VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of July, 2021.

Dina Elizabeth Guardado, No. 1493296, Petitioner,

against Record No. 200147

Eric Aldridge, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the amended petition for a writ of habeas corpus filed July 23, 2020, the rule to show cause, the respondent's motion to dismiss and motion to dismiss the amended petition, and petitioner's reply, the Court is of the opinion that the motion should be granted and the petition should be dismissed.

Petitioner was convicted in the Circuit Court of Spotsylvania County of arson, possession of explosive material, burglary with a deadly weapon, five counts of attempted murder, and five counts of attempted malicious wounding, and was sentenced to eighty years' imprisonment with sixty-five years suspended. Petitioner's appeals to the Court of Appeals of Virginia and to this Court were unsuccessful, and she now challenges the legality of her confinement pursuant to these convictions.

On March 29, 2017, the Spotsylvania County Department of Fire, Rescue, and Emergency Management responded to a fire at the home of Albrecht Arcand and his family. On the floor in the basement of the house, Fire Marshal Shawn Divelbliss found three homemade bombs. Two of the bombs had been made from T-Fal pressure cookers, and the third was made from an Ambiano slow cooker. One of the bombs had exploded. The devices were filled with various items, including a fire starter log, two types of combustible black powder, and packets of tin foil containing nuts, screws, and bullets. The slow cooker had been plugged in, and all three devices had been covered by a towel. The towel had been set on fire, and the fire from the towel caused one of the devices to explode.

Petitioner lived in the same apartment complex where Arcand and his family previously lived and had gone on two dates with Arcand. When Arcand decided not to pursue a

relationship, petitioner began a pattern of threatening behavior which resulted in Arcand having to obtain a protective order against her. Petitioner's harassing behavior continued even after the Arcands moved to the house in Spotsylvania County. Petitioner was seen in the yard of the home on at least one occasion prior to the bombing.

Police investigating the bombing focused on petitioner as a suspect and quickly discovered evidence indicating she had purchased or stolen the materials used to make the improvised explosive devices and had searched the internet for instructions on bomb-making. They found a glove, a hammer, a March 24, 2017 receipt from Aldi for a slow cooker, and an open bottle of a flammable mineral spirits in petitioner's car. In petitioner's bedroom in the home she shared with her parents, the police found instruction manuals and recipe booklets for the pressure cookers and a slow cooker. In a purse inside petitioner's closet, the police found a shopping bag containing four empty black powder containers and three unused digital clocks, still in their packaging. Police also found a laptop computer with nearly 150 searches for information pertaining to improvised explosive devices, arson, explosions, and how to make bombs using clocks, pressure cookers, aluminum foil, and black powder. A plastic bag found inside one of the explosive devises bore a single fingerprint from petitioner's mother.

Investigators recovered the March 24, 2017, surveillance recordings from an Aldi in Dumfries, Virginia, which shows a woman who resembles petitioner purchasing a slow cooker at the same time as is listed on the Aldi receipt found in petitioner's car. The handbag in which the receipt was found appears to be identical to the handbag the woman is carrying in the recording. The slow cooker found at the Arcand residence matched the one purchased from Aldi. Investigators also recovered surveillance recordings from a Gander Mountain store from March 24, 2017, which appeared to show petitioner shoplifting black powder and bullets from the store. Employees who had interacted with petitioner identified her as the person shown on the surveillance recordings.

In a portion of claim (a), petitioner contends she was denied the effective assistance of counsel because counsel failed to move to dismiss the indictments for attempted malicious wounding on double jeopardy grounds. Petitioner asserts her convictions for attempted malicious wounding and for attempted murder are multiple punishments for the same offenses under *Blockburger v. United States*, 284 U.S. 299 (1932). Petitioner argues attempted malicious

wounding and attempted murder, considered in the abstract, do not each require proof of a fact the other does not.

The Court holds this portion of claim (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has previously rejected the argument that convictions for attempted murder and malicious wounding, based on a single, continuous criminal act, constituted multiple punishments for the same offenses under *Blockburger*. *See Coleman v. Commonwealth*, 261 Va. 196, 200 (2001). Accordingly, counsel could reasonably have determined a similar challenge to petitioner's convictions would have been futile. *See Correll v. Commonwealth*, 232 Va. 454, 470 (1989) (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 error, the result of the proceeding would have been different.

In another portion of claim (a), petitioner contends she was denied the effective assistance of counsel when counsel failed to hold the Commonwealth to its promise not to seek convictions for both the attempted malicious wounding charges and the attempted murder charges. Petitioner asserts the Commonwealth charged her with five counts of attempted malicious wounding and five counts of attempted murder intending to proceed on either the attempted malicious wounding charges or the attempted murder charges, but not both. Further, petitioner asserts the Commonwealth informed the trial court that it had "promised" not to seek convictions on both sets of charges.

