

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of February, 2019.

Gregory Richardson, No. 1072973, Petitioner,

against Record No. 180182

Superintendent of Piedmont Regional Jail, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed February 2, 2018, the rule to show cause, the respondent's motion to dismiss, and petitioner's reply, the Court is of the opinion that the motion should be granted and the writ should not issue.

Petitioner, a sexually violent predator, was civilly committed by the Circuit Court of the City of Richmond for an indefinite period in April 2010. Petitioner filed a petition for a writ of habeas corpus challenging his confinement pursuant to his civil commitment and was granted a belated appeal, which was ultimately unsuccessful, and his remaining claims were dismissed with prejudice. Petitioner was recommitted following an annual review in November 2014, and this Court dismissed petitioner's appeal from that decision, holding the petition for appeal was not timely filed. In February 2014, while civilly committed, petitioner was convicted in the Circuit Court of Nottoway County of two misdemeanor counts of indecent exposure and was sentenced to twenty-four months' imprisonment. His subsequent appeals to the Court of Appeals of Virginia and to this Court were unsuccessful. In January 2016, petitioner was convicted in the Circuit Court of Nottoway County of indecent exposure, a felony third offense, and was sentenced to five years' imprisonment with four years suspended. On March 7, 2017, the Court of Appeals of Virginia reversed petitioner's felony indecent exposure conviction, holding the circuit court erred in finding petitioner consented to waive his jury trial rights and to proceed with a bench trial. The Commonwealth has not retried petitioner on that charge.

On November 6, 2015, the circuit court granted petitioner's motion to appoint counsel and continued his fourth annual review hearing until January 6, 2016. On the date of the scheduled hearing, the court entered a consent order, signed by petitioner's counsel, that deferred the annual review hearing pursuant to Code § 37.2-919(B), which provides, in cases where an

active sentence of at least twelve months is imposed, the annual or biennial review hearing shall not occur until twelve months after the person has been returned to the civil commitment.

Petitioner returned to the Virginia Center for Behavioral Rehabilitation ("VCBR") in March 2016. According to a sworn affidavit prepared by an official from the Virginia Department of Corrections ("DOC"), petitioner had fully served his sentence for a 1994 rape conviction by March 2016 and was not in the custody of the DOC pursuant to any conviction as of March 30, 2018.

In 2015, petitioner filed a petition for a writ of habeas corpus challenging his 2010 civil commitment, his 2014 recommitment, his prosecution for felony and misdemeanor indecent exposure, and the conditions of his confinement, which this Court dismissed on April 21, 2016. In 2016, petitioner filed a petition for a writ of habeas corpus challenging the misdemeanor and felony indecent exposure convictions, several earlier convictions, his civil commitment, the conditions of confinement at the Piedmont Regional Jail, and the conditions of his civil commitment at the VCBR, which this Court dismissed on January 17, 2017. Petitioner filed a second petition for a writ of habeas corpus in 2016 challenging his civil commitment, the conditions of his civil commitment at the VCBR, the diagnoses rendered at his 2014 annual review hearing, and the timing of his annual review hearing, which this Court dismissed on August 15, 2017.

On July 31, 2017, the Circuit Court of the City of Richmond conducted petitioner's most recent annual review hearing and entered a recommitment order on September 25, 2017. Petitioner did not appeal. On December 1, 2017, petitioner was arrested for the assault and battery of two employees of the VCBR and was transferred to the Piedmont Regional Jail to await trial. On October 22, 2018, petitioner entered a guilty plea in the Circuit Court of Nottoway County to one count of felony assault and battery and was sentenced to one year and ninth months' imprisonment, and the Commonwealth disposed of the remaining count by nolle prosequi. Petitioner's appeal of the assault and battery conviction is pending in the Court of Appeals of Virginia. Presently confined at the Piedmont Regional Jail, petitioner now challenges the legality of several prior convictions for which he is no longer in the custody of the DOC, his pre-trial confinement on the assault and battery charges, the conditions of his civil commitment, and his 2017 recommitment.

In claim (a), petitioner contends the use of the 1994 rape conviction as the basis for finding he is a sexually violent predator and for his resulting civil commitment violates the "collateral consequences" doctrine. Similarly, in claim (a)(2), petitioner contends the use of the rape conviction in this manner causes him "incessant and unforeseeable harm."

In claim (a)(1), petitioner contends state officials used the rape conviction as the basis for petitioner's civil commitment as part of a "furtive scheme" to punish petitioner for a 1992 acquittal on an unspecified charge.

