VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of November, 2021.

Harshadkumar Nanjibhai Jadav, Appellant,

against Record No. 210105
Circuit Court No. CL20-2620

J. Woodson, Warden, Buckingham Correctional Center, Appellee.

From the Circuit Court of Hanover County

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

A Copy,

Teste:

Muriel T. Pitney, Clerk

By: _____
Deputy Clerk

APPENDIX - A

VIRGINIA:

IN THE CIRCUIT COURT OF HANOVER COUNTY

HARSHADKUMAR NANJIBHAI JADAV, NO. 1851236,
Petitioner

v. **Civil No. CL20-2620**

J. WOODSON, WARDEN,
BUCKINGHAM CORRECTIONAL CENTER,
Respondent.

FINAL ORDER

This matter came before the Court on the petitioner's Writ of Habeas Corpus, and the respondent's Motion to Dismiss. Upon mature consideration of the pleadings and exhibits, controlling legal authority and the record in the criminal case of Commonwealth v. Harshadkumar Nanjibhai Jadav, Case No. CR16000897, which is hereby made a part of the record in this matter, the Court makes the following findings of fact and conclusions of law:

The petitioner, Harshadkumar Nanjibhai Jadav, is in custody pursuant to a final order of this Court entered on May 25, 2018. Case No. CR16000897. After a multiple day jury trial, from June 12, 2017 to June 15, 2017, the jury found Jadav guilty of first-degree murder and recommended a sentence of life imprisonment. On January 25, 2018, the Court sentenced Jadav to life imprisonment, in accordance with the jury verdict.

Petitioner appealed his conviction. The Court of Appeals of Virginia denied his appeal by per curium order December 28, 2019, and by three-judge panel on April 3,

2019. Record No. 0223-18-2. The Supreme Court of Virginia refused his appeal on October 7, 2019. Record No. 190570.

Prior Proceeding

In its December 28, 2019 order, the Court of Appeals made the following findings of fact:

> Appellant and Reena Jadav were married on September 8, 2012, but by the summer of 2016, they were experiencing marital problems. They fought almost daily, and Reena frequently spent her weekends with her parents. In July 2016 appellant began dating women he met through an online dating service. He told those women that he was single and even invited them to stay at the marital home while Reena was visiting her parents. One of the women rejected his sexual advances, but the other woman was physically intimate with him between the end of July and late August 2016. Appellant assured both women that he was seeking a serious, long-term relationship.
>
> Unaware of her husband's infidelity, Reena traveled with appellant to Nashville, Tennessee on August 29, 2016, when she started a new job with Regions Bank. The new position included life insurance policies with total coverage exceeding one million dollars. Reena named appellant as the beneficiary of the policies. While appellant was in Nashville with Reena, his Google account records showed searches using the terms "accidental death and dismemberment insurance," "homicide," and "death by natural causes."
>
> The couple returned to their home in Hanover on Saturday, September 3, 2016. On the day of their return, they ate dinner with Reena's parents, Chandra and Sumitra Shrestha. When Reena went to the bathroom, appellant spoke to Chandra in a hushed voice and asked him to advise his daughter not to communicate with her new employer in Tennessee because "they were not going back." Appellant told Chandra that the bank would have to fire her and pay her for another two weeks if Reena did not reply to the bank's communications.
>
> That same evening, appellant communicated with Felicia Smith, one of the women he had met online and had been dating since July 27, 2016. He told Smith that he missed her and could not wait to "cuddle" with her. Using the dating website, appellant also texted another woman whom he had met online and suggested that they meet in person.
>
> On Sunday, September 4, 2016, the day before Labor Day, Reena's parents and Reena attended a family dinner hosted by Reena's sister; when

appellant did not appear, Chandra called him and urged him to come. Appellant declined, explaining that he and Reena were fighting. After the dinner, Reena asked her parents to stop by her house in the Honey Meadows subdivision, and they arrived there between 8:15 p.m. and 8:30 p.m. Appellant was in the kitchen cooking when Reena, Sumitra, and Chandra arrived. Sumitra went upstairs with her daughter to help her unpack from her trip, and Chandra sat down in the living room while appellant continued cooking. After the women went upstairs, appellant emerged from the kitchen and removed Reena's cell phone from her purse.

