

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of April, 2019.

David Meyers, No. 1039777,

Petitioner,

against Record No. 170505

Harold W. Clarke, Director of the
Department of Corrections,

Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the amended petition for a writ of habeas corpus filed March 23, 2018, the rule to show cause, the respondent's motion to dismiss the amended petition for a writ of habeas corpus, and petitioner's reply, the Court is of the opinion that the motion should be granted and the writ should not issue.

Petitioner was convicted by a jury in the Circuit Court of the City of Petersburg of robbery, malicious wounding, two counts of abduction, and four counts of use of a firearm in the commission of a felony, and was sentenced to thirty years' imprisonment. Petitioner's appeals to the Court of Appeals of Virginia and this Court were unsuccessful, and petitioner, by counsel, now challenges the legality of his confinement pursuant to these convictions.

In claim (A)(1), petitioner contends he was denied the effective assistance of counsel when counsel failed to move to strike the Commonwealth's evidence at the conclusion of the Commonwealth's case in chief. Petitioner argues the evidence was insufficient to prove his identity as one of the perpetrators.

The Court holds claim (A)(1) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The record, including the trial transcript, demonstrates that Maurice Rives ("Rives") and Shereasa McDaniel Rives ("Shereasa"), two of the three victims of a January 29, 2012 home invasion robbery, identified petitioner at trial as one of the two robbers who entered their home and demanded money from them at gunpoint. Additionally, Rives identified petitioner as the man who, after Shereasa escaped, shot him three times. Both witnesses testified petitioner was wearing a mask during the robbery, but that his eyes were visible. Rives, who was thirty-two at

the time of the robbery, testified he had known petitioner since he was thirteen and that was how he recognized him. Shereasa testified petitioner had been in their home less than a week earlier and that she had previously seen him in the neighborhood.

Both witnesses were impeached with their failure to immediately identify petitioner to the police. Shereasa admitted she told police she did not recognize the perpetrators and that one of the men looked like someone called Zo, whom she had known a long time ago. Rives admitted he was under the influence of medication the first time he talked to the police and that he could not recall the content of the conversation. He admitted he told police one of the perpetrators looked like a driver who worked for a Chinese restaurant, and he explained this was the second perpetrator, not the individual he identified as petitioner. The officer who initially interviewed Rives testified Rives, who was being prepared for surgery, had trouble collecting his thoughts and forming complete sentences, said one of the assailants looked like a driver from a Chinese restaurant, but was not able to say who shot him. Under the circumstances, counsel could have reasonably determined the issue of petitioner's identity as one of the assailants presented an issue of witness credibility, which was a matter for the jury to decide, and that any argument to the contrary would have been futile. *See Commonwealth v. Hudson*, 265 Va. 505, 514 (2003) ("It is the province of the jury to evaluate the credibility of witnesses."). Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (A)(2), petitioner contends he was denied the effective assistance of counsel because counsel failed to move to strike Rives' and Shereasa's testimony identifying petitioner as one of the perpetrators. Petitioner argues neither witness testified based on their personal knowledge of petitioner's identity and their testimony was therefore inadmissible under Rule 2:602. He further argues the witnesses' "hypothesis" that petitioner was one of the perpetrators was not based on their personal experiences or observations and their testimony therefore constituted inadmissible opinion testimony, in violation of Rule 2:701. Finally, he contends the witnesses' identification of petitioner as one of the perpetrators constituted impermissible testimony on the ultimate issue of fact, in violation of Rule 2:704(b).

The Court holds claim (A)(2) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript,

demonstrates Rives' and Shereasa's testimony was based on their personal knowledge, including their experiences during the robbery and shooting and their familiarity with petitioner.

Moreover, Rule 2:701 explicitly permits lay opinion testimony as to identity. Further, the Court of Appeals has previously rejected the argument that a witness' identification testimony implicates an ultimate issue of fact. "'Ultimate issues of fact' for purposes of the conviction of a crime are the statutory elements of that offense." *Bowman v. Commonwealth*, 30 Va. App. 298, 303 (1999). Under the circumstances, counsel could have reasonably determined any argument that these witnesses' testimony constituted impermissible opinion testimony was futile. *See Correll v. Commonwealth*, 232 Va. 454, 470 (1987) (counsel not ineffective for failing to make a meritless objection). Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (A)(3), petitioner contends the "competent evidence introduced at trial" did not prove his identity as one of the perpetrators beyond a reasonable doubt. Petitioner contends his conviction therefore violates due process.

