VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 26th day of October, 2017.

David Edward Cavalieri, Appellant,

against Record No. 160885
Circuit Court No. 95313

Commonwealth of Virginia, Appellee.

From the Circuit Court of Loudoun County

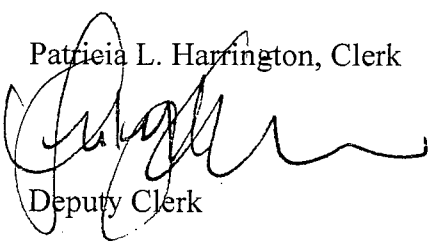
Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Justice McClanahan and Justice Kelsey took no part in the resolution of the petition.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of February, 2018.

David Edward Cavalieri, Appellant,

against Record No. 160885
Circuit Court No. 95313

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 26th day of October, 2017 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice McClanahan and Justice Kelsey took no part in the resolution of the petition.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: _____

Deputy Clerk

Rec. 2/6/18

Mailed on the 11th of March
Rec. 3/14/16

VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

DAVID EDWARD CAVALIERI,

Petitioner,

v. Civil No. 95313

WENDALL W. PIXLEY, WARDEN,
SUSSEX II STATE PRISON

Respondent.

FINAL ORDER

The Court has considered the parties' pleadings and the attached exhibits. The Court has reviewed the record in the criminal case of *Commonwealth of Virginia v. David Edward Cavalieri*, Case No. CR20989, which is made a part of the record in this matter. The Court is of the opinion for the reasons stated in respondent's motion to dismiss that the petitioner is not entitled to the relief sought and an evidentiary hearing is unnecessary. → Townsend v. Sain Va. Code § 8.01-654(B)(4); *Yeatts v. Murray*, 249 Va. 285, 288, 455 S.E.2d 18, 20 (1995). Pursuant to Va. Code § 8.01-654(B)(5), the Court makes the following findings of fact and conclusions of law:

The petitioner is confined pursuant to a judgment of this Court. A Loudoun County jury convicted petitioner of first-degree murder and, by final

order dated May 19, 2010, this Court imposed the jury's sentence of life imprisonment.

Petitioner appealed his convictions to the Court of Appeals of Virginia. By orders dated December 29, 2010 and February 23, 2011 the Court of Appeals denied petitioner's appeal for failure to file the necessary transcripts. The Supreme Court of Virginia refused petitioner's appeal on August 25, 2011. (

This Court granted in part, and dismissed without prejudice in part, petitioner's initial Petition for a Writ of Habeas Corpus, allowing him a delayed direct appeal. By orders dated November 6, 2013, and January 21, 2014, the Court of Appeals denied petitioner's appeal, in which he contended the trial court erred by denying his motion to suppress evidence obtained as a result of a warrantless search of his residence. The Supreme Court of Virginia refused petitioner's appeal on July 18, 2014, and denied his petition for rehearing on September 18, 2014.

Petitioner filed his petition for a writ of habeas corpus in this Court on or about July 16, 2015, in which he challenges his detention on the following grounds:

(3) (I.) Appellate counsel was ineffective for failing to pursue six specific claims on appeal that petitioner instructed counsel to present. Habeas 10-19 & Appendix C Final Order p. 12

+ letter as Exhibit VSC

(1) II. Petitioner's Fourteenth Amendment rights to due process and equal protection were violated by the Court of Appeals when it denied his right to submit a pro se amended petition for appeal. Habeas 19-24/ Final Order p.7

Not adjudicated in lower court

(2) III. Petitioner's conviction was obtained by the prosecution's "knowing use of perjured testimony," his Fifth Amendment right to due process was violated, and a "*Napue* violation occurred" when the Commonwealth knowingly presented false testimony. Habeas 25-29 & Exhibit E FO p.7 and note 2

Napue violation

(4) IV. Petitioner's conviction was obtained by the use of evidence gained pursuant to an unconstitutional search and seizure. Final Order p.7 & Habeas p.29-38 & App. E.

(5) V. Petitioner's Fourteenth Amendment right to due process was violated when the trial court abused its discretion by denying the motion to suppress. Final Order p.7/ Habeas 39-43

Full & Fair opportunity

(6) VI. Petitioner's conviction was obtained by an unconstitutional failure of the prosecution to disclose evidence in the prosecution's possession that was favorable to petitioner. FO p.8 Habeas p. 44-47 & Exhibits.

