; (3) failed to pursue an accidental shooting defense; (4) failed to develop a voluntary intoxication defense; (5) made errors affecting the penalty phase of the capital murder trial; (6) did not present evidence of Hedrick's remorse and cooperation; (7) did not cross-examine Jones effectively and failed to cross-examine law enforcement officers; (8) did not advise Hedrick not to testify at the capital murder trial due to his emotional immaturity and intellectual limitations; (9) failed to object to the testimony of the victim's grandmother; (10) failed to object to the Commonwealth's Attorney's closing argument; (11) failed to object to venue; (12) failed to make a motion for a change of venue when members of the venire were exposed to media coverage about the case; (13) failed to conduct an adequate voir dire of the jury; (14) failed to advise him regarding a statement he made to the police after his arrest; (15) failed to request various jury instructions; and (16) failed to preserve and argue meritorious issues on appeal.²¹

20. *Hedrick*, 570 S.E.2d at 845-47. While Hedrick's petition for habeas corpus was pending, he forwarded a notarized letter requesting permission to withdraw his petition. *Id.* at 845. The next day, however, Hedrick wrote another letter stating that his attorneys were not acting according to his wishes and that their beliefs regarding capital punishment conflicted with his own. *Id.* Hedrick stated that he is a religious man who believed that he should be punished with death for his crime but his attorneys opposed the death penalty. *Id.* Subsequently, Hedrick forwarded another letter prepared by his attorneys stating that he wished to proceed with his habeas corpus petition. *Id.* at 846. The Supreme Court of Virginia entered an order instructing the circuit court to hold another evidentiary hearing to determine whether Hedrick wanted to proceed with his petition. *Id.* The circuit court concluded that Hedrick did desire to continue with the petition and that this was his final decision on the matter. *Id.* If the circuit court reached the opposite result, that Hedrick did not wish to continue his habeas petition, then additional procedures would be required. *See also* Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55, 56 (2001) (examining "the ethical and professional obligations of the attorney whose client pleads guilty and asks for death").

21. *Hedrick*, 570 S.E.2d at 848-62. Hedrick made two other claims. *Id.* at 862. Hedrick asserted that the circuit court erred by refusing to allow his habeas corpus counsel to inspect the Commonwealth's Attorney's files. *Id.* The Supreme Court of Virginia concluded that Hedrick could not expand the scope of the court's order directing the circuit court to conduct an evidentiary hearing only on the issues raised in Claim I of the habeas corpus petition alleging ineffective assistance of counsel. *Id.* Claim I of Hedrick's petition did not include issues regarding the Commonwealth's Attorney's files or trial counsel's access to such files. *Id.* Hedrick also claimed that the Commonwealth failed to disclose favorable information to him in violation of *Brady v. Maryland*. *Id.*; *see Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding "that the suppression by the

II. Holding

The Supreme Court of Virginia found that the circuit court properly applied the two-pronged test of ineffectiveness established by *Strickland v. Washington*.²² Agreeing with the circuit court that Hedrick's claims were all without merit, the Supreme Court of Virginia held that the alleged deficiencies in trial counsel's assistance did not constitute ineffective assistance.²³ The court dismissed the petition for a writ of habeas corpus.²⁴

III. Analysis

The court relied on the established legal principles of *Strickland* to determine whether Hedrick's claims of ineffective assistance of counsel had merit.²⁵ Under *Strickland*, a two-pronged test must be satisfied to prevail on an ineffective assistance claim.²⁶ The defendant must show that counsel's performance was so greatly lacking that the defendant did not receive a reasonable standard of care and competence guaranteed by the Sixth Amendment.²⁷ If the defendant can show deficient performance, the defendant must also demonstrate that the deficient representation by counsel prejudiced the defense.²⁸

Ineffective assistance of counsel claims require the defendant to prove prejudice.²⁹ The United States Supreme Court held in *Strickland* that the defendant must show that particular errors in counsel's performance had an actual adverse effect on the defense.³⁰ The Supreme Court of Virginia used the following test established by the United States Supreme Court to determine whether the required prejudice existed:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome When a defendant challenges a conviction, the question is whether there is a

prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The court held this claim to be procedurally defaulted because Hedrick did not raise this claim in his opening brief. *Hedrick*, 570 S.E.2d at 862.