The Court holds claim (A)(3) is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks v. Peyton*, 210 Va. 318, 321-22 (1969).

In claim (B), petitioner contends Latasha Henderson was a member of the petit jury that convicted petitioner and that she was related to Rives. Petitioner further contends Henderson lied during voir dire about her relationship with Rives.

The Court holds claim (B) is factually without merit. The record, including the trial transcript and the manuscript record, demonstrates Henderson was one of the many prospective jurors called for service on the day of petitioner's trial. There were two jury trials scheduled that day, of which petitioner's was the second. At the beginning of the day, the court noted that all of the jurors who were not selected for the first trial would be required to "come back" for petitioner's trial. The record does not disclose whether Henderson was present that day or whether she was selected for the first trial, but it does demonstrate she was not one of the prospective jurors who were subjected to voir dire or were empaneled for petitioner's case.

In claim (C)(1), petitioner contends he was denied the effective assistance of counsel when counsel failed to investigate whether there was evidence to show petitioner was physically

incapable of committing the crimes for which he was convicted. Petitioner argues the evidence adduced at trial suggests the offenses were committed by two "able bodied intruders." Petitioner alleges he has a history of knee and neck injuries and suffered a gunshot wound to the chest in 1990. Petitioner further alleges that, as a result of these injuries, "from 2005 to the present day" he has "intermittently used a cane, a walker, or a wheelchair." In support of this claim, petitioner has attached documents that show he required the use of a walker when he was incarcerated in 2014 and that he walked with the aid of a cane in May 2012, when he was admitted at Central State Hospital for restoration of competency, an affidavit from petitioner stating he has been "required to use, off and on, a cane, walker, or wheelchair since 2005," and an affidavit from Latitia Browder, the mother of petitioner's child, stating that petitioner was required to use a cane and a neck brace "off and on over the years." Petitioner contends that, had counsel conducted an adequate investigation, he could have introduced this evidence to show petitioner as physically incapable of committing the charged offenses.

The Court holds claim (C)(1) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the affidavit of counsel, demonstrates petitioner never suggested to counsel that he was physically incapable of committing the crimes for which he was charged. Prior to trial petitioner provided counsel with a list of places he had gone with various people on the day of the crimes without indicating his prior injuries impeded his actions. In addition, counsel was aware Browder had filed a complaint against petitioner shortly before the crimes, alleging petitioner had assaulted her with a cord and threatened her life. Under the circumstances, petitioner cannot demonstrate counsel unreasonably failed to investigate this line of defense. Furthermore, none of the evidence petitioner contends counsel was deficient for failing to obtain demonstrates that petitioner was physically incapacitated at the time of the offenses, in January 2012, such that he could not have committed the crimes. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (C)(2), petitioner contends he was denied the effective assistance of counsel when counsel failed to consult with and call an expert in the reliability of eyewitness testimony. Petitioner contends an expert would have testified Shereasa's testimony "was not a true

recitation of actual observations," and that she "reasoned her way into believing [petitioner] was an intruder because he had previously visited her home." An expert would have explained Shereasa's testimony "evolved as time passed" until she finally claimed to have realized petitioner was one of the intruders. An expert would have explained "that this inferential belief contradicts the scientific understanding that memory does not become more accurate over time."

Petitioner further alleges an expert would have "explained to the jury the questionable scientific reliability of [Rives'] identification testimony." Petitioner alleges the expert would have testified identifying a person known to the witness is easy and that, even if Rives had only had a brief, partial glimpse of petitioner, he should have easily recognized him. Rives' eventual identification of petitioner was scientifically unreliable. In support of this claim, petitioner has attached an affidavit from Dr. Daniel Reisberg, a psychologist with a degree in experimental psychology who has studied "the completeness and accuracy of human memory."