Brady claim

* Appendix A, Exhibit 1

VII. Petitioner's Fourteenth Amendment due process and equal protection rights were violated whereby the search warrant was obtained without being the product of an independent source. No probable cause existed.

need to check

VIII. Petitioner's Fourteenth Amendment due process guarantee was violated by the use of erroneous, improper jury instructions. Final Order p.7

(8) (9) IX. Petitioner's Sixth Amendment guarantee of the effective assistance of Trial counsel was violated by the deficient performance and ultimate prejudice of trial counsel.

1) Trial counsel was ineffective for failing to "properly, fully, or effectively" present the affirmative defense of "heat of passion" at trial;

2) Trial counsel was ineffective for failing "to object at trial, and to file to vacate the verdict, when several of

the jury instructions contained impermissible, burden-shifting presumptions that operated to relieve the Commonwealth of its burden of ultimate persuasion;"

3) Trial counsel was ineffective for failing to "properly and competently litigate" petitioner's Fourth Amendment claim and ensure evidence was excluded;

4) Trial counsel was ineffective for failing to object and allowed the Commonwealth to "infer the victim died as a result of strangulation with twine;"

5) Trial counsel was ineffective for failing to object to the "Commonwealth's proffer that the defendant was pacing back and forth behind the couch;"

6) Trial counsel was ineffective when counsel failed to proffer evidence of petitioner's "far greater than a reasonable person" drinking habits, and Trial counsel omitted any proof of alcoholism;

7) Trial counsel "failed, neglected and was beyond deficient" in not preparing and investigating Petitioner's case;

8) Trial counsel was ineffective in failing to challenge the credibility and applicability of the Commonwealth's expert witness, a fifth-degree Jui-Jitsu Sensei.

9) Trial counsel was ineffective for failing to call character witnesses to testify;

10) Trial counsel was ineffective for failing to call a mental health expert to testify;

11) Trial counsel was ineffective for conducting an ineffective and incompetent cross-examination of the medical examiner, as trial counsel should have made

it "more clear" that manual strangulation was the cause of death;

12) Trial counsel was ineffective for failing to introduce evidence of the victim's relationship with Petitioner to show the relationship was "loving, strong, and happy;"

13) Trial counsel was ineffective for failing to properly preserve the motion to strike on the sufficiency of the evidence; the motion to set aside the verdict was "poorly constructed and "ineffective;"

14) Trial counsel was ineffective for denying petitioner the right to present witness testimony, as the defendant wanted seven witnesses to be subpoenaed to testify on his behalf;

15) Petitioner was denied the right to testify on his own behalf.

16) Trial counsel was ineffective for denying petitioner his right to testify in his own defense at trial, as he told counsel four times he wanted to testify.

X. "Petitioner's Sixth Amendment and Fourteenth Amendment rights were violated by the cumulative effect of trial errors, false testimony, and the ineffective assistance of trial counsel." - Final order p.9 Habeas p.65-71 & Appendix E

XI. The evidence was insufficient to convict petitioner of first-degree murder.

NON-COGNIZABLE CLAIMS

The Court dismisses Claims II, III, IV, V, VI, VII, VIII, XII, X, and XI because they are not cognizable in habeas.

In claim II, petitioner alleges the Court of Appeals violated his Fourth Amendment rights when it denied his right to submit a pro se amended

incorrect statement of claim

petition on appeal. In claim III, petitioner argues his conviction was obtained by the prosecution's "knowing use of perjured testimony," which violated his Fifth Amendment right to due process and violated *Napue*. In Claim IV, petitioner maintains his conviction was obtained by the use of evidence gained pursuant to an unconstitutional search and seizure. In claim V, Petitioner asserts his right to due process was violated when the Court denied his motion to suppress.

In claim VI, petitioner alleges his "conviction was obtained by an unconstitutional failure of the prosecution to disclose evidence in the prosecution's possession that was favorable to petitioner." In claim VII, petitioner says his due process and equal protection rights were violated when police obtained the search warrant without probable cause. In Claim VIII, petitioner claims his right to due process was violated by the use of erroneous jury instructions. And, in part of claim X and claim XI, petitioner challenges the sufficiency of the evidence to support the conviction. In another part of claim X, petitioner alleges the trial court was biased against him and favored the prosecution.

once you look at the outcome of the Direct Appeal. Because the Direct Appeal was adjudicated the way it was SHOWS how the Napue violations would have resulted in a different decision on the Motion to Suppress.