22. *Hedrick*, 570 S.E.2d at 847; *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (holding that defendant must show counsel's deficient performance and that performance prejudiced defense before sentence or conviction will be overturned).

23. *Hedrick*, 570 S.E.2d at 847, 862.

24. *Id.* at 862.

25. *Id.* at 847.

26. *Strickland*, 466 U.S. at 687.

27. *Id.*

28. *Id.*

29. *Hedrick*, 570 S.E.2d at 847.

30. *Strickland*, 466 U.S. at 693.

reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.³¹

The court reiterated the United States Supreme Court's decision that *Strickland's* standard is "highly demanding."³²

A. Communication

Hedrick contended that the main issue in this case was that trial counsel were ineffective because they failed to communicate with him regarding a strategy, witnesses and witness testimony.³³ The circuit court concluded that this claim was without merit and the Supreme Court of Virginia agreed.³⁴ Lee R. Harrison ("Harrison") and James P. Baber ("Baber") were Hedrick's trial counsel.³⁵ At the evidentiary hearing, Harrison testified that a communication problem occurred only on one occasion when Baber did not give certain information to Harrison promptly.³⁶ Harrison remedied the situation by retrieving a copy of the material needed from Baber's office.³⁷ Trial counsel also testified that although they did not meet at one another's offices, they did meet at other locations to discuss the case.³⁸ Harrison prepared the expert witnesses and Baber located lay witnesses while collecting information about Hedrick's background.³⁹ The evidentiary hearing report revealed that trial counsel provided the mental health expert witness with the information Baber collected and materials given by the Commonwealth.⁴⁰ Based on the evidentiary hearing report submitted by the circuit court, the Supreme Court of Virginia held that Hedrick's allegation that trial counsel failed to communicate did not pass the performance and prejudice test established in *Strickland*.⁴¹

B. Investigation and Preparation for Trial

Hedrick further argued that trial counsel neither investigated nor adequately prepared for trial.⁴² Hedrick alleged that counsel did not discuss his background with his friends or relatives and did not speak with witnesses prior to the wit-

31. *Strickland*, 466 U.S. at 694-95.

32. *Hedrick*, 570 S.E.2d at 848 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986)).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Hedrick*, 570 S.E.2d at 848.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

nesses' testimony during the sentencing hearing.⁴³ Hedrick also asserted that the mental health expert, Dr. Gary Hawk ("Hawk"), urged counsel to contact Hedrick's friends, family members or other individuals regarding Hedrick's background and that trial counsel did not do so.⁴⁴ Hedrick claimed that trial counsel failed to obtain his school records that indicated his " 'borderline' intellectual abilities" and that they failed to obtain an expert witness to advise them in scientific areas.⁴⁵

The circuit court rejected Hedrick's allegations.⁴⁶ The circuit court found that trial counsel researched legal issues, prepared and filed motions and reviewed extensive discovery provided by the Commonwealth.⁴⁷ Trial counsel also collected background information, contacted Hedrick's friends and family and attempted to obtain Hedrick's school records.⁴⁸ The circuit court found that trial counsel met with various expert witnesses, including Hawk, and discussed the case with Hedrick numerous times before the trial.⁴⁹ Based on the circuit court's findings, the Supreme Court of Virginia held that Hedrick's allegation that trial counsel failed to investigate and prepare adequately for trial did not pass the performance and prejudice test established in *Strickland*.⁵⁰

C. Guilt Phase Theories

Hedrick argued that trial counsel failed to develop guilt phase theories, specifically arguing that Baber and Harrison did not reconcile their differences regarding a possible theory that Hedrick accidentally shot Crider.⁵¹ Hedrick also argued that trial counsel failed to procure an expert witness to help the development of this theory.⁵² Hedrick asserted that the Commonwealth's medical examiner had evidence supporting this theory.⁵³

The Supreme Court of Virginia rejected this allegation based on the circuit court's report stating that the jury was presented with testimony that Hedrick attempted to shoot above Crider's head "to scare her."⁵⁴ However, the Commonwealth's evidence demonstrated that the shooting took place at a distance of three to seven feet from Crider's mouth.⁵⁵ The evidence also established that

43. *Id.*

44. *Hedrick*, 570 S.E.2d at 848-49.