The Court holds claim (C)(2) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the affidavit of counsel and the trial transcript, demonstrates counsel determined the best way to attack the testimony of Rives and Shereasa was to attempt to show they were lying, not that they were simply mistaken. Counsel explains in his affidavit that Petersburg is "an extremely violent city with a long history of witnesses simply refusing to cooperate with police" or lying to them. Further, counsel was aware petitioner had been accused of robbing Rives years earlier but that petitioner had not been punished for the offense. Counsel, in addition to extensively cross-examining Rives and Shereasa regarding their initial failure to identify petitioner as one of the perpetrators, elicited testimony from Shereasa and Browder which established this past history between the Rives and petitioner and argued it showed Rives had a motive to falsely identify petitioner in this case. Counsel chose this theory after a complete investigation and a full appreciation of the facts, and, thus, the reasonableness of counsel's choice is all but unassailable. See *Wiggins v. Smith*, 539 U.S. 510 (2003) ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.") (internal quotation marks omitted). Having chosen a reasonable theory of defense, counsel was not required to present alternative or inconsistent theories of petitioner's innocence. See *Jackson v. Shanks*, 143 F.3d 1313, 1326 (10th Cir. 1998) ("Trial counsel's decision not to present inconsistent defense

theories does not constitute ineffective assistance.”).

Thus, petitioner has failed to demonstrate that counsel’s performance was deficient or that there is a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different.

In claim (C)(3), petitioner contends he was denied the effective assistance of counsel when counsel failed to obtain Rives’ medical records. Petitioner contends Rives’ medical records would have shown the types of medications Rives was given prior to and just after his surgery. Dr. Reisberg opines that if Rives was given opiates they would have affected his memory, making it difficult for Rives to distinguish between a real memory and a false memory based upon inference. Similarly, petitioner contends that if Rives was given certain benzodiazepine medications, the medications could have disrupted his memory, again impacting his ability to distinguish between a true memory and a false memory based on external suggestions, such as suggestive questioning by the police.

The Court holds claim (C)(3) satisfies neither the “performance” nor the “prejudice” prong of the two-part test enunciated in *Strickland*. As previously discussed, counsel made a reasonable tactical decision to challenge Rives’ credibility by demonstrating he had a motive to lie, rather than suggesting his memory was merely faulty. Counsel could reasonably have determined evidence regarding the type of drugs administered to Rives prior to and immediately after surgery would not have been helpful to this defense. Thus, petitioner has failed to demonstrate that counsel’s performance was deficient or that there is a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different.

In claim (C)(4), petitioner contends he was denied the effective assistance of counsel when counsel failed to request a jury instruction on the dangers of eyewitness identification. Such an instruction would have explained to the jury how to assess whether Rives’ and Shereasa’s testimony was reliable despite lacking an adequate foundation in observational fact, informed the jury about assessing whether that testimony should be credited as observational, despite being an inferential reconstruction, and properly emphasized the need for finding the circumstance of the witnesses’ identifications were convincing beyond a reasonable doubt.

The Court holds claim (C)(4) satisfies neither the “performance” nor the “prejudice” prong of the two-part test enunciated in *Strickland*. As previously discussed, counsel made a

reasonable tactical decision to challenge Rives' and Shereasa's credibility by demonstrating they had a motive to lie, not that they were mistaken. The record, including the trial transcript and the manuscript record, demonstrates the jury was instructed as to witness credibility that:

[Y]ou are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth, and for having observed the things about which they testify, their interest in the outcome of the case, their bias, and if any have been shown, their prior inconsistent statements or whether they knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you've considered all of the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper. You're entitled to use your commonsense in judging any testimony.

From these things and all of the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Counsel could reasonably have determined this instruction was sufficient given his chosen theory of the case. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (C)(5), petitioner contends he was denied the effective assistance of counsel when counsel failed to impeach Shereasa's testimony that petitioner had been in her home within the week prior to the robbery. Petitioner alleges he was incarcerated in the weeks before the robbery and, had counsel investigated, counsel could have impeached Shereasa with this information. In support of this claim, petitioner has attached records showing that on January 11, 2012, he was arrested for the January 6, 2012 assault of a family or household member and that he was released on bond on January 16, 2012.

The Court holds claim (C)(5) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that the home invasion robbery occurred on January 29, 2012. Counsel could reasonably have determined petitioner's incarceration from January 11, 2012 to January 16,

2012, would not have impeached Shereasa's testimony that petitioner had been in her home within the week prior to the robbery, which would have encompassed January 22 through January 28. Moreover, counsel could have reasonably determined any attempt to impeach Shereasa with petitioner's recent incarceration would have been unnecessarily prejudicial to petitioner. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (D)(1), petitioner contends he was denied the effective assistance of counsel when counsel failed to call Ernest Jones to testify at petitioner's trial. Petitioner contends Jones would have testified petitioner was at Sheila Crockett's house at 7:30 p.m. on the day of the robbery. Petitioner contends this testimony would have impeached Crockett's trial testimony that petitioner was not at her house on the day of the robbery and would have bolstered her initial account to police, in which she claimed petitioner had been at her home on the night of the robbery.