Claim II, those parts of claims IV, V, and VII that differ from petitioner's argument on direct appeal,[1] claim VIII, and those parts of claim X alleging bias raise and insufficiency of the evidence, and claim XI all allege nonjurisdictional grounds of trial court error that could have been brought on direct appeal. As such, they are not cognizable on habeas review under the rule in *Slayton v. Parrigan*, 215 Va. 27, 29-20, 205 S.E.2d 680, 682 (1974). ("A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error" because "[a] prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction."). incorrect law claim VIII

* In claim III, petitioner alleges his right to due process was violated because his conviction was obtained by the prosecution's knowing use of false testimony. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). (Pet. 25-29). The court finds petitioner possessed the information upon which he bases his *Napue* claim prior to his trial and his direct appeal. Accordingly, petitioner's *Napue* claim is non-cognizable under *Slayton*. *See Bowman v. Johnson*, 282 Va. 359, 367, 718 S.E.2d 456, 460 (2011) (holding *Napue* claim barred by

you can not even HAVE a Napue claim until AFTER trial; ppl need to first testify falsely. Second, I personally did make the claim on my ↑ Direct Appeal - but the prejudice of the false testimony really begins it feels

[1] On direct appeal, petitioner assigned the following error: "The trial court erred in denying the Defendant's Motion to Suppress, which asserted that law enforcement's search of the Defendant's premises and the evidence obtained thereafter, was in violation of the Defendant's Fourth and Fourteenth Amendment Rights to the United States Constitution." Petitioner argued on direct appeal that this Court erred in finding that the search of his residence was lawful based on his express or implied consent.

Can't have a Napue claim without prejudice no prejudice with guilty verdict.

Slayton when petitioner was aware of basis of his claim prior to trial but did not then pursue it).[2] >My Napue claim is in regard 100% to the Motions To Suppress. The Courts use of law is NOT analogous to the claim at bar.

In Claim VI, petitioner claims the prosecution failed to disclose an additional, two-minute phone call that he made to Emergency Services prior to his call being transferred to 9-1-1. *See Brady v. Maryland*, 373 U.S. 83, 83 (1963). Because petitioner had the information upon which he bases his claim at trial and direct appeal, this claim is barred by the rule is *Slayton*. *See Elliot v. Warden*, 274 Va. 598, 601, 652 S.E.2d 465, 473 (2007) (holding *Brady* claim barred by *Slayton*).[3]

→ Motions To Suppress Granted - THEN no trial. (1)

[2] In any event, the court finds that petitioner's *Napue* claim is without merit. As noted above, petitioner relies on Coderre's preliminary hearing testimony that was never heard by the jury; instead, the jury watched the recording of petitioner's confession. Next, Petitioner provides no evidence, other than his own self-serving statements that were rejected by this Court as incredible at the suppression hearing, to support his claim that he did not consent to the search of his condominium. And, petitioner's claim that he expressly summoned an ambulance only, rather than police, when he called 9-1-1 to report that he was suffering from stab wounds, is without merit. → matter of law.

(2) the trial record

(3) lies

[3] The court further finds petitioner's *Brady* claim is without merit, as petitioner has not established that such a recording exists or that he could not obtain it from another source. *See Gagelonia v. Commonwealth*, 52 Va. App. 99, 113, 661 S.E.2d 502, 509 (2008); *Epperly v. Booker*, 997 F.2d 1, 9 (4th Cir. 1993). Nor has petitioner established that such a recording would be material. *See Stover v. Commonwealth*, 211 Va. 789, 795, 180 S.E.2d 504, 509 (1971) ("[E]vidence is material, 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"). → redo argument

8 ↳ matter of law

3 separate Motions to the Court were denied.

Those parts of claims IV, V, and VII that were raised in petitioner's direct appeal related to his consent to search his residence are not cognizable on habeas review under the rule in *Henry v. Warden*, 265 Va. 246, 249, 576 S.E.2d 495, 496 (2003). ("[A] non-jurisdictional issue raised and decided either in the trial or on direct appeal from the criminal conviction will not be considered in a habeas corpus proceeding."). These claims are dismissed.

Aggregate Prejudice

In claim X, petitioner argues his "Sixth and Fourteenth Amendment rights were violated by the cumulative effect of trial errors, false testimony, and the ineffective assistance of counsel." (Petition at 65-70). This claim consists of a laundry list of short conclusory claims regarding the trial counsel's alleged ineffectiveness, alleged bias by the trial court, and insufficiency of the evidence. As noted above, portions of this claim are barred by the rule in *Slayton*, 215 Va. at 29-20, 205 S.E.2d at 682. The remainder of this claim fails facially due to its conclusory nature. *See Sigmon v. Dir. of the Dep't of Corr.*, 285 Va. 526, 535-36, 739 S.E.2d 905, 909-10 (2013); *Muhammad v. Warden*, 274 Va. 3, 19, 646 S.E.2d 182, 195 (2007). A habeas petitioner is not entitled to relief simply because he is able to "nitpick gratuitously" the conduct of his trial counsel. *See Smith v. Mitchell*, 348 F.3d 177, 206 (6th Cir. 2003).