45. *Id.* at 849.

46. *Id.*

47. *Id.*

48. *Id.* at 849.

49. *Id.* at 848-49.

50. *Hedrick*, 570 S.E.2d at 849.

51. *Id.*

52. *Id.* at 850.

53. *Id.*

54. *Id.*

55. *Id.* at 848-49.

Special Agent Holt ("Holt") initially suggested the accidental shooting theory to minimize Hedrick's involvement.⁵⁶ Hedrick admitted in his judicial admission filed with the Supreme Court of Virginia that he was guilty of the crimes charged.⁵⁷ Therefore, the court held that Hedrick's argument failed to satisfy the performance and prejudice standards of *Strickland*.⁵⁸

D. Voluntary Intoxication

Hedrick asserted that because he was under the influence of marijuana he was not aware of his actions and did not have a "clear mind."⁵⁹ Hedrick claimed that trial counsel did not develop evidence of voluntary intoxication as a defense.⁶⁰ The circuit court found that trial counsel did present evidence regarding Hedrick's drug and alcohol abuse and his intoxication on the night before the murder.⁶¹

The quantities of drugs and alcohol that Hedrick consumed were not known and the circuit court found that a minimum of five hours lapsed between the time Hedrick ingested alcohol or drugs and the time of the shooting.⁶² Also, the evidence at trial portrayed someone who was neither intoxicated nor impaired.⁶³ The evidence demonstrated that the conduct of Jones and Hedrick was both purposeful and planned.⁶⁴ Based on the facts presented at trial and defense counsel's presentation of evidence of drug and alcohol consumption, the Supreme Court of Virginia held that Hedrick's claims failed to satisfy the performance or prejudice standards of *Strickland*.⁶⁵

E. Errors Affecting Penalty Phase

Hedrick claimed that trial counsel made numerous errors during the penalty phase of the capital murder trial.⁶⁶ Hedrick argued that counsel did not conduct a "meaningful . . . investigation" and asserted that "[t]hey made only the most superficial effort to collect records concerning . . . [his] background."⁶⁷ He

56. *Hedrick*, 570 S.E.2d at 850.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 850. Hedrick also argued that trial counsel failed to proffer a jury instruction on voluntary intoxication. The Supreme Court of Virginia disagreed. The court relied on the circuit court's observation that the evidence "'did not depict [petitioner] as someone who was significantly intoxicated and impaired.'" *Id.* at 851.

62. *Hedrick*, 570 S.E.2d at 851.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

alleged that trial counsel did not interview people regarding his background and did not subpoena any witnesses nor speak to the witnesses about their testimony prior to the trial.⁶⁸ Hedrick claimed that his family members could have described a "chaotic and often violent environment in which . . . [he] grew up."⁶⁹ Hedrick also asserted that trial counsel failed sufficiently to use Hawk, whose expert report cited Hedrick's parents' substance abuse.⁷⁰

The Supreme Court of Virginia held that Hedrick's claims lacked merit.⁷¹ According to the circuit court's report, trial counsel met with Hawk to prepare for the capital murder trial and Hawk conducted interviews with Hedrick's mother and brother.⁷² Hawk informed trial counsel of mitigating factors he identified such as Hedrick's inferior intellect, drug and alcohol abuse, and depression.⁷³ With regard to Hedrick's claim that trial counsel did not present evidence of Hedrick's "chaotic" family environment, the circuit court found that Hedrick instructed his attorneys not to present evidence of a " 'bad childhood.' "⁷⁴ The Supreme Court of Virginia stated that Hedrick could not assert in a subsequent habeas corpus petition that he was prejudiced by trial counsel's conduct because they followed his instructions.⁷⁵