The Court holds claims (a), (a)(1), and (a)(2) were not raised within one year after the cause of action accrued and are time-barred. Code § 8.01-654(A)(2). In addition, the Court holds claims (a), (a)(1), and (a)(2) are barred by Code § 8.01-654(B)(2). These claims, the facts of which were known prior to petitioner's first petition for a writ of habeas corpus, were not previously raised.

In claim (a)(3), petitioner contends the circuit court failed to consider the nature and circumstances of the rape offense at the 2017 annual hearing. Petitioner asserts he was not guilty of rape, and he entered a guilty plea due to his then-counsel's poor advice. Petitioner "seeks habeas relief to challenge his [rape] conviction."

The Court rejects claim (a)(3). To the extent petitioner claims the circuit court erred at the 2017 annual review hearing, the claim 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). To the extent petitioner challenges the validity of his 1994 rape conviction, the sentence for which petitioner fully served before filing the petition for a writ of habeas corpus, "a court does not acquire jurisdiction to determine the validity of a sentence fully served before the proceeding for a writ of habeas corpus is instituted." *E.C. v. Va. Dep't of Juvenile Justice*, 283 Va. 522, 529 (2012).

In a portion of claim (b)(1), petitioner contends his civil commitment violates unspecified provisions of Code § 37.2-910 and the Eighth and Fourteenth Amendments to the United States Constitution.

The Court holds this portion of claim (b)(1) was not raised within one year after the cause of action accrued and is time-barred. Code § 8.01-654(A)(2). In addition, the Court holds this portion of claim (b)(1) is barred by Code § 8.01-654(B)(2). This claim, the facts of

which were known prior to petitioner's first petition for a writ of habeas corpus, was not previously raised.

In another portion of claim (b)(1), petitioner contends Nottoway County "uses its judiciary" to "punish" petitioner, a patient of the VCBR, thereby depriving him the opportunity to participate in and complete treatment.

The Court holds this portion of claim (b)(1) is not cognizable in a petition for a writ of habeas corpus. The writ "is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness" of his custody and detention. *Virginia Parole Bd. v. Wilkins*, 255 Va. 419, 420-21 (1998).

In claim (b)(2), petitioner contends he was denied a bail determination under Code § 37.2-919.

The Court holds claim (b)(2) is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In claim (b)(3), petitioner contends his detention on the assault and battery charges will result in prejudice at future annual review hearings.

The Court holds claim (b)(3) is not cognizable in a petition for a writ of habeas corpus. The writ is "not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness" of his custody and detention. *Wilkins*, 255 Va. at 420-21. Any issues that may arise at petitioner's future annual review hearings do not affect the lawfulness of petitioner's present custody and detention at the VCBR. *Id.* at 421.

In claim (b)(4), petitioner contends the cost to communicate with his loved ones while detained at the Piedmont Regional Jail is too high, the jail serves him food that is not nutritious, and the jail is unsafe and "induces abnormal behavior."

In claim (c), petitioner contends the annual review hearings are too infrequent, and he is entitled to a periodic review.

The Court holds claims (b)(4) and (c) are not cognizable in a petition for a writ of habeas corpus. The writ "is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness" of his custody and detention. *Id.* at 420-21.

In claim (d), petitioner contends the circuit court denied petitioner due process when it denied petitioner conditional release at the 2017 annual review hearing.

In claim (d)(1), petitioner contends the circuit court erred in treating in-patient treatment as an “automatic” consequence of remaining a sexually violent predator, and it failed to recognize petitioner’s improvement during his civil commitment.

In a portion of claim (d)(2), petitioner contends the evidence “wasn’t impressive enough” to deny him conditional release.

The Court holds claims (d), (d)(1), and this portion of (d)(2) are barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In another portion of claim (d)(2), petitioner contends he was denied the effective assistance of counsel at his annual review hearing because counsel “wasn’t aiming at release, but only to have experts say” petitioner “may be eligible for conditional release.”