When Sumitra returned downstairs, she announced that Reena had changed into her nightclothes and would join them shortly. Appellant, who was still holding Reena's phone in his hands, encouraged Reena's parents to leave, telling them that Reena might want to leave with them if they stayed. Sumitra and Chandra complied and left the house between 9:30 p.m. and 9:45 p.m. They never saw their daughter again.

At approximately 11:00 p.m., Dr. Willie Stroble and Roger Hultgren, who lived in neighboring houses in the Honey Meadows subdivision, heard a woman's scream behind their houses. Both men looked from their homes toward their backyards, but the area was dark, and they saw nothing.

At 12:47 a.m. appellant texted Reena's phone and asked her to tell him when she arrived at her parents' house, noting that he was "so seeeepyyyy [sic]."

The following morning, appellant texted Reena's parents and asked if Reena was at their house. Chandra called appellant immediately and told him that Reena was not with them. Appellant told Chandra that he and Reena went for a walk after Chandra and Sumitra left, but that when he and Reena returned home, Reena wanted appellant to walk a second time. Appellant told Reena that he was tired and went upstairs to bed, leaving her watching television downstairs. He admitted to Chandra that he had taken Reena's car key, but noted that Reena told him that she was leaving and that she would call her father to pick her up.

Because Reena's jogging clothes were missing, appellant speculated to Chandra that she might have gone for a walk. Chandra directed appellant to search for her in the car while Chandra stayed on the phone. Appellant drove through the neighborhood in Reena's gray Prius and finally told Chandra that he saw Reena lying unconscious on the ground. Appellant told Chandra that he was calling 911 and hung up.

Dressed in black athletic pants, an orange shirt, and sneakers, Reena was lying on her left side in the grassy area behind Stroble's and Hultgren's houses. Her head was covered in blood, with visible blows to her face and the back of her head. A "gaping hole" in the top of her head exposed brain matter. When appellant called 911, however, he did not state that she was

clearly dead. Instead, he described her as "all bloodied up" and stated that she "look[ed] like she's not breathing." Based on appellant's ambiguous description, the 911 operator instructed him to turn Reena over on her back to start CPR. Rather than telling the operator that Reena was dead, appellant responded that she was too heavy and "all jammed up." When the 911 operator asked appellant if Reena was "beyond help," appellant replied, "I'm not a doctor. I don't know."

Hanover County Sheriff's Sergeant Gardner arrived at the scene at approximately 5:44 a.m. on September 5, 2016. Gardner saw appellant standing next to a gray Prius talking on the phone. Reena's body was nearby lying in the grass next to a black backpack and covered in blood. After seeing the condition of Reena's body, Gardner immediately approached appellant and directed him to hang up the phone and to keep his hands visible while Gardner checked his car for a weapon. Appellant calmly told Gardner that Reena had gone out for a run the night before and that he had searched for her when she did not come home.

Deputy Dumond arrived at the scene at approximately 5:45 a.m. After handcuffing appellant, Dumond detained him in his police car for approximately two hours and recorded their conversation. Appellant told Dumond that he and Reena fought almost daily and acknowledged that they had been fighting the prior evening. When Reena told appellant that she "didn't want to be in the same room" with him, he went upstairs and went to sleep. He stated that he did not realize Reena was missing until he woke up the following morning. Appellant noted that, after he found her, he attempted to perform CPR, but could not move her because "she's really heavy."[1] Later, he asked Dumond why Reena was not in the ambulance. When Dumond informed appellant that she was deceased, he responded, "You're kidding me." But he did not cry.

Investigator Laplaga arrived at the scene at approximately 7:30 a.m. on September 5, 2016. Laplaga examined the backpack on the ground next to Reena's body and found red and brown stains on the top of it. The backpack contained only a pair of work gloves. Laplaga executed a search warrant at appellant's house and found an open bag of tools in an upstairs closet. The tool bag contained multiple tools, but it did not contain a hammer.