The Supreme Court of Virginia stated that trial counsel presented evidence that Hedrick ingested alcohol and drugs on the evening prior to the murder.⁷⁶ However, nobody knew the quantity of substances Hedrick consumed.⁷⁷ Hedrick's expert witnesses could not opine that Hedrick was intoxicated to such a degree that he was unable to "form an intent to commit a specific act."⁷⁸ The Supreme Court of Virginia found that Hedrick was not prejudiced by trial counsel's conduct because the evidence on the record demonstrated that he deliberately developed and implemented the plan to rob and kill Crider.⁷⁹ The court held that Hedrick's arguments did not satisfy the performance and prejudice requirements established in *Strickland*.⁸⁰

68. *Hedrick*, 570 S.E.2d at 851.

69. *Id.* at 852.

70. *Id.* at 851-52.

71. *Id.* at 852.

72. *Id.*

73. *Id.*

74. *Hedrick*, 570 S.E.2d at 852. During Hedrick's sentencing hearing, his family testified that he was raised in a "normal" family, was not abused and was taught right from wrong. *Id.* at 852.

75. *Id.*

76. *Id.* at 853.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Hedrick*, 570 S.E.2d at 853.

F. Remorse and Cooperation

Hedrick argued that trial counsel did not adequately present evidence of his remorse for his acts and his cooperation with police officers in making statements regarding Crider's death.⁸¹ Hedrick asserted that trial counsel neither questioned Hedrick's spiritual counselor about his remorse nor used jail records stating that he expressed "extreme shame, remorse, [and] pessimism."⁸² Hedrick also claimed that trial counsel failed to question Jones before or during the trial regarding Hedrick's reaction to the crimes committed.⁸³

The Supreme Court of Virginia held that Hedrick's claims were without merit because trial counsel presented evidence of Hedrick's cooperation with police officers.⁸⁴ Moreover, trial counsel presented witnesses who testified to Hedrick's remorse.⁸⁵ The circuit court also stated that Hedrick's testimony did not demonstrate remorse for the victim.⁸⁶ Based on this report, the Supreme Court of Virginia held that Hedrick failed to satisfy the performance and prejudice standards of *Strickland*.⁸⁷

*G. Cross-Examination**1. Jones*

Hedrick claimed that trial counsel failed to cross-examine Jones adequately.⁸⁸ Hedrick argued that although trial counsel knew of Jones's bias against Hedrick, trial counsel did not elicit such bias.⁸⁹ Hedrick also claimed that Baber did not impeach Jones regarding inconsistent statements he made to police officers and did not question Jones adequately about his felony convictions.⁹⁰ Hedrick argued that trial counsel did not question Jones regarding the offers of leniency made by the Commonwealth in exchange for his testimony.⁹¹

The Supreme Court of Virginia agreed with the circuit court's conclusion that these assertions lacked merit.⁹² The circuit court accepted that trial counsel made tactical decisions regarding the cross-examination of Jones and the determination to emphasize that Jones led the crimes.⁹³ The Supreme Court of Virginia

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Hedrick*, 570 S.E.2d at 853-54.

87. *Id.* at 854.

88. *Id.* at 855.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Hedrick*, 570 S.E.2d at 855.

93. *Id.*

held that Hedrick did not show that he was prejudiced as a result of the alleged deficiencies in the cross-examination of Jones.⁹⁴ The court held that Hedrick did not satisfy the performance and prejudice requirements established in *Strickland*.⁹⁵

The court also agreed with the circuit court's finding that trial counsel were not ineffective in failing to question Jones about the alleged offer of leniency.⁹⁶ During the habeas evidentiary hearing, the Commonwealth's Attorney testified against the validity of the allegation.⁹⁷ The Supreme Court of Virginia held that Hedrick failed to demonstrate how he was prejudiced by the fact that trial counsel did not question Jones about his purported bias against him and that he did not demonstrate that there was a reasonable probability that the outcome of the trial would have been different if this testimony was elicited.⁹⁸ Further, the court stated that given Hedrick's judicial admission of guilt, he could not have been prejudiced.⁹⁹