The Court holds this portion of claim (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that, when questioned by the court regarding whether petitioner could be convicted of both attempted malicious wounding and attempted murder, the prosecutor told the court he had advised defense counsel that he intended to "instruct the Court that my argument was going to be either or." After further discussion and argument, however, the prosecutor elected not to withdraw either set of charges. Thus, contrary to petitioner's allegation, the prosecutor did not admit to making any promise to petitioner. Further, petitioner does not allege the Commonwealth's initial plan to elect between the two sets of charges was part of a plea

agreement petitioner entered with the Commonwealth, or to otherwise articulate any grounds upon which counsel could have argued the Commonwealth should be bound by that intent. 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 error, the result of the proceeding would have been different.

In claim (b), petitioner contends she was denied the effective assistance of counsel because counsel labored under a conflict of interest which caused him to neglect to raise arguments suggesting petitioner's mother was the real culprit. Petitioner further contends counsel's conflict of interest led him to object to the admission of evidence that would have implicated petitioner's mother. Specifically, petitioner contends counsel objected when, during cross-examination of petitioner's mother, the prosecutor began to ask how her fingerprint came to be in one of the explosive devices. Further, counsel failed to argue the individual in the surveillance recording from the Gander Mountain could have been petitioner's mother or to emphasize that petitioner's mother had access to petitioner's laptop.

The Court holds claim (b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner has not explained the nature of the alleged conflict of interest or how counsel's actions resulted from that conflict. Thus, petitioner has failed to establish either an actual conflict of interest or an adverse effect on counsel's performance. *See Mickens v. Taylor*, 535 U.S. 162, 172 (2002). Further, petitioner fails to provide any support for her conclusory assertion that, had the prosecutor been permitted to question her mother about her fingerprint, the answer would have exculpated petitioner and implicated her mother. In addition, the record, inducing the trial transcript, demonstrates that the Gander Mountain employees who had interacted with petitioner at the store identified her as the person shown on the surveillance recordings. Given that positive identification and the trial court's ability to view the recording and petitioner, counsel could reasonably have determined any argument that the recording showed petitioner's mother would have been unsuccessful.

Finally, as to petitioner's claim that counsel should have emphasized that her mother had access to her laptop, the record demonstrates that petitioner testified she kept her laptop in the living room with a post-it note with the user name and password. However, the laptop was found in petitioner's room. Further, petitioner's mother, testifying on petitioner's behalf, denied

even knowing petitioner had a laptop. In addition, petitioner's mother required a translator to testify, yet the computer searches for information on making improvised explosive devices were conducted in English. Under the circumstances, counsel could reasonably have determined suggesting petitioner's mother was the true culprit based on her purported access to petitioner's laptop would have been futile. 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 error, the result of the proceeding would have been different.

In claim (c), petitioner contends she was denied the effective assistance of counsel because counsel failed to rehabilitate petitioner during his redirect examination. Petitioner alleges that during cross-examination, the Commonwealth "pressed her aggressively on a number of statements and acts that were either definitively or allegedly attributed to her." On redirect, instead of attempting to rehabilitate petitioner, or simply deciding not to question petitioner further, counsel "actively attacked [her] credibility," by questioning her "grasp on reality." Petitioner suggests counsel's decision to do so likely stemmed from his purported desire to protect himself from a professional complaint based on his poor decision to call petitioner as a witness.

The Court holds claim (c) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. "An actual conflict of interest exists where counsel has responsibilities to other clients or personal concerns that are actively in opposition to the best interests of the defendant." *Moore v. Hinkle*, 259 Va. 479, 489 (2000). However, "an attorney's desire to protect himself against a later charge of ineffective assistance of counsel, standing alone, does not constitute a per se conflict of interest." *Id.* Petitioner's speculative assertion that counsel must have been acting in his own self-interest at petitioner's expense is insufficient to show an actual conflict of interest.

In addition, the record, including the trial transcript, demonstrates that, during her trial testimony, petitioner insisted she had a relationship with Arcand, despite extensive evidence to the contrary, including a protective order and an order banning her from the Arcands' property. Petitioner claimed she could not recall having sent Parris Smith, who was dating one of Arcand's brothers, Facebook messages and claimed she rarely used Facebook, despite the Commonwealth having introduced nearly fifty such messages. She claimed she was with Vasil Stoev when the

explosive devices were placed in the Arcand family's home, despite that Stoev had just testified to the contrary. Petitioner also denied exchanging text messages with Stoev, even after being shown the texts sent from her phone.

On redirect, counsel asked petitioner about her inability to recall the messages, questioning whether she had any memory problems. Petitioner said she did not. Counsel asked if she had "ever been confronted with the idea that you have a problem with reality?" Petitioner said no. Counsel asked if petitioner understood what was going on and that she was on trial, and she said she did. Counsel asked if petitioner had been able to communicate with him about the evidence, and she said she had. Counsel then asked petitioner if it were her testimony that she had nothing to do with the explosive devices, and she said it was. While this questioning may have drawn further attention to petitioner's already apparent mental health struggles, it did not, as petitioner contends, constitute an open attack on her credibility. Further, counsel could reasonably have determined highlighting petitioner's difficulties would garner sympathy for her with the trial court. Finally, petitioner fails to proffer what questions counsel could have asked to rehabilitate petitioner or to proffer her expected answers. 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 error, the result of the proceeding would have been different.

Upon further consideration whereof, petitioner's motion for an evidentiary hearing is denied.

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

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Helen Kaynor

Deputy Clerk