Investigator Dover arrived at the scene at 7:05 a.m. and interviewed appellant at approximately 8:15 a.m. Appellant told Dover that Reena became upset after her parents left without warning and that the couple took a walk together. When they returned home, Reena ate a snack and suggested a second walk, but appellant declined. Angry, Reena told

[1] When the medical examiner later arrived at the scene, she turned Reena on her back "rather effortlessly."

appellant to go upstairs and announced that she was going to her parents' house. Appellant stated that he went to bed at approximately 10:30 p.m. and woke up at 12:30 a.m. to find Reena was not beside him. He noted that he texted her and asked her to let him know when she arrived safely at her parents' house. Appellant specifically told Dover that he did not leave his house between 10:30 p.m. on September 4, 2016, and 5:22 a.m. the following morning.

Investigator Cary checked appellant's cell phone records to determine his whereabouts on the night of the murder. During the weeks preceding the murder, Cary discovered that appellant's cell phone consistently "pinged" off the same cell tower between 11:00 p.m. until 6:00 a.m. each night. On the night of the murder, however, Cary noticed a "deviation in the pattern" between the hours of 11:00 p.m. and 6:00 a.m. At 11:31 p.m. appellant's phone was at his usual "home" cell phone tower, but "shifted" to the "301/295 tower" at 11:38 p.m. and then shifted again at 11:42 p.m. to the "301 tower south of New Ashcake." At 11:44 p.m. the phone shifted back to the "301/295 tower" and at 11:47 p.m. moved to the Atlee Station Road tower "towards [his] residence." By 12:01 a.m. on September 5, 2016, appellant's phone connected with his usual "home tower" and remained there until he made the 911 call four or five hours later. Stated generally, between 11:31 p.m. on September 4, 2016, and 12:01 a.m. on September 5, 2016, appellant's cell phone left his "home" cell tower and used three cell towers in three areas surrounding the Honey Meadows subdivision before returning home. Surveillance footage from businesses in the areas where appellant's phone traveled during that timeframe showed a gray Prius traveling the roads; the vehicle matched the one appellant was driving when the police found him at the crime scene.

On Wednesday, September 7, 2016, Melinda Mitchell discovered a hammer in the grassy ravine abutting Route 301 behind her house. Strewn about the embankment she found a size medium blue shirt with red stripes, a pair of men's gray Levi's pants, size 36/30, a pair of gray Hanes brand men's underwear, and a cleaning wipe. Mitchell placed the hammer in her husband's toolbox and threw away the underwear and the wipe. Planning to donate the shirt and the pants, she washed them.

On Saturday, September 10, 2016, appellant attended Reena's funeral, but did not join the family at a function immediately after the funeral or in Virginia Beach the following day to spread Reena's ashes in the ocean. As Reena's family drove back from Virginia Beach, her brother Gaurav Shrestha texted appellant and asked if the family could gather some of Reena's belongings as keepsakes; appellant informed Gaurav that he had donated all of her possessions to Goodwill while the family was at the beach.

On Monday, September 12, 2016, Mitchell saw police searching the area next to the road behind her house and turned over the items she had found five days earlier. The shirt was identical to the one appellant had been wearing when Reena's parents saw him at 9:30 p.m. on September 4, 2016. Traces of blood were visible on the hammer head and claw, and forensic analysis determined that Reena could not be statistically eliminated as the source. Furthermore, DNA material was found in the men's underwear recovered from Mitchell's yard, and neither appellant nor Reena could be statistically eliminated as the sources. Cary confirmed that appellant's cell phone used a cell tower serving the area around Mitchell's home sometime between 11:31 p.m. on September 4, 2016 and 12:01 a.m. on September 5, 2016. Using "time-distance equations" and how much time passed between appellant's phone moving from one cell tower to the next, Cary was able to narrow the routes on which appellant's phone traveled. Cary drove one potential route from Honey Meadows subdivision to Mitchell's house and back to Honey Meadows and found that the round-trip excursion took twelve minutes and one second.