The Court holds this portion of claim (d)(2) satisfies neither the “performance” nor the “prejudice” prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner fails to articulate what it means to “aim” for release, proffer what actions counsel should have taken to do so, or explain how those unspecified actions would have affected the outcome of his annual review hearing. 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 claims (e)(1) and (e)(2) and a portion of claim (e)(3), petitioner contends the circuit court lacked subject matter jurisdiction to conduct the annual review hearing. Petitioner asserts he was discharged from the custody of the Department of Behavioral Health and Rehabilitative Services (“DBHRS”) when he was transferred to Piedmont Regional Jail in 2015 pending trial on indecent exposure charges. Therefore, petitioner argues, DBHRS “forfeited its right” to treat petitioner, depriving the circuit court of authority to order his recommitment.

The Court holds claims (e)(1) and (e)(2) and this portion of claim (e)(3) are without merit. Circuit courts possess subject matter jurisdiction “to adjudicate the class of cases involving the involuntary commitment of alleged sexually violent predators.” *Jenkins v. Commonwealth, Director, Va. Ctr. for Behav. Rehab.*, 271 Va. 4, 13 (2006). Petitioner’s

detention on criminal charges did not sever the circuit court's subject matter jurisdiction to conduct the annual review hearing. *See* Code § 37.2-919(B) (procedure for resuming annual or biennial review hearing upon patient's return from incarceration).

In another portion of claim (e)(3), petitioner contends the pertinent statutes do not address how "time lost in treatment is indemnified" if a conviction entered during the course of the civil commitment is overturned. Petitioner appears to refer to his conviction for indecent exposure, third offense, which was reversed on appeal.

✱ In claim (e)(4), petitioner contends his detention at the Piedmont Regional Jail presented "obstacles for treatment" because the VCBR penalized petitioner for his time away from the treatment.

The Court holds this portion of claim (e)(3) and claim (e)(4) are not cognizable in a petition for a writ of habeas corpus. The writ "is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness" of his custody and detention. *Wilkins*, 255 Va. at 420-21.

In claim (f)(1), petitioner contends he was denied the effective assistance of counsel at his 2017 annual review hearing because counsel failed to argue the report of Dr. Craig S. King was inadmissible because it referenced unspecified "prior criminal offenses" that lacked "probative value."

The Court holds claim (f)(1) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner fails to identify which prior offenses lacked probative value or explain how their presence in Dr. King's report affected the outcome of the annual review hearing. Moreover, the record, including the September 25, 2017 recommitment order, demonstrates Dr. Mario J.P. Dennis and Dr. King offered written reports in accordance with Code § 37.2-910(B). As petitioner recognizes, Dr. King submitted his report to offer a second, non-treating opinion. Any professional person who conducts a second evaluation "shall submit a report of his findings" to the court. *Id.*; *see also* Code § 37.2-912(A) (court may consider petitioner's "disciplinary record and any infractions" and "any other factors that the court deems relevant"). The circuit court was entitled to Dr. King's report, and counsel could reasonably have determined any objection to its contents would have been futile. *See Correll v. Commonwealth*, 232 Va. 454, 470 (1987) (counsel is not required to make a futile

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 (f)(2), petitioner contends Dr. King "became a witness for the Commonwealth" and deprived petitioner of the due process right to a second opinion. Petitioner argues Dr. King was not a qualified expert, was too unfamiliar with petitioner to form an opinion that petitioner remained a sexually violent predator, did not explain the "Static-99r" measurement when he interviewed petitioner, and did not consider mitigating circumstances in petitioner's criminal history in his report or inform the court an earlier evaluation conducted by another professional was not properly administered. In addition, in a portion of claim (f)(3), petitioner contends Dr. King's report falsely alleged petitioner refused the Parole Board's invitation to return to the Rubicon treatment program over a decade ago.

The Court holds claim (f)(2) and this portion of claim (f)(3) are barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In another portion of claim (f)(3), petitioner contends the reports of Dr. Dennis and Dr. King referred to several prior convictions and parole violations that petitioner asserts are infirm for a variety of reasons.

The Court rejects claim (f)(3). To the extent petitioner challenges the contents of the experts' reports, the claim is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Id.* To the extent petitioner challenges the validity of the prior convictions and parole violations, the sentences for which petitioner fully served before filing the petition for a writ of habeas corpus, "a court does not acquire jurisdiction to determine the validity of a sentence fully served before the proceeding for a writ of habeas corpus is instituted." *E.C.*, 283 Va. at 529.

In claim (g)(1), petitioner "challenges his arrest and detention at jail" because the "court" lacked "subject matter jurisdiction" under unspecified portions of the Thirteenth and Fourteenth Amendments to the United States Constitution.