Moreover, the petitioner has failed to show prejudice in that there was substantial evidence of his guilt. To the extent the petitioner presents this as a claim of "aggregate prejudice," the claim fails because such claims are not cognizable in Virginia. *See Lenz v. Warden*, 267 Va. 318, 339, 593 S.E.2d 292, 305 (2004). Accordingly, claim X is dismissed.

using 12 yr. old law inconsistent with Every other Federal Circuit.

SUCCESSIVE CLAIMS

The court dismisses claims IX (1), (4), (5), and (6) as successive under Code § 8.01-654(B)(2)[4] and as barred by the language of this Court's February 1, 2013 order.

can not be "successive" under Code when it was never heard.

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[4] Code § 8.01-654(B)(2) states:

> [A petition for the writ of habeas corpus] shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition. The provisions of this section shall not apply to a petitioner's first petition for a writ of habeas corpus ***when the sole allegation*** of such petition is that the petitioner was deprived of the right to pursue an appeal from a final judgment of conviction or probation revocation, except that such petition shall contain all facts pertinent to the denial of appeal that are known to the petitioner at the time of the filing, and such petition shall certify that the petitioner has filed no prior habeas corpus petitions attacking the conviction or probation revocation.

(Emphasis added).

On February 1, 2013, this Court entered an Order granting petitioner a belated appeal to the Court of Appeals of Virginia and dismissing the remainder of his habeas claims:

> without prejudice to the petitioner's right to file a subsequent petition for writ of habeas corpus limited to the grounds assigned in his Petition for Writ of Habeas Corpus, filed on April 5, 2012, and his Petition in Support of Writ of Habeas Corpus, filed on May 8, 2012, and any additional grounds that may arise during the progress of his case on direct appeal. → Martinez.

This provision of the Court's Order is consistent with Code § 8.01-654(B)(2), which bars successive habeas petitions. — again, can't be successive

In claim IX(1), petitioner alleges trial counsel was ineffective for failing to "properly, fully, or effectively" present a "heat of passion" defense at trial. In claim IX(4), petitioner argues trial counsel was ineffective for failing to object to evidence that the victim died from strangulation with twine. In claim IX(5), petitioner says trial counsel was ineffective for failing to object to the Commonwealth's evidence that petitioner "was pacing back and forth behind the couch" before he strangled Harper. In claim IX(6), petitioner alleges trial counsel was ineffective for failing to introduce evidence of his "far greater than a reasonable person drinking habits."

These grounds were not raised in petitioner's April 5, 2012 or May 8, 2012 habeas filings. Moreover, it is plain that petitioner was aware of the factual bases of these claims at the time of his prior habeas petition, because

-NOT a strategic decision.

they arise from trial counsel's strategic decisions at trial, where Petitioner was present. Accordingly, these claims are barred by Code § 8.01-654(B)(2) and this Court's February 1, 2013 Order. Claims IX (1), (4), (5), and (6) are dismissed.

The petitioner's remaining claims allege the ineffective assistance of both appellate and trial counsel. The court finds that the petitioner has not met the highly demanding standard set forth for such claims in *Strickland v. Washington*, 466 U.S. 668 (1984). The following claims are dismissed. (p. 51-65 claim IX)

Claim I ★

In claim I, Petitioner maintains appellate counsel was ineffective for failing to present the following specific claims on direct appeal:

- The jury instructions violated *Sandstrom* and *Mullaney*.
- The defendant's trial attorney refused to allow the defendant to testify on his own behalf.
- The evidence was insufficient to sustain the verdict.
- The Commonwealth presented false evidence to obtain the conviction.
- The defendant's Sixth Amendment right to call witnesses in his favor was violated.

★ Petitioner further argues appellate counsel's petition for appeal contained errors in the statement of facts and did not properly argue his Fourth Amendment claim on appeal.

The court finds petitioner has failed to show deficient performance under *Strickland*. Counsel's choice of which issues to raise on appeal is virtually unassailable. *See Jones v. Barnes*, 463 U.S. 745 (1983) (counsel cannot be found ineffective for failing to raise every non-frivolous issue identified by a defendant); *Townes v. Commonwealth*, 234 Va. 307, 320, 362 S.E.2d 650, 657 (1987) (appellate counsel decides what questions should be raised on appeal).