2. Police Officers

Hedrick argued that trial counsel failed to cross-examine police officers.¹⁰⁰ Hedrick claimed that trial counsel did not challenge the Commonwealth's argument that Holt created the accidental shooting theory to trick Hedrick into confessing to the killing.¹⁰¹ Hedrick asserted that an adequate cross-examination of Holt would have demonstrated that his testimony was inconsistent with notes written by both Holt and Deputy Sheriff Williamson ("Williamson") suggesting that the accidental shooting theory did not originate with Holt but with Hedrick.¹⁰² Hedrick argued that trial counsel failed to demonstrate this conflict to the jury.¹⁰³

The Supreme Court of Virginia agreed with the circuit court's conclusion that further cross-examination of both Holt and Williamson "would not have led to a reasonable probability that the outcome of the trial would have been different."¹⁰⁴ The Supreme Court of Virginia held that Hedrick did not demonstrate prejudice because he admitted his guilt to the police officers.¹⁰⁵ Thus, the court

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Hedrick*, 570 S.E.2d at 855-56; see *Strickland*, 466 U.S. at 694-95 (requiring defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

99. *Hedrick*, 570 S.E.2d at 856.

100. *Id.*

101. *Id.*

102. *Id.* at 856-57.

103. *Id.* at 857.

104. *Id.*

105. *Hedrick*, 570 S.E.2d at 857.

held that Hedrick did not satisfy the prejudice and performance standards of the *Strickland* test.¹⁰⁶

H. Advice Regarding Hedrick's Testimony

Hedrick argued that trial counsel failed to advise him not to testify at the capital murder trial given his "intellectual limitations and emotional immaturity."¹⁰⁷ Hedrick also claimed that trial counsel did not prepare him for trial and failed to rehabilitate him after a poor performance during cross-examination.¹⁰⁸ The Supreme Court of Virginia found these claims to lack merit because of the circuit court's report that trial counsel were aware of Hedrick's ability to relate his version of events regarding the crimes.¹⁰⁹ The report stated that both Harrison and Baber testified that Hedrick wanted to tell his version of the story.¹¹⁰ The circuit court also noted in the report that trial counsel "repeatedly" reviewed Hedrick's version of the events with him and discussed with him the inconsistencies in his story.¹¹¹ The circuit court stated that trial counsel could not have rehabilitated Hedrick on cross-examination and therefore elected to remove him from the stand.¹¹² Based on these findings, the Supreme Court of Virginia held that Hedrick did not satisfy the performance and prejudice prongs of the *Strickland* test.¹¹³

I. Victim's Grandmother

Hedrick argued that trial counsel failed to object to the testimony of Crider's grandmother, Edna Alexander ("Alexander").¹¹⁴ Alexander identified a picture of Crider's son and detailed the events that occurred on the day before Crider's death.¹¹⁵ The circuit court found that trial counsel made a tactical decision not to object believing that the information was not likely to cause prejudice to Hedrick and permitted trial counsel to cross-examine Alexander about her knowledge that Crider was a prostitute and sold drugs.¹¹⁶ The Supreme Court of Virginia agreed with the circuit court and held that Hedrick failed to satisfy the performance and prejudice requirements established by *Strickland*.¹¹⁷

106. *Id.*

107. *Id.* at 856.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Hedrick*, 570 S.E.2d at 856.

112. *Id.*

113. *Id.*

114. *Id.* at 857.

115. *Id.*

116. *Id.*

117. *Hedrick*, 570 S.E.2d at 857.

J. Commonwealth's Closing Argument

Hedrick argued that trial counsel were ineffective because they did not object to the Commonwealth's Attorney's closing argument.¹¹⁸ During closing argument, trial counsel argued that Hedrick was only guilty of manslaughter and suggested that Crider was killed accidentally.¹¹⁹ In rebuttal, the Commonwealth's Attorney stated that the case was not about manslaughter and that Hedrick was guilty.¹²⁰ Additionally, the Commonwealth's Attorney stated, "[n]ot guilty means he gets to walk right out that door That's not what this case is about. It's about capital murder."¹²¹