The Court holds claim (g)(1) asserts conclusions or opinions without providing factual support and, therefore, will not support the issuance of a writ of habeas corpus. *Penn v. Smyth*, 188 Va. 367, 370-71 (1948).

In claim (g)(2), petitioner contends he is “immune from criminal prosecution” due to his civil commitment and mandated treatment until his behavior changes and he “is no longer deemed a threat.”

The Court holds claim (g)(2) is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In claim (g)(3), petitioner contends he should not be forced to reside in Nottoway County, where he is “mistreated,” and he “has no ties to the community, no protection, or legal advocacy.”

The Court holds claim (g)(3) is not cognizable in a petition for a writ of habeas corpus. The writ “is not available to secure a judicial determination of any question which, even if determined in the prisoner’s favor, could not affect the lawfulness” of his custody and detention. *Wilkins*, 255 Va. at 420–21.

In claim (g)(4), petitioner contends the General Assembly abused its legislative powers “by approving criminal prosecution” of civilly committed persons under Code § 37.2-919.

The Court holds claim (g)(4) is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In claim (g)(5), petitioner contends his civil commitment “abridges rights that could deter bad conduct,” including the rights to associate with family and loved ones, to work, to be active, and to pursue freedom, happiness, prosperity, and peace. Petitioner equates his continued civil commitment with involuntary servitude.

The Court holds claim (g)(5) was not raised within one year after the cause of action accrued and is time-barred. Code § 8.01-654(A)(2). In addition, the Court holds claim (g)(5) is barred by Code § 8.01-654(B)(2). This claim, the facts of which were known prior to petitioner’s first petition for a writ of habeas corpus, was not previously raised.

In claim (g)(6), petitioner contends he should not suffer any civil or criminal consequences for alleged behavior that is attributable to his civil commitment.

The Court holds claim (g)(1) asserts conclusions or opinions without providing factual support and, therefore, will not support the issuance of a writ of habeas corpus. *Penn v. Smyth*, 188 Va. 367, 370-71 (1948).

In claim (g)(2), petitioner contends he is “immune from criminal prosecution” due to his civil commitment and mandated treatment until his behavior changes and he “is no longer deemed a threat.”

The Court holds claim (g)(2) is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In claim (g)(3), petitioner contends he should not be forced to reside in Nottoway County, where he is “mistreated,” and he “has no ties to the community, no protection, or legal advocacy.”

The Court holds claim (g)(3) is not cognizable in a petition for a writ of habeas corpus. The writ “is not available to secure a judicial determination of any question which, even if determined in the prisoner’s favor, could not affect the lawfulness” of his custody and detention. *Wilkins*, 255 Va. at 420–21.

In claim (g)(4), petitioner contends the General Assembly abused its legislative powers “by approving criminal prosecution” of civilly committed persons under Code § 37.2-919.

The Court holds claim (g)(4) is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In claim (g)(5), petitioner contends his civil commitment “abridges rights that could deter bad conduct,” including the rights to associate with family and loved ones, to work, to be active, and to pursue freedom, happiness, prosperity, and peace. Petitioner equates his continued civil commitment with involuntary servitude.

The Court holds claim (g)(5) was not raised within one year after the cause of action accrued and is time-barred. Code § 8.01-654(A)(2). In addition, the Court holds claim (g)(5) is barred by Code § 8.01-654(B)(2). This claim, the facts of which were known prior to petitioner’s first petition for a writ of habeas corpus, was not previously raised.

In claim (g)(6), petitioner contends he should not suffer any civil or criminal consequences for alleged behavior that is attributable to his civil commitment.

In claim (g)(7), petitioner contends he is immune from criminal prosecution under the Fifth and Eighth Amendments of the United States Constitution due to the length and conditions of his detention pursuant to his civil commitment.

In claim (h)(1), petitioner appears to contend the admission of evidence of prior convictions for indecent exposure and assault and battery at his annual review hearing was unduly prejudicial.

The Court holds claims (g)(6), (g)(7), and (h)(1) are barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In claims (h)(2) and (h)(4), petitioner challenges his 2013 convictions for indecent exposure.

The Court holds claims (h)(2) and (h)(4) were not raised within one year after the cause of action accrued and are time-barred. Code § 8.01-654(A)(2).

In claim (h)(3), petitioner contends unspecified convictions for assault and battery of two security guards employed by the VCBR are invalid because the trial court “did not have subject matter jurisdiction as [the] incident was not a case and controversy for [the] court to decide.”