This is true because "appellate counsel is given significant latitude to develop a strategy that may omit meritorious claims in order to avoid burying issues in a legal jungle." *Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000). "The attorney need not advance every argument, ***regardless of merit***, urged by the appellant and must play the role of an active advocate." *Fitzgerald*, 6 Va. App. at 56, 366 S.E.2d at 625 (quoting *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)) (emphasis added). Counsel is not constitutionally obligated to raise every possible claim on appeal and a failure to do so does not render counsel's performance deficient.

The court also finds petitioner has failed to prove prejudice, which in the context of an appeal, requires the petitioner to demonstrate a reasonable probability that the claims he asserts would have been successful on appeal. *See Williams v. Warden of Sussex I State Prison*, 278 Va. 641, 648, 685 S.E.2d

A not applicable

A laundry-list of case law does not prove the Courts disposition if the law is not analogous to the claims being made having merit

674, 678 (2009) (where counsel failed to preserve issue for appeal he was not ineffective where no reasonable probability of a different outcome had he done so).

Finally, the court rejects as baseless petitioner's claim that appellate counsel's statement of facts contained errors is not supported by the record. Petitioner does not point to actual errors, but instead disputes the factual findings made at the suppression hearing and at trial with his own version of events.

YES I DO

→ with clear evidence to rebut the findings

For these reasons, claim I is dismissed.

Claim IX(2) ?

In claim IX(2), petitioner says trial counsel was ineffective for failing to "object at trial, and to file to vacate the verdict, when several of the jury instructions contained impermissible, burden-shifting presumptions that operated to relieve the Commonwealth of its burden of ultimate persuasion." (Pet. 52). Petitioner does not specifically allege which of the jury instructions contained impermissible, burden-shifting presumptions. Habeas petitioners are required to allege sufficient, specific facts in support of their claim for relief; instead Petitioner has presented only a legal conclusion. *See Penn v. Smyth*, 188 Va. 367, 370-71, 49 S.E.2d 600, 601 (1948) (holding "mere conclusions or opinions of the pleader will not suffice to make out a case" for

habeas relief). In any event, a review of the jury instructions reveals no impermissible, mandatory presumption language. (2/4/2010 Tr. at 199-207). Thus, the record belies petitioner's claim.

Research this check trial transcript & argument

Furthermore, petitioner has failed to explain how trial counsel's objection to a jury instruction that contained a "burden-shifting presumption" would have affected the outcome of his trial, given his confession, the overwhelming collaborating evidence of his guilt — including Harper's decomposing body concealed under a bed in his home — and the totality of the jury instructions, which told the jury Petitioner was presumed innocent and that the Commonwealth bore the burden to prove every element of the offense beyond a reasonable doubt. (2/4/2010 Tr. at 199-207). *See, e.g.*, *Tweety v. Mitchell*, 682 F.2d 461, 465 (4th Cir. 1982) (applying harmless error analysis to habeas claim that intent instruction contained an impermissible mandatory presumption). that the Rope proved malice or intent

In these circumstances, the court finds petitioner has not borne his burden under either *Strickland* prong. Claim IX(2) is dismissed.

Claim IX(3) HUGE claim

In claim IX(3), petitioner alleges trial counsel "failed to fully and competently litigate the defendant's" Fourth Amendment "illegal search and

→ quote case law

seizure claim to the trial court." Petitioner maintains trial counsel should have taken the following specific actions:

- obtained the recording of the 9-1-1 call he placed to Fire Rescue/Emergency Services;
- presented Mr. Brooks' statement "to a Sheriff's Deputy, corroborating Petitioner's statement he only summoned an ambulance;"
- argued to the court the significance that the CAD notes all say "patient;"
- emphasized "that Deputy Hill left Cavlieri's condominium for a period of time before being stationed as a 'guard'" in order to argue that Deputy Hill's "intrusion into bedroom #2 a third 'protective sweep'" and the "epitome of illegal search and seizure;"
- "effectively cross-exam[ined] Sgt. Cerniglia to the point she stated, on the record, that in fact she did tell the defendant a CSI was coming to photograph the master bedroom and bath;"
- "identif[ied] that police had created, of their own accord, exigent circumstances to enter Petitioner's condo;"
- "identif[ied] a 'no knock entry was performed;"
- "identif[ied] for the court some of Petitioner's behavior was based on his extreme pain, hallucinations, and long-standing depression."

The court finds petitioner has not established deficient performance. Each of Petitioner's allegations in claim IX(3) go toward trial counsel's tactical decisions in arguing the motion to suppress. It is well-established that once petitioner determined to be represented by counsel, counsel took control over the presentation of the case, and it was for counsel to decide the best strategy at the suppression motion. *See Townes,* 234 Va. at 320, 362 S.E.2d at 657; *Spencer v. Commonwealth,* 238 Va. 295, 303, 384 S.E.2d 785

→ Case law on tactical decisions / analogous facts of my case to US S.Ct. laws as to material facts & therefore a different adjudication of the Motion To Suppress.