The Court holds claim (D)(1) fails to satisfy the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that petitioner proffered at trial that Jones would testify he drove petitioner to Crockett's apartment building, dropped him off there at 7:26 p.m. on the night of the robbery, and left. There is no evidence in the record that Jones saw petitioner enter Crockett's residence. Crockett testified petitioner was not with her on the night of the robbery. However, shortly after the robbery she told police petitioner had arrived at her home around 7:30 on the night of the robbery, that he left around 8:00 to pick up a sandwich for her, and that he returned about an hour to an hour and a half later. Crockett also told police she had never seen petitioner being dropped off in a vehicle, nor had she ever seen him in a car. Under the circumstances, petitioner has failed to demonstrate Jones could have provided testimony that would have been relevant or helpful to his case. Petitioner has neither alleged nor proven that Jones could have testified petitioner actually entered Crockett's apartment on the night of the robberies, nor does the record establish Crockett ever suggested she saw petitioner being dropped off by Jones. Thus, petitioner has not established that Jones' testimony would have either impeached Crockett's trial testimony or supported her earlier statement to police. Thus, petitioner has failed to demonstrate that counsel's performance

was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (D)(5), petitioner contends he was denied the effective assistance of counsel when counsel failed to obtain recordings of telephone calls between petitioner and Crockett, made while petitioner was in jail awaiting trial, and petitioner's cell phone records. Petitioner alleges he had his cell phone with him while he was with Crockett on the night of the robberies and that his cell phone provider's cell site location information would have bolstered his alibi. Petitioner further alleges that during the recorded conversations Crockett indicated petitioner had been at her home on the night of robberies.

The Court holds claim (D)(5) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner fails to provide the cell phone records he alleges counsel was ineffective for failing to obtain and fails to proffer any evidence to show such records would have been able to differentiate between Crockett's residence and that of the victims, which, according to Crockett's testimony, were fairly close together. Similarly, petitioner fails to provide the recorded conversations he contends counsel should have provided, or any evidence to support his claim that such recordings existed beyond his own conclusory allegations. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (E), petitioner contends the Commonwealth failed to provide petitioner with notes, transcripts, recordings, or reports related to the police interviews of Shereasa, Rives, Edward Fox, the third victim of the robbery, and Terrance Smith, who petitioner alleges provided police with information implicating petitioner in the crimes. Petitioner contends it is "reasonable to expect" the Commonwealth collected such documents, speculates these interviews might have contained exculpatory evidence, and argues the Commonwealth's failure to disclose these documents must have violated *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner concedes his arguments in this regard are "underdeveloped" because he does not know what, if any, materials the Commonwealth withheld, and contends he is entitled to discovery of the prosecution's records. Petitioner further concedes his trial counsel "knew that the Commonwealth had videos of various persons helping the investigation."

The Court holds claim (E) is barred because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975). Petitioner does not assert he discovered any information after his trial and appellate proceedings concluded suggesting the Commonwealth violated *Brady*.

In claim (F), petitioner contends the cumulative effect of counsel's errors prejudiced petitioner.

The Court holds claim (F) is without merit. As addressed previously, petitioner's individual claims of ineffective assistance of counsel are without merit. "Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." *Lenz v. Warden of the Sussex I State Prison*, 267 Va. 318, 340, *cert. denied*, 542 U.S. 953 (2004).

In claim (G)(1), petitioner contends he was denied the effective assistance of counsel because counsel failed to share unspecified information with petitioner.

The Court holds claim (G)(1) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner fails to articulate what information counsel failed to share with him or to explain how this alleged failure impacted the outcome of his case. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (G)(2), petitioner contends he was denied the effective assistance of counsel when counsel left the courtroom during the direct examination of Shereasa on March 7, 2014, the second day of petitioner's trial. Petitioner alleges the trial transcript does not accurately represent this.

The Court holds claim (G)(2) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates petitioner's counsel called Shereasa as a part of his case in chief on the second day of petitioner's trial. Petitioner's counsel conducted the direct examination and the Commonwealth declined to cross examine the witness. Moreover, petitioner provides no support

for his claim that the transcript does not accurately represent what occurred during petitioner's trial and fails to proffer the testimony he alleges Shereasa provided that was not accurately recorded. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (G)(3), petitioner contends he was denied the effective assistance of counsel when counsel refused to subpoena Greg Brown and Tommy Williams as witnesses. Petitioner alleges Brown and Williams would have testified they were the "actual robbers." Petitioner does not provide an affidavit from either witness in support of this claim, and acknowledges Brown was recently interviewed and did not provide any helpful information, but argues he is entitled to limited discovery to compel Brown and Williams to testify under oath to "settle what either witness would testify to."