At 2:30 p.m. on September 12, 2016, the police arrested appellant. At the time of his arrest, he was wearing a medium size polo shirt and size 36/30 Levi's jeans. He was also carrying a backpack containing ten thousand dollars in cash, his passport, Reena's passport, correspondence explaining how to collect on Reena's life insurance policies, and a pair of men's Hanes underwear identical to the ones discarded in Mitchell's back yard.

At trial, medical examiner Dr. Michael Hays testified that Reena had suffered "at least" fifteen blows to her head, all of which were consistent with having been struck with either the head or the claw of a hammer. She had been struck in the face at least six times, breaking her jaw and knocking out her teeth. The left and right sides of her head, as well as the back of her head showed signs of trauma, including a quarter-inch round "puncture" wound near her right temple consistent with an object other than a hammer head piercing her skull.

Present Petition

On or about July 30, 2020, Jadav timely filed the instant habeas petition, attacking the validity of his convictions, asserting the following claims:

I. The prosecution suppressed exculpatory, material video evidence and thus violated due process under Brady v. Maryland, 373 U.S. 83 (1963).

II. Trial counsel was ineffective for the failure to investigate, develop, and produce at trial exculpatory video evidence.

III. Trial counsel was ineffective for the failure to investigate and present at trial exculpatory alibi evidence – a digital forensic report.

IV. Trial counsel was burdened under a conflict of interest.

V. Prosecutors violated due process under Brady by suppressing exculpatory luminol test results.

VI. Trial counsel was ineffective for failing to investigate and impeach Investigator LaPlaga.

VII. Trial counsel was ineffective for failing to investigate the Commonwealth's evidence.

VIII. The prosecution violated their obligation under Brady by failing to disclose exculpatory text messages exchanged between the petitioner and Investigator Dover.

IX. Trial counsel was ineffective for failing to investigate and present at trial exculpatory text messages.

X. Trial counsel was ineffective for failing to authenticate cell phone location records.

XI. Trial counsel was ineffective for failing to protect the petitioner's rights under Miranda v. Arizona.

XII. Trial counsel was burdened under a conflict of interest.

Non-Cognizable Claim

The Court finds that claims I, V, and VIII are not cognizable in habeas corpus because Jadav could have raised them at trial or on appeal. Morrisette v. Warden, 270 Va. 188, 188, 613 S.E.2d 551, 554 (2005). "A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error." Slayton v. Parrigan, 215

Va. 27, 29, 205 S.E.2d 680, 682 (1974). "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." Id. at 30, 205 S.E.2d at 682. In each of the Brady claims against the prosecution, the Court finds that it is clear both from the record and Jadav's own petition that the evidence Jadav alleges was suppressed, video surveillance, luminol testing, and his own text messages, were known to the defendant prior to or during trial, and available to be utilized at trial. Therefore, claim I, V, and VIII are non-cognizable and are dismissed pursuant to Slayton, 215 Va. at 29, 205 S.E.2d at 682.

Brady Claims

The Court further finds that Jadav's claims I, V, and VIII, alleging prosecutorial misconduct, are without merit as he failed to establish any valid Brady claim.

In order to establish a Brady violation, a petitioner must prove: (1) that the Government possessed evidence favorable to him; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. See United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990).

Claim I

In claim I, Jadav alleges that the prosecution suppressed exculpatory, material video evidence and thus violated due process under Brady. The Court finds that the

record refutes Jadav's claim, as it is abundantly clear from the trial transcript that the video was known and available to counsel prior to trial, or at the very latest, during trial.

The prosecutor who handled the underlying trial has provided the Court with an affidavit regarding the allegations against the Commonwealth. The Commonwealth provided Jadav's trial counsel with open-file discovery. In the discovery agreement, the Commonwealth wrote that there were items of physical evidence in the possession of law enforcement that the defense attorney could view by making an appointment.