(1989). "Counsel is not ineffective merely because [s]he overlooks one [trial] strategy while vigilantly pursuing another." *Williams v. Kelly,* 816 F.2d 939, 950 (4th Cir. 1987). Tactical decisions, such as what issues to raise, lie solely within the province of counsel. *Jones,* 463 U.S. at 751-752 (the "process of winnowing out weaker claims . . . is the hallmark of effective" advocacy).

Here, the record establishes that not only did trial counsel vigorously advocate the issue of whether petitioner consented to the search of his condominium, trial counsel maintained law enforcement had no authority under any theory to conduct a search of petitioner's condominium. Trial counsel further emphasized during the evidentiary hearing on the motion to suppress that Petitioner's 9-1-1 call was recorded by dispatch as a self-inflicted shooting or stabbing and a suicide attempt, and argued that police did not therefore have probable cause to enter the condominium.

my additional facts compound the law

However, after hearing the testimony of the responding officers and petitioner, the Court found as a fact that petitioner expressly consented to the search of his condominium. The search was justified under the Fourth Amendment, and the motion to suppress was denied. Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful. *See James v. Iowa,* 100 F.3d 586, 590 (8th Cir. 1996).

with my additional facts, the Court would not have been able to find the way it did because of controlling case law.

The court further concludes petitioner has not established *Strickland* prejudice. Petitioner has not shown that, had trial counsel taken the actions he lists in his petition, the outcome of the suppression hearing would have been different. Nothing petitioner has argued on habeas changes the central fact found by the Court: that he consented to the search of his condominium. Claim IX(3) is dismissed.

Claim IX(7)

In claim IX(7), petitioner contends trial counsel was ineffective because she "failed, neglected was beyond deficient in not preparing and investigating" his case. Petitioner specifically alleges trial counsel "never once sat with [him] to find out the full purview of what transpired the morning of April 15, 2009," and did not "go over the full confession with" petitioner. (Petition at 56). Petitioner claims his defense was not fully developed because trial counsel did not develop a defense with him. (Petition at 57-58).

The court finds that petitioner has not established deficient performance. "[T]here is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'" *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005) (quoting *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.

1988)). Instead, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 at 691.

A reasonably competent defense attorney, faced with the evidence of petitioner's guilt, including his video-taped confession to law enforcement, could have concluded that viewing the over six-hours of video of petitioner's interview with law enforcement with petitioner would be unfruitful. Or, trial counsel may have faced difficulty regarding the availability of video equipment at the facility where petitioner was housed awaiting trial.

More importantly, a reasonably competent defense attorney could conclude petitioner's theories regarding Officer Coderre's statement that petitioner "paced back and forth behind the couch" and petitioner's "prolonged martial arts training creat[ing] muscle-memory-movement even in a drunken black-out stupor" were not viable defense strategies in light of petitioner's statements to law enforcement. (Petition at 57). *See Bullock*, 297 F.3d at 1047 (holding trial counsel's "deficiency will not be found where fully informed and competent 'hypothetical counsel' could have taken the same action"). Finally, trial counsel did not have a duty to follow petitioner's directives in developing a defense; rather, the development of the best theory

of defense is counsel's prerogative. *See Townes,* 234 Va. at 320, 362 S.E.2d at 657.

The court further finds petitioner has also failed to establish *Strickland* prejudice on this record. Given the overwhelming evidence of petitioner's guilt, including his confession that he murdered Harper by strangling her and then concealed her body in her child's bedroom for two weeks, petitioner has not shown that, had trial counsel taken the actions he insists she should have, the outcome of his trial would have been different. Claim IX(7) is dismissed.

Claim IX(8)

In claim IX(8), petitioner maintains trial counsel was ineffective when she "failed to object to the Commonwealth's expert witness, a 5th degree Jiu-Jitsu Sensei." Petitioner further argues counsel was ineffective for failing to challenge the witness's credibility and the relevance of his testimony, and for failing to "proffer the questions of the defendant to him. Petitioner argues counsel was ineffective for failing to object when the witness demonstrated a choke-hold in front of the jury, and claims petitioner was ineffective for moving to strike the witness's testimony under Virginia law requiring a medical doctor to testify regarding causation of human injury.