The Court holds claim (G)(3) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner has provided no basis for his claim that Brown and Williams had any useful information to provide regarding the robbery or that they would have been willing and able to do so if subpoenaed for trial. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (G)(4), petitioner contends he was denied the effective assistance of counsel when counsel failed to subpoena the surveillance system from Rives' home.

The Court holds claim (G)(4) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that although Rives had installed a security camera on the exterior of his home, it was not operable at the time of the robbery. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (G)(5), petitioner contends he was denied the effective assistance of counsel when counsel failed to "thoroughly cross examine Edward Foxx [sic] on his criminal history."

The Court holds claim (G)(5) satisfies neither the “performance” nor the “prejudice” prong of the two-part test enunciated in *Strickland*. Petitioner fails to proffer what admissible evidence counsel would have elicited had he cross examined Fox as petitioner wished, *see* Rule 2:609(b) (stating limits on impeachment of witnesses based on prior convictions), or to explain how such evidence would have altered the outcome of his case. Thus, petitioner has failed to demonstrate that counsel’s performance was deficient or that there is a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different.

In claim (G)(6), petitioner contends he was denied the effective assistance of counsel when counsel moved to sever a charge of possession of a firearm by a convicted felon. Petitioner appears to assert that requiring him to stand trial separately for this offense amounted to a double jeopardy violation.

The Court holds claim (G)(6) fails to satisfy the “prejudice” prong of the two-part test enunciated in *Strickland*. The record, including the manuscript record, demonstrates petitioner was indicted for possession of a firearm by a convicted felon in connection to the home invasion robbery of Rives and Shereasa’s home, but that the Commonwealth moved for entry of a nolle prosequi as to that charge, which motion the court granted. Thus, petitioner has failed to demonstrate that counsel’s performance was deficient or that there is a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different.

In claim (G)(7), petitioner contends he was denied the effective assistance of counsel because counsel failed to object to petitioner being tried on the ground that petitioner is feebleminded.

The Court holds claim (G)(7) satisfies neither the “performance” nor the “prejudice” prong of the two-part test enunciated in *Strickland*. Petitioner’s trial counsel twice moved to have petitioner evaluated for competency to stand trial, which motions were granted. After the first evaluation petitioner was deemed incompetent, received treatment, and was subsequently restored to competency. In the second evaluation, petitioner was found to be competent. Petitioner fails to articulate any grounds upon which counsel could reasonably have moved for a third evaluation or otherwise argued petitioner was not competent to stand trial. Thus, petitioner has failed to demonstrate that counsel’s performance was deficient or that there is a reasonable

probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (G)(8), petitioner contends he was denied the effective assistance of counsel because counsel refused to make a discovery motion related to "the large quantity of narcotics found on Maurice Rives."

The Court holds claim (G)(8) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and the affidavit of counsel, demonstrates that counsel learned through discovery that Rives was in possession of apparent narcotics when he was shot, although the "off-white, chunky substance" found in a plastic bag in Rives' trousers was not tested. Counsel elicited testimony regarding this point at trial, as well as Rives' history of drug distribution. Petitioner fails to identify any additional evidence on this point that counsel failed to obtain through discovery. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (G)(9), petitioner contends he was denied the effective assistance of counsel because counsel made remarks to the jury indicating petitioner was guilty of these crimes.

The Court holds claim (G)(9) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that counsel conceded during opening argument that the evidence would show the victims were robbed and that Rives was shot, but argued the evidence would not establish petitioner was one of the perpetrators. In closing argument, counsel vigorously argued petitioner's innocence. Counsel did not concede petitioner's guilt. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (G)(10), petitioner contends he was denied the effective assistance of counsel because counsel refused to move to strike members of the military from the jury.

The Court holds claim (G)(10) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner fails to proffer any grounds upon which counsel could reasonably have argued prospective jurors were disqualified merely because

of their military service. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Upon consideration whereof, petitioner's request for discovery is denied.

Accordingly, the petition is dismissed and the rule is discharged.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:



Deputy Clerk