The Commonwealth's casefile contained a disc of the portions of the surveillance video the Commonwealth intended to introduce at trial, and the police report, in which the officer listed that he collected surveillance video covering the night of the murder and the early morning hours of the following day. Jadav's trial counsel did not ask to view the portions of the video the Commonwealth did not intend to use at trial.

Jadav alleges that the Court called the entire video evidence exculpatory, but that is a misreading of the transcript. After the defense gave an example of how the video could be exculpatory, the Court responded, "Obviously it could be, and I would consider that exculpatory and I believe the Commonwealth would." That comment was made prior to the Court learning that the discovery agreement indicated that the physical evidence was in the possession of the law enforcement agency and that the attorney could make an appointment to view it and that the police report, which the attorney did review, listed the entire surveillance video as being in the possession of law enforcement. Jadav's trial counsel did not disagree with the Commonwealth's assertion regarding the police report and the open file discovery agreement.

Furthermore, contrary to Jadav's conclusory assertion that the video would prove that he was not at the crime scene, the video does not show the crime scene. Rather, it shows the street upon which a car would likely travel to exit the neighborhood, thus, it could not have shown that Jadav was not present at the crime scene. In addition, the street upon which the surveillance camera was oriented in the opposite direction of the Jadav residence. It was the Commonwealth's theory that Jadav and his wife went for a walk and, once in the secluded area, Jadav took the hammer out of the backpack and used it to beat his wife to death. Jadav then returned home to change his clothing before driving out of the neighborhood to discard the hammer and clothing he wore during the killing. Thus, the Court finds that the evidence is not material.

Furthermore, the Court finds that the evidence was neither new nor suppressed. Jadav's trial counsel had seen the video clips the Commonwealth intended to use at trial and viewed the police report in which the full video is listed as evidence and the existence of the full video was disclosed at trial.

The Court finds that Jadav has failed to prove all four prongs of the Brady analysis, including that this evidence was not available to him, was suppressed by the Commonwealth, and would have had a material effect on the outcome of the trial. Therefore, claim I is dismissed.

Claim V

In claim V, Jadav alleges that prosecutors violated due process under Brady by suppressing luminol test results.

At the beginning of trial, Jadav's attorney purported to have learned, for the first time that morning, that investigators conducted luminol tests on Jadav's car and house which resulted in negative or inconclusive results. The defense then raised a motion to exclude the testimony of the crime scene analysist, Kevin LaPlaga, on the basis that he performed the luminol tests, but the Commonwealth had not disclosed the information by way of the police report. The Commonwealth quickly read LaPlaga's portion of the police report and did not see anything about the luminol test, and so initially agreed with the defense attorney that it would be exculpatory if there were negative luminol tests that were not disclosed. However, prior to ruling on the motion the court took a recess. During the recess, the Commonwealth scoured the voluminous police report and found that the case agent, Shawn Dover, wrote in the police report that LaPlaga performed a luminol test on the Jadav's car and that the results were inconclusive. There was nothing in the report about a negative luminol test in Jadav's house, because no such test was ever conducted. Thus, the Court finds that the results of luminol testing were not suppressed by the Commonwealth.

The Court further finds that trial counsel admitted he was able to thoroughly discuss the luminol testing prior to trial with the investigator. Counsel and the investigator thoroughly discussed the efforts the investigator took and that he had not included it in the report because of the inconclusive nature of the testing. Trial counsel was able to discuss the potential remedies with his client and whether they should go forward with trial, and counsel attempted to suppress all testimony by the investigator, arguing that it was tainted. The Court ultimately ruled that a defendant is not even

entitled to these police reports, therefore, the fact that this was missing from the report did not require the exclusion of the investigator's testimony. Trial counsel then affirmed with the Court that he had discussed the luminol testing with Jadav and they had agreed to go forward with trial and that they were not seeking a continuance. The Court then arraigned Jadav, who never mentioned not wanting to proceed with trial. Jadav also affirmed he was entirely satisfied with the services of counsel.