Petitioner has not established deficient performance. Whether to object to inadmissible or objectionable material is a tactical decision left to counsel. *Humphries v. Ozmint*, 397 F.3d 206, 234 (4th Cir. 2005) (collecting cases). Fernando Yamasaki, who testified as an expert in the martial art of Judo, was a life-long Judo practitioner who had achieved a high level of expertise, owned his own dojo, and taught Judo at Georgetown University. A reasonably competent defense attorney could conclude that objecting to Yamasaki's qualification as an expert would be futile.

The petitioner's remaining allegations of deficient performance are without merit. The record establishes trial counsel not only thoroughly cross-examined Yamasaki, she also objected to the choke-hold demonstration. (2/4/10 Tr. at 116-19, 133-39). Petitioner's claim that "counsel admitted she was ill-prepared for the witness, and did not know what to ask him," is unsupported by any evidence beyond petitioner's self-serving claims, and trial counsel did not have any duty to ask the witness questions posed by petitioner. *See Ozmint*, 397 F.3d at 234.

The court also finds that petitioner's reliance on civil cases requiring a medical doctor to testify to the causation of human injury is misplaced. *See, e.g., John v. Im*, 263 Va. 315, 321, 559 S.E.2d 694, 697 (2002) (holding "[a]n opinion concerning the causation of a particular physical human injury is a

component of a diagnosis, which is part of the practice of medicine"). It is plain from the record that Yamasaki's testimony was not offered for a medical opinion as to Harper's cause of death, but to show that petitioner, who described himself as a Judo black-belt, would be familiar with various choking techniques and their effect.

Finally, petitioner did not articulate how the outcome of his trial would be different had counsel taken the steps he outlined in his petition. Accordingly, petitioner did not prove *Strickland* prejudice. *See Sigmon v. Dir. of the Dep't of Corr.*, 285 Va. 526, 535-36, 739 S.E.2d 905, 909-10 (2013) (dismissing habeas petition when petitioner "fail[ed] even to assert, much less demonstrate, that but for counsel's alleged errors, the result of his trial would have been different."). Because petitioner has not met either prong of the *Strickland* test, claim IX(8) is dismissed.

Claims IX(9), IX(10) and IX(14)

In claims IX(9), IX(10), and IX(14), petitioner contends trial counsel was ineffective for failing to call witnesses on his behalf. Petitioner has not, however, proffered affidavits from these witnesses containing the testimony they would have given at trial. This failure to proffer is fatal to his claim. *See Muhammad*, 274 Va. at 18, 646 S.E.2d at 195 (failure to proffer affidavits regarding testimony witness would have offered is fatal to *Strickland* claims).

I did however proffer what their testimony would have been and offered evidence via police reports.

* - Exactly how does the Court expect me to get these affidavits; & why would the Court think these witnesses would go out of their way without subpeonas?

In these circumstances, petitioner has failed to establish either prong of the *Strickland* test, and claims IX(9), IX(10), and IX(14) are dismissed.

~~Claim IX(11)~~

In claim IX(11), petitioner argues counsel was ineffective for "incompetent cross examination of the Medical Examiner." Specifically, petitioner claims trial counsel should have emphasized in her cross-examination of the medical examiner that the cause of death was manual strangulation. (Petition at 61(A)).

The court finds petitioner has not shown deficient performance for two reasons. First, the scope of cross-examination is a matter of trial tactics. *See Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978); *Johnson v. Riddle*, 222 Va. 428, 433, 281 S.E.2d 843, 846 (1981). Second, this claim is belied by the record.

On cross-examination, trial counsel specifically asked the medical examiner to clarify his earlier testimony that Harper's hyoid bone was broken in two places, which was more common in manual strangulation than in ligature strangulation. And, trial counsel confirmed with the medical examiner that he could not tell whether the marks on the right side of Harper's neck were from ligature marks or decomposition. And finally, trial counsel asked the medical examiner whether he found evidence of two

separate strangulations, or evidence that Harper had been strangled manually, and then strangled with a ligature. The medical examiner answered that while there was no doubt Harper was strangled, he did not "find specific evidence of that pointed to one particular modality."

Under these circumstances, petitioner has not established either prong of the *Strickland* test. Claim IX(11) is dismissed.

Claim IX(12)

In claim IX(12), petitioner argues counsel failed to introduce material evidence in the form of "'loving' and cheerful emails" between petitioner and Harper, that, given the opportunity, petitioner could have pointed out these emails to defense counsel. Petitioner has failed to proffer these emails, and this failure to proffer is fatal to his claim. *See Muhammad*, 274 Va. at 18, 646 S.E.2d at 195. *See also Anderson v. Collins*, 18 F.3d 1208, 1221 (5th Cir. 1994) (internal quotation marks and citation omitted) (holding "habeas court cannot even begin to apply *Strickland*'s standards' absent a "specific affirmative showing of what the missing evidence . . . is").