The Court holds claim (h)(3), to the extent it challenges petitioner’s October 22, 2018 conviction for assault and battery, does not implicate the circuit court’s subject matter jurisdiction and is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

In claim (h)(5), petitioner contends the VCBR ignores the rights of civilly committed persons and needs to do more to improve its patients’ behavior.

The Court holds claim (h)(5) is not cognizable in a petition for a writ of habeas corpus. The writ “is not available to secure a judicial determination of any question which, even if determined in the prisoner’s favor, could not affect the lawfulness” of his custody and detention. *Wilkins*, 255 Va. at 420–21.

In claim (h)(6), petitioner contends unspecified arrests and criminal prosecutions involved “unheard of” bond proceedings.

The Court holds claim (h)(6) asserts conclusions or opinions without providing factual support and, therefore, will not support the issuance of a writ of habeas corpus. *Penn*, 188 Va. at 370-71.

In an unnumbered claim, petitioner contends the VCBR's staff and residents imperil his property, person, and liberty, and petitioner must allow others to harm him or he will be blamed and punished.

The Court holds this unnumbered claim is not cognizable in a petition for a writ of habeas corpus. The writ "is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness" of his custody and detention. *Wilkins*, 255 Va. at 420-21.

In another unnumbered claim, petitioner contends the Commonwealth's "plan" is to "destroy" petitioner's mind so petitioner will engage in "bad behaviors" that the Commonwealth will use to "deem him untreated" and "unprepared for society."

The Court holds this unnumbered claim asserts conclusions or opinions without providing factual support and, therefore, will not support the issuance of a writ of habeas corpus. *Penn*, 188 Va. at 370-71.

In another unnumbered claim, petitioner contends civil commitment is — unconstitutional.

The Court holds this unnumbered claim was not raised within one year after the cause of action accrued and is time-barred. Code § 8.01-654(A)(2). In addition, the Court holds this unnumbered claim is barred by Code § 8.01-654(B)(2). This claim, the facts of which were known prior to petitioner's first petition for a writ of habeas corpus, was not previously raised.

In another unnumbered claim, petitioner contends he was denied the effective assistance of counsel because counsel did not request a bond hearing when petitioner was detained on the 2017 felony assault and battery charges.

The Court holds this unnumbered claim satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner fails to proffer what arguments counsel should have made at a bond hearing or explain how those unspecified arguments would have affected the outcome of the hearing. 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 another unnumbered claim, petitioner contends Dr. Dennis mischaracterized petitioner's performance in the treatment program and caused the circuit court to deny petitioner a conditional release.

The Court holds this unnumbered claim is barred because a petition for a writ of habeas corpus may not be employed as a substitute for an appeal. *Brooks*, 210 Va. at 321-22.

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

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:



Deputy Clerk

VIRGINIA:

IN THE SUPREME COURT

GREGORY RICHARDSON,

Petitioner,

v.

Record No. 180182

**SUPERINTENDENT OF
PIEDMONT REGIONAL JAIL,¹**

Respondent.

MOTION TO DISMISS

The respondent, by counsel, moves this Court to deny and dismiss the petition for a writ of habeas corpus, and in support of this motion, says as follows:

Procedural History

1.- The Petitioner, Gregory Richardson, is in the custody of the Piedmont Regional Jail, awaiting trial in the Nottoway Circuit Court for two counts of felony assault and battery. (Respondent's Exhibit A: indictments for felony assault and battery, Case Nos. CR18000014-00 and CR18000014-01).

¹ The Office of the Attorney General does not represent the Superintendent of Piedmont Regional Jail. However, the Commonwealth is addressing all of the Petitioner's claims because they fail as a matter of law, for the reasons stated herein.

2. Prior to his current incarceration, Richardson was in the physical and legal custody of the Department of Behavioral Health and Developmental Services (DBHDS), at the Virginia Center for Behavioral Rehabilitation (VCBR), having been declared a sexually violent predator and civilly committed pursuant to the Civil Commitment of Sexually Violent Predators Act, Virginia Code § 37.2-900 *et seq.* (the SVP Act). Petitioner remains subject to DBHDS legal custody pursuant to that civil commitment.

3. A petition to have Richardson declared a sexually violent predator was filed in the Richmond Circuit Court on or about August 20, 2007. On June 11-12, 2009, the trial court conducted a jury trial. By clear and convincing evidence, the jury found Richardson to be a sexually violent predator, and the trial court confirmed the verdict by written order. (Respondent's Exhibits B and C). At the disposition phase of the trial on March 10, 2010, the trial court ordered Richardson to be civilly committed to the custody of DBHDS, which was memorialized in the trial court's written order dated April 21, 2010. (Respondent's Exhibit D).