Therefore, the Court finds that Jadav has failed to prove all four prongs of the Brady analysis, including that this evidence was not available to him, was suppressed by the Commonwealth, and would have had a material effect on the outcome of the trial. Therefore, claim V is dismissed.

Claim VIII

In claim VIII, Jadav alleges that the prosecution violated its obligation under Brady by failing to disclose exculpatory text messages exchanged between him and Investigator Dover.

The Court finds that these text messages simply cannot serve as the basis of a Brady claim because they are Jadav's own text messages which would have been known to and available to him. There is no Brady violation when the defendant had equal access to the information. See Epperly v. Booker, 997 F.2d 1, 10 (4th Cir. 1993) ("where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine") (quoting United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990)).

Moreover, the Court finds that Jadav fails to demonstrate that these text messages are not material. Therefore, the Court finds that Jadav has failed to meet his burden to prove all four prongs of the Brady analysis. Therefore, claim VIII is dismissed.

Ineffective Assistance of Counsel Claims

To prevail on a claim of ineffective assistance, a habeas petitioner must satisfy the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, the burden is on the petitioner to prove both deficient performance by his counsel and prejudice. See Strickland, 466 U.S. at 687. "Unless [petitioner] establishes both prongs of the two-part test, his claims of ineffective assistance of counsel will fail." Jerman v. Director of the Dept. of Corrections, 267 Va. 432, 438, 593 S.E.2d 255, 258 (2004); see Harrington v. Richter, 562 U.S. 86, 110-12 (2011).

To satisfy Strickland's performance prong, "the defendant must show that . . . counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; Bowles v. Nance, 236 Va. 310, 374 S.E.2d 19 (1988). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688.

To satisfy Strickland's prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.; see

also Lovitt v. Warden, 266 Va. 216, 250, 585 S.E.2d 801, 821 (2003) (same). To satisfy Strickland's prejudice prong in the context of a guilty plea, the court must decide if there is a reasonable probability that, but for counsel's error, the defendant would have pleaded not guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Stated differently, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

An ineffective assistance of counsel claim may be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements." Spencer v. Murray, 18 F.3d 229, 232-33 (4th Cir. 1994). See also Smith v. Spisak, 558 U.S. 139, 150-56 (2010) (applying only the "prejudice" prong of Strickland test).

Furthermore, petitioner is obliged to allege specific facts sufficient to permit this Court to reach an independent conclusion that he is entitled to relief. Va. Code §§ 8.01-654(B)(2) and 8.01-655. Habeas corpus relief is not warranted where the petition fails to "articulate a factual basis to support [his] claim." Muhammad v. Warden, 274 Va. 3, 19, 646 S.E.2d 182, 195 (2007); cf. Nickerson v. Lee, 971 F.2d 1125, 1135 (4th Cir. 1992) (a "bare allegation" of constitutional error not sufficient for relief).

Analysis

Claim II

In claim II, Jadav alleges that trial counsel was ineffective for failing to investigate, develop, and produce at trial exculpatory video evidence. Jadav alleges that

counsel failed to review the full-length surveillance video of his neighborhood which he then speculates could have shown other people driving in the neighborhood around the time of the victim's murder.

Jadav repeatedly alleges that the Court determined this video was "exculpatory," but as discussed above, that is a mischaracterization of the Court's statement. The records shows that the Court merely agreed that *if* the video showed other cars driving through the area, it *may* be exculpatory.

The Court finds that the surveillance video was thoroughly discussed at trial. While counsel admitted he had not viewed the entire video, the Commonwealth told the Court that the police reviewed the full ten hours of video and there was nothing exculpatory on the video. The Commonwealth told the Court that the video did show other vehicles driving by, but that the Commonwealth was going to use the video simply to show that a vehicle matching the defendant's vehicle was also seen in the video.