The Supreme Court of Virginia stated that even assuming trial counsel should have objected, Hedrick did not establish prejudice.¹²² Agreeing with the circuit court, the Supreme Court of Virginia explained that the jury knew about Hedrick's other convictions and that he would not have been released from prison if the jury did not convict him of capital murder.¹²³ Therefore, the Supreme Court of Virginia held that Hedrick did not satisfy the performance and prejudice requirements of *Strickland*.¹²⁴

K. Venue

Hedrick claimed that trial counsel were ineffective because they failed to object to venue.¹²⁵ Hedrick argued that venue for this case "was not proved on the substantive charges of forcible sodomy and rape."¹²⁶ The circuit court stated in its report that the murder of Crider occurred in Appomattox County.¹²⁷ The Supreme Court of Virginia stated that venue "was proper for all the capital murder indictments in Appomattox County, regardless of where the underlying offenses occurred."¹²⁸ The court held that Hedrick did not satisfy the performance and prejudice standards established in *Strickland*.¹²⁹

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Hedrick*, 570 S.E.2d at 857.

124. *Id.* at 857-58.

125. *Id.* at 858.

126. *Id.*

127. *Id.*

128. *Id.*; see VA. CODE ANN. § 19.2-244 (Michie 2000) (stating that, "as otherwise provided by law, the prosecution of a criminal case shall be had in the county or city in which the offense was committed"); VA. CODE ANN. § 19.2-247 (Michie Supp. 2002) (stating that for capital murder, "the offense may be prosecuted in any jurisdiction in the Commonwealth in which any one of the killings may be prosecuted").

129. *Hedrick*, 570 S.E.2d at 858.

L. Media Coverage and Change of Venue

Hedrick claimed that trial counsel were ineffective because of a failure to move for a change of venue when venire members were exposed to media coverage on the case.¹³⁰ Hedrick based this argument on newspaper articles that detailed the crime and included his confession to the crimes.¹³¹ The circuit court's report stated that the articles could not have affected the jury because the articles were "routine" and an "accurate coverage of events."¹³² The jurors assured the trial court that they could set aside any outside information they acquired about the case and that they would base their decision only on the evidence presented at trial.¹³³ The Supreme Court of Virginia stated that trial counsel had no basis on which to file the motion and that Hedrick failed to satisfy the performance and prejudice standards established in *Strickland*.¹³⁴ Therefore, this claim was determined to be without merit.¹³⁵

M. Voir Dire

Hedrick claimed that trial counsel failed to conduct an adequate voir dire of the jury by failing to ask members of the venire what they read or heard about the case and what effect this information had on their abilities to be a juror.¹³⁶ The Supreme Court of Virginia held that Hedrick's argument lacked merit because the record of the capital murder trial demonstrated that trial counsel conducted a voir dire of prospective jurors and successfully removed certain jurors for cause.¹³⁷ The court held that Hedrick's claim failed to satisfy the performance and prejudice standards established by *Strickland*.¹³⁸

N. Statements to Police Officer

Hedrick claimed that trial counsel were ineffective because of a failure to adequately advise him concerning a statement he made to police officers.¹³⁹ After Hedrick's first statement to the police, he feared the information Jones would give and contacted his attorneys about his intention to make another statement to the police.¹⁴⁰ According to Hedrick, Baber stated that another

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Hedrick*, 570 S.E.2d at 858.

136. *Id.*

137. *Id.* at 859.

138. *Id.* at 860.

139. *Id.* Hedrick made his first statement to the police after his arrest and before trial counsel were appointed. *Id.*

140. *Id.*

statement "could not hurt him" while Harrison stated that Hedrick should not make another statement.¹⁴¹ Hedrick argued that trial counsel did not obtain information that would allow them to give him competent advice, such as formulating rules for the statement to the police before he made the second statement.¹⁴²

The circuit court reported that Harrison testified at the evidentiary hearing that Hedrick stated that he would make the statement regardless of counsel's presence.¹⁴³ The circuit court stated that counsel could not have been ineffective because Hedrick "waived his right and submitted to questions by the police."¹⁴⁴ The Supreme Court of Virginia agreed with the circuit court's conclusions and held that Hedrick failed to satisfy the performance and prejudice standards established by *Strickland*.¹⁴⁵