4. On July 31, 2017, at Richardson's last annual review hearing of his civil commitment, the trial court found that he remains a sexually violent predator, and ordered him recommitted to the custody of DBHDS. The trial court entered an order to that effect on September 25, 2017. (Respondent's Exhibit E).

Present Petition

5. Richardson's current petition for writ of habeas corpus was filed in this Court on or about February 2, 2018, raising the following grounds (as numbered in the Petition):

- A. Petitioner is challenging his 1994 conviction for rape;
- B. Petitioner is challenging his current detention in the Piedmont Regional Jail, claiming this detention "commingle multiple issues prejudicial to his freedom." (Petition at 1);
 - B.1. Local government uses its judiciary to punish and manage VCBR's charge and deprives him of the right to participate and complete treatment;
 - B.2. Petitioner's "[d]etention without bail is cruel and unusual;"
 - B.3. Petitioner's current detention will prejudice his 2018 annual review hearing;
 - B.4. Petitioner challenges certain conditions of his current detention, and that his current detention will prejudice future annual review hearings;
- C. Petitioner is challenging annual review hearings as violating due process rights because they should be "more periodic than annual." (Petition at 2).

- D. The trial court erred in not considering him for conditional release;
 - D.1. Inpatient treatment is not an automatic outcome of an annual review hearing and the trial court erred in not considering conditional release;
 - D.2. Counsel “was not impressive enough” for the trial court to believe “it heard everything as why Richardson could not be granted conditional release” and that counsel was “ineffective because he wasn’t aiming at release, but only to have experts say on record how Richardson may be eligible for conditional release;” (Petition at 2);
- E. Petitioner challenges the trial court’s subject matter jurisdiction to conduct his annual review, because of his criminal arrests and detention;
- F. Petitioner is alleging “multiple claims that must be challenged simultaneously;” (Petition at 3)
 - F.1. Petitioner’s counsel was ineffective for failing to object to Dr. King’s report, which references prior criminal offenses;
 - F.2. Dr. King deprived him of a due process right to a second opinion, based on the report and testimony at the hearing;
 - F.3. Petitioner is challenging his prior criminal offenses, to challenge the experts’ reports;

G. Petitioner is challenging his current detention;

G.1. Petitioner is challenging his current arrest and detention on the grounds that the trial court lacks subject matter jurisdiction;

G.2. Petitioner believes he is immune from criminal prosecution;

G.3. Petitioner is forced to reside in Nottoway County;

G.4. The General Assembly abused its legislative process and violated the Virginia Constitution by "approving criminal prosecution in [Virginia Code §] 37.2-919"

G.5. "Civil commitment abridges rights that could deter bad conduct;" (Petition at 5)

G.6. Petitioner is seeking release from both annual review and jail detention and criminal prosecution based on behavior attributed to civil commitment;

G.7. Petitioner is immune from criminal prosecution;

H. Petitioner is challenging his criminal convictions (Petition at 5-6, H.1-H.4)

H.5. The VCBR could do more "to change and improve mind state of those known for this behavior in prison." (Petition at 6)

H.6. Petitioner alleges that "[a]rrest criminal prosecutions involved bond proceedings unheard of;" (Petition at 6).

Grounds A, F.1, F.3, and H.1 – H.4

1. Grounds A, F.1, F.3, and H.1 – H.4 all encompass challenges to Richardson's prior criminal convictions. Richardson is currently in the custody of Piedmont Regional Jail awaiting trial on pending felony charges. He is also subject to subject to DBHDS legal custody pursuant to his civil commitment as a sexually violent predator. Richardson is not currently detained on any of the criminal convictions he challenges in grounds A, F.1, F.3, and H.1 – H.4, having fully served those sentences. (Respondent's Exhibit F, Department of Corrections Affidavit). Thus, this Court does not have jurisdiction to determine claims A, F.1, F.3, and H.1 – H.4. These allegations should be dismissed. *See Moore and Ancarrow v. Peyton*, 211 Va. 119, 176 S.E.2d 427 (1970) (finding that the courts have no jurisdiction to determine "the validity of a sentence fully served before the proceeding for a writ of *habeas corpus* is instituted").