Under these circumstances, petitioner has met neither prong of the *Strickland* test, and claim IX(12) is dismissed.

Claim IX(13)

In claim IX(13), petitioner claims trial counsel was ineffective for failing to properly preserve the motion to strike on the sufficiency of the evidence and claims the motion to set aside the verdict was "poorly constructed and "ineffective." This bald, conclusory claim does not merit habeas relief. *See Hedrick*, 264 Va. at 521, 570 S.E.2d at 862 (finding habeas petitioner had not established deficient performance or prejudice because he failed to provide any evidence to support claim); *see also Bass*, 6 Va. App. at 44, 366 S.E.2d at (the habeas petition must allege sufficient facts which would support the conclusion of law advanced and mere conclusions or opinions of the pleader will not suffice); *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) (bald, unsupported assertions do not state a claim for relief).

Petitioner has not met either prong of the *Strickland* test and claim IX(13) is dismissed.

Claims IX(15) and IX(16)

In claims IX(15) and IX(16) petitioner says trial counsel denied him the right to testify on his own behalf. Petitioner claims he told his attorneys twice before trial that he wanted to testify on his own behalf, and told his attorney twice more during trial that he wanted to testify. However, petitioner claims, trial counsel "was unprepared for Defendant to take the

stand, had no prepared line of questioning or strategy, and refused to let Defendant testify." (Petition at 62(A)-65). Petitioner has failed to meet the *Strickland* test for several reasons.

First, petitioner has not proffered what his testimony would have been in the trial court. Petitioner's statements in relation to Harper's murder were already before the Court in the form of his statements to law enforcement, including his confession to murdering Harper. Petitioner has not proffered that his testimony would have differed from his confession. This failure is fatal to his *Strickland* claim. *See Muhammad*, 274 Va. at 18, 646 S.E.2d at 195.

Second, petitioner has provided no evidence supporting his conclusory claim that counsel "refused" to allow him to testify against his wishes, beyond his own self-serving statements. *See Hedrick*, 264 Va. at 521, 570 S.E.2d at 862.

Third, petitioner's claim that counsel "refused to let" him testify because she was unprepared to question him lacks legal merit. Competent defense counsel can reasonably determine that a witness, who is telling the truth, does not need preparation before taking the stand. *See Clozza v. Murray*, 913 F.2d 1092, 1101 (4th Cir. 1990) (trial counsel who stated that "he does not normally prepare clients for cross-examination, believing with

reason that a witness who is not lying will not be tripped up" was not ineffective when habeas petitioner told a different version of events on the witness stand than he had previously given counsel). Petitioner does not have the right to have counsel assist him in concocting a lie. *See id.*

And, fourth, while the right to testify at trial cannot be waived by defense counsel, "if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client ***in the strongest possible terms not to testify***." *United States v. Teague*, 953 F.2d 1525, 1533 (11th. Cir. 1992) (emphasis added). Thus, "[a]bsent evidence of coercion, legal advice concerning the defendant's right to testify does not constitute ineffective assistance of counsel." *Carter v. Lee*, 283 F.3d. 240, 249 (4th. Cir. 2002); *see also Jones v. Murray*, 947 F.2d 1106, 1116 n.6 (4th Cir. 1991) (reiterating principle that advice to testify is paradigmatic of strategic decision). Had petitioner testified at trial, he would have been subject to cross-examination. A competent defense attorney, faced with the evidence of petitioner's guilt, including his statements to law enforcement, could reasonably conclude that exposing petitioner to a long and detailed cross-examination would be an imprudent defense strategy.

In these circumstances, petitioner has met neither *Strickland* prong, and claims IX(15) and IX(16) are dismissed.

CONCLUSION

The Court finds the petitioner's allegations can be disposed of on the basis of recorded matters, and no plenary hearing is necessary. Code § 8.01-654(B)(4); Friedline v. Commonwealth, 265 Va. 273, 576 S.E.2d 491 (2003); Yeatts v. Murray, 249 Va. 285, 455 S.E.2d 18 (1995).

The Court thus is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore, ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is, hereby denied and dismissed with prejudice.

It is further ORDERED that the petitioner's endorsement on this Order is dispensed with pursuant to Rule 1:13 of the Supreme Court of Virginia.

The Clerk is directed to forward a certified copy of this Order to petitioner and to Assistant Attorney General Victoria Johnson, counsel for the respondent.

Entered this 1st day of March, 2016

Judge

I ask for this:

Victoria Johnson

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