O. *Jury Instructions*

1. *Testimony of Accomplice*

Hedrick argued that trial counsel were ineffective because they failed to request a jury instruction informing the jury to accept the testimony of the accomplice with "great caution."¹⁴⁶ The Supreme Court of Virginia disagreed, stating that trial counsel were not required to request such an instruction because cautionary accomplice instructions are granted when corroborative evidence is lacking.¹⁴⁷ The circuit court reported that corroborative evidence was not lacking at Hedrick's capital murder trial.¹⁴⁸ The Supreme Court of Virginia stated that Hedrick did not show prejudice, particularly in light of Hedrick's judicial admission.¹⁴⁹ The court further stated that Hedrick did not claim that corroboration was needed "to support his conviction of capital murder during the commission of robbery."¹⁵⁰ Therefore, the court held that Hedrick failed to satisfy the performance and prejudice standards of *Strickland*.¹⁵¹

2. *Unanimously and Beyond a Reasonable Doubt*

Hedrick claimed that trial counsel were ineffective because they did not request a jury instruction informing "the jury that it must find unanimously and

141. *Hedrick*, 570 S.E.2d at 860.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Hedrick*, 570 S.E.2d at 860.

148. *Id.* at 860-61.

149. *Id.* at 861.

150. *Id.*

151. *Id.*

beyond a reasonable doubt that . . . [Hedrick] forced Crider to commit either oral sodomy, anal sodomy, or both before finding him guilty of forcible sodomy or capital murder in the commission of a forcible sodomy.”¹⁵² Hedrick argued that the jury instructions allowed the jury to convict Hedrick more easily and “permitted the jury to make two alternate findings to prove the element of sodomy—anal penetration or oral penetration.”¹⁵³ Hedrick also contended that the instructions did not require the jury to find unanimously that either act was proven beyond a reasonable doubt.¹⁵⁴

The Supreme Court of Virginia stated that regardless of whether trial counsel were required to request such an instruction, Hedrick did not demonstrate any prejudice. The court stated that if Hedrick prevailed on his claim concerning the forcible sodomy instruction, his “convictions for capital murder in the commission of robbery and capital murder in the commission of a rape would not be affected.”¹⁵⁵ The outcome would remain the same. Therefore, the court held that Hedrick’s claim did not satisfy the performance and prejudice standards established in *Strickland*.¹⁵⁶

3. *Vileness and Aggravating Circumstance*

Hedrick claimed that trial counsel failed to request a jury instruction requiring the jury unanimously to agree upon “the vileness aggravating circumstance.”¹⁵⁷ Hedrick argued that the vileness instruction that was submitted to the jury posed a risk that Hedrick would be sentenced to death based upon the vileness predicate even though the jury was split on whether his conduct demonstrated depravity of mind, aggravated battery, or acts of torture.¹⁵⁸ The Supreme Court of Virginia held that Hedrick failed to satisfy the prejudice requirement of *Strickland* because in the penalty phase of the trial, the jury found that Hedrick was “a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.”¹⁵⁹ Hedrick did not challenge the future danger predicate and that finding alone was sufficient to impose a sentence of death.¹⁶⁰

152. *Id.*

153. *Hedrick*, 570 S.E.2d at 861.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Hedrick*, 570 S.E.2d at 862.

160. *Id.*

P. Preservation of Meritorious Issues on Appeal

Hedrick claimed that trial counsel were deficient because they “failed to preserve and argue meritorious issues on appeal.”¹⁶¹ Hedrick failed to present any evidence on this issue during the evidentiary hearing.¹⁶² The Supreme Court of Virginia held that Hedrick failed to satisfy the performance and prejudice standards established in *Strickland*.¹⁶³