Grounds B.1, B.4, G.5, and H.5

2. Grounds B.1, B.4, G.5, and H.5 encompass complaints regarding the conditions of Richardson's confinement at the jail, which are not cognizable in a petition for a writ of habeas corpus. The writ "is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness of his immediate custody and detention." *Virginia Parole Board v. Wilkins*, 255 Va. 419, 421, 498 S.E.2d 695, 696 (1998); *see also Carroll v.*

Johnson, 278 Va. 683, 685 S.E.2d 647 (2009). Grounds B.1, B.4, G.5, and H.5 should be dismissed.

Grounds B.2, B.3, G.1 – G.4, G.6, G.7, and H.6

3. Grounds B.2, B.3, G.1 – G.4, G.6, G.7, and H.6 all encompass challenges to Richardson's current detention in jail for his pending felony charges and aspects related to this current criminal prosecution, which are not cognizable in a petition for a writ of habeas corpus. These grounds represent claims that could be raised during his upcoming trial and on appeal if he is convicted. "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." *Slayton v. Parrigan*, 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974). A petition for a writ of habeas corpus "may not be used as a substitute for an appeal or writ of error." *Brooks v. Peyton*, 210 Va. 318, 321, 171 S.E.2d 243, 246 (1969). These claims should be dismissed.

Ground C

4. In Ground C, Richardson challenges the SVP Act's provisions for annual review hearings for civilly committed respondents, arguing that they should be "more periodic than annual" and, because they are not, various constitutional violations result. (Petition at 2). To the extent that Richardson is making a constitutional challenge of the SVP Act, this is a claim that does not appear was

raised at his annual review hearing, (see Respondent's Exhibit E), but was also not appealed to this Court. "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." *Slayton*, 215 Va. at 30, 205 S.E.2d at 682. A petition for a writ of habeas corpus "may not be used as a substitute for an appeal or writ of error." *Brooks*, 210 Va. at 321, 171 S.E.2d at 246. This claim should be dismissed.

Grounds D.1 and F.2

5. In Ground D.1, Richardson claims the trial court erred in not granting him conditional release at the annual review hearing. In Ground F.2, Richardson complains that his appointed expert, Dr. King, deprived him of a due process right to a second opinion, and recites substantive challenges to Dr. King's report and opinions. To the extent that Richardson is making a sufficiency of the evidence claim regarding the annual review hearing which resulted in his recommitment to DBHDS custody, and challenges to the evidence presented at that hearing, these are claims that do not appear to have been raised at his annual review hearing, (see Respondent's Exhibit E), but were also not appealed to this Court. "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." *Slayton*, 215 Va. at 30, 205 S.E.2d at 682. A petition for a writ of habeas corpus

“may not be used as a substitute for an appeal or writ of error.” *Brooks*, 210 Va. at 321, 171 S.E.2d at 246. Grounds D.1 and F.2 should be dismissed.

Ground D.2 and F.1

6. Grounds D.2 and F.1 are essentially claims that his appointed counsel was ineffective at the annual review hearing, for not being “impressive enough” to convince the trial court that he should have been granted conditional release (Ground D.2), and for not objecting to the introduction of his expert’s report, which referenced Richardson’s prior criminal offenses. (Ground F.1).² In *Jenkins v. Director, Va. Ctr. for Behav. Rehab.*, 271 Va. 4, 624 S.E.2d 453 (2006), this Court has held that respondents in sexually violent predator proceedings have a constitutional right to effective assistance of counsel, and that claims of ineffective assistance of counsel are to be evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jenkins*, 271 Va. at 16, 624 S.E.2d at 460. The Court in *Jenkins* further explained:

Under *Strickland*, a habeas petitioner must first demonstrate that “counsel’s performance was deficient,” i.e., “that counsel’s representation fell below an objective standard of reasonableness.” 466 U.S. at 687-88. Second, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. These requirements are commonly referred to as the “performance” and “prejudice” prongs of the *Strickland* two-part test.

² As previously noted, see para. 6 above, to the extent Richardson is challenging his prior criminal offenses in Ground F.1, this Court is without jurisdiction to determine the validity of that challenge.

Jenkins, 271 Va. at 17, 624 S.E.2d at 461.

7. In Ground D.2, Richardson makes the conclusory claim that his counsel was ineffective “because he wasn’t aiming at release, but only to have experts say on record how Richardson maybe eligible for conditional release.” (Petition at 2). Richardson provides no explanation as to his perceived legal distinction between “aiming for release” and being “eligible for conditional release” in the context of the annual review hearing; how, if it all, his counsel made that distinction; or why that distinction should have been important to the trial court. More importantly, Richardson provides no showing of how, even if the allegation was true, this argument rendered counsel’s performance deficient or that the result of the hearing would have been different. Notably, in his Ground D, Richardson claims the trial court erred in not considering him for conditional release, even while admitting that his counsel argued his eligibility for conditional release. Petitioner’s failure to supply sufficient facts is fatal to his claim. See *Muhammad v. Warden*, 274 Va. 3, 18, 646 S.E.2d 182, 195 (2007); *Hedrick v. Warden*, 264 Va. 486, 521, 570 S.E.2d 847, 862 (2002) (both finding habeas petitioner had not established deficient performance or prejudice because he failed to provide any evidence to support claim).

8. Similarly, in Ground F.1, Richardson makes the conclusory allegation that counsel was ineffective for failing to object to Dr. King’s report. (Petition at 3).

Virginia Code § 37.2-910(B) requires a second opinion expert to submit a written report of his findings to the trial court, Commissioner of DBHDS, and counsel for both parties. In this case, Dr. King was also called to testify regarding his evaluation of Richardson. While it is factually accurate that Richardson's counsel did not object to the introduction of the report, Richardson again provides no facts to establish that his counsel's performance was deficient in this regard, that the report would not have been introduced but for this lack of objection, or that the result of the hearing would have been different but for the introduction of this second opinion report.

9. Richardson's conclusory, self-serving allegations are insufficient to support habeas corpus relief. *Elliott v. Warden*, 274 Va. 598, 613, 652 S.E.2d 465, 480 (2007). Richardson has failed to demonstrate that his counsel erred at all in his representation of Richardson, and "fails even to assert, much less demonstrate, that but for counsel's alleged errors, the result of his trial would have been different." *Sigmon v. Director*, 285 Va. 526, 536, 739 S.E.2d 905, 910 (2013). These grounds should be dismissed.

alleged non-jurisdictional defect of a judgment of conviction.” *Slayton*, 215 Va. at 30, 205 S.E.2d at 682. A petition for a writ of habeas corpus “may not be used as a substitute for an appeal or writ of error.” *Brooks*, 210 Va. at 321, 171 S.E.2d at 246.

11. “Subject matter jurisdiction refers to a court’s power to adjudicate a class of cases or controversies, and this power must be granted through a constitution or statute.” *Jenkins*, 271 Va. at 13, 624 S.E.2d at 458. The SVP Act confers subject matter jurisdiction “upon the circuit courts to adjudicate the class of cases involving the involuntary commitment of alleged sexually violent predators.” *Id.* at 13, 624 S.E.2d at 459. This Court found that even though Jenkins was neither a prisoner nor a defendant at the time of his probable cause hearing, the circuit court retained the subject matter jurisdiction to adjudicate his case. *Id.* at 12, 624 S.E.2d at 458. *Jenkins* is squarely on point. The trial court never lost jurisdiction over Richardson’s case due to his subsequent arrests and jail detentions, even with potential tolling of his future annual review hearings pursuant to Virginia Code § 37.2-919. Ground E should be dismissed.

12. Each and every allegation not expressly admitted by the respondent

Commonwealth, 265 Va. 273, 576 S.E.2d 491 (2003); *Yeatts v. Murray*, 249 Va. 285, 455 S.E.2d 18 (1995); *Arey v. Peyton*, 209 Va. 370, 164 S.E.2d 691 (1968).

14. Pursuant to Rule 5:7, respondent has included one copy of the entire record of Richardson's criminal charges from the Nottoway County Circuit Court, which are still pending trial. (Case Nos. CR18000014-00 and CR18000014-01).

15. Respondent has also included as Exhibits all of the orders which are directly pertinent to Richardson's claims, and which demonstrate that those claims are not cognizable in habeas corpus, that this Court is without jurisdiction to determine them, or that Richardson has failed to state a claim for relief on the face of his Petition. With respect to Rule 5:7, respondent respectfully states that the Exhibits included adequately represent the record for this Court to resolve all of the claims without the need for an evidentiary hearing. However, respondent stands ready to supply additional records should the Court require it to do so.

WHEREFORE, the respondent prays that this Court deny and dismiss the habeas corpus petition.

Respectfully submitted,