Q. Concurrence

The concurring justices agreed that Hedrick did not establish the “prejudice” prong of the two-part test established by the United States Supreme Court in *Strickland*.¹⁶⁴ Defendants must satisfy the *Strickland* two-part test demonstrating that trial counsel’s performance was lacking and that such deficient performance resulted in prejudice.¹⁶⁵ The concurrence clarified that to satisfy the “prejudice” prong, Hedrick needed to demonstrate that “‘but for counsel’s unprofessional errors,’” there was a reasonable probability that “the result of the proceeding would have been different.”¹⁶⁶ The concurrence reiterated the majority opinion’s holding that Hedrick did not do this with any of his claims.¹⁶⁷ The concurrence noted that, as in Hedrick’s case, when it is easier to dispose of an ineffectiveness claim on the ground of insufficient prejudice, then that course should be followed, rather than the longer analysis that the majority took.¹⁶⁸

IV. Application

As *Hedrick* shows, ineffective assistance of counsel claims are difficult to prove. This case is a good example of what defendants must do in order to prevail on such a claim. The court emphasized the importance of the “prejudice” prong and stated that a defendant only needs to show that a reasonable probability exists that the case would have turned out differently but for counsel’s deficient performance.¹⁶⁹ In actuality, this standard is quite high.¹⁷⁰ Practi-

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Strickland*, 466 U.S. at 687.

166. *Hedrick*, 570 S.E.2d at 862-63 (quoting *Strickland*, 466 U.S. at 694).

167. *Id.*

168. *Id.*; see also *Strickler v. Murray*, 452 S.E.2d 648, 652 (Va. 1995) (stating that when determining whether prejudice exists, the court must consider the totality of the evidence before the jury or judge).

169. *Hedrick*, 570 S.E.2d at 847.

170. See Philip H. Yoon, Case Note, 15 CAP. DEF. J. 427 (2003) (analyzing *Woodford v. Visciotti*, 123 S. Ct. 357 (2002)); see generally *Woodford v. Visciotti*, 123 S. Ct. 357 (2002) (implying that state court opinions that include a citation to and analysis of Supreme Court opinions will receive much deference).

tioners should be aware, as the concurrence explains, that it is easier to dispose of ineffective assistance claims based on a lack of sufficient prejudice, and when this is the case, courts will often follow that simpler route.¹⁷¹ Practitioners must be sure to demonstrate how the outcome of the case would have been different if trial counsel did not commit unprofessional errors in *every* instance of ineffective assistance. Thus, for each argument supporting the claim, practitioners must establish both deficient performance and prejudice resulting from it.

V. Conclusion

The Supreme Court of Virginia, relying on the circuit court's report, held that all of Hedrick's ineffective assistance of counsel claims lacked merit and did not demonstrate sufficient prejudice to prevail. Therefore, the court dismissed Hedrick's petition for a writ of habeas corpus. The concurring justices reiterated what is necessary to satisfy the "prejudice" prong established in *Strickland* and stated the simplicity of disposing an ineffective assistance of counsel claim when the defendant demonstrates insufficient prejudice as a result of the alleged deficient performance.

VI. Epilogue

An April 3, 2003 execution date was set for Brandon Wayne Hedrick.¹⁷² The Virginia Attorney General's Office reported that Hedrick withdrew his federal habeas petition.¹⁷³ However, on April 2, 2003, Hedrick again made "a final push" and asked for a stay of execution.¹⁷⁴ In the past, Hedrick's religious convictions influenced his decision to die for his crime.¹⁷⁵ Most recently, Hedrick believed that his death would only perpetuate emotional trauma in Crider's family.¹⁷⁶ Hedrick asserted his remorse for the killing and wished to engage in conversations with Crider's mother regarding the brutal murder.¹⁷⁷ The United States District Court for the Western District of Virginia granted Hedrick a stay of execution.¹⁷⁸

Priya Nath

171. *Hedrick*, 570 S.E.2d at 863.

172. Frank Green, *Execution Date Set in Slaying*, RICH. TIMES-DISPATCH, Feb. 5, 2003, at B-2, available at 2003 WL 8013490.

173. *Id.*

174. *Killer, 24, Hopes to Stop His Execution Thursday*, THE ROANOKE TIMES, April 2, 2003, at B3.

175. Green, *supra* note 172.

176. *Killer, supra* note 174.

177. *Id.*

178. VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, ACTION ALERTS, at <http://www.vadp.org/action.htm> (last visited April 6, 2003).