The Court further finds that, contrary to Jadav's conclusory assertion that the video would prove that he was not at the crime scene, the video does not show the crime scene. Rather, the surveillance video shows the street upon which a car would likely travel to exit the neighborhood. Thus, the video could not have shown that Jadav was not present at the crime scene. In addition, the street upon which the security camera was trained was in the opposite direction of the Jadav residence. It was the Commonwealth's theory that Jadav and his wife went for a walk and, once in the secluded area, Jadav took the hammer from the backpack and used it to beat his wife to death. Jadav then returned

home to change his clothing before driving out of the neighborhood to discard the hammer and clothing he wore during the killing.

The Court finds that Jadav failed to demonstrate that there were other people at the crime scene or that the entirety of the video would have been beneficial to him. That omission is fatal to his claim of ineffective counsel.

> [W]ithout a specific, affirmative showing of what the missing evidence or testimony would have been, a "habeas court cannot even begin to apply Strickland's standards" because "it is very difficult to assess whether counsel's performance was deficient, and nearly impossible to determine whether the petitioner was prejudiced by any deficiencies in counsel's performance."

Anderson v. Collins, 18 F.3d 1208, 1221 (5th Cir. 1994) (citation omitted). See Bassette v. Thompson, 915 F.2d 932, 940-41 (4th Cir. 1990) (petitioner must allege "what an adequate investigation would have revealed."). See also Moawad v. Anderson, 143 F.3d 942, 948 (5th Cir. 1998) (defendant who alleges failure to investigate on part of counsel must allege with specificity what investigation would have revealed and how it would have altered outcome of trial).

The Court finds that Jadav's claim that this video was beneficial to him is conclusory and speculative. Therefore, he fails to demonstrate that trial counsel's performance was deficient.

The Court further finds that Jadav fails to demonstrate he suffered prejudice considering the overwhelming evidence of his guilt. The trial in this case was lengthy and included substantial evidence of Jadav's guilt. The lack of prejudice is abundantly clear from the Court of Appeals determination of the facts as well as the trial transcripts.

Ultimately, the evidence at trial demonstrated that Jadav was a deceitful, unfaithful husband, who plotted the murder of his wife to obtain the proceeds of life insurance policies. Jadav convinced his wife's parents to leave his house that evening. He then engaged in deceptive text messaging to cover his tracks. The evidence showed that his cell phone traveled from his house that night, to the location the murder weapon and his clothes were later found. The clothes found with the murder weapon matched what Jadav had previously been wearing that evening. The evidence showed that after Jadav allegedly discovered his brutally beaten wife in their neighborhood the next morning, he was not emotional during any subsequent interactions with the police. He did not attend memorial services for his wife, was cold to her family, and immediately discarded her possessions. The evidence also showed he had recently been searching terms such as "homicide," "accidental death and dismemberment insurance," and "death by natural causes," and that the victim had recently obtained life insurance for one million dollars.

The Court finds that in light of the entire record at trial, Jadav fails to demonstrate that but for counsel's alleged failure to investigate the security video, the outcome of his trial would have been any different. Therefore, Jadav has failed to demonstrate both deficient performance and prejudice as required by Strickland and his claim II is dismissed.

Claim III

In claim III, Jadav alleges that trial counsel was ineffective for the failure to investigate and present at trial exculpatory alibi evidence – the digital forensic report

attached to his petition. At the offset, the document has not been authenticated or sworn to by anyone. Therefore, Jadav fails to demonstrate how it would have been properly admitted into evidence at trial. Nevertheless, the Court finds that Jadav also fails to carry his burden to prove both prongs of the Strickland test with respect to this evidence. Jadav wrongly argues that his internet searched provide an alibi or proof of innocence.

Jadav alleges that trial counsel should have used searches for "divorce" that he made after his wife's murder. Jadav argues that this was an "alibi" for him. Jadav further argues that the prosecution would not have been able to discredit him if counsel had used this evidence, and that it would have proven his innocence. Jadav's claim simply ignores the entire record and cumulative evidence of his guilt.

The Court finds that Jadav claim also ignores the other searches in the report he attaches, including his searches for "homicide," "death by natural causes," and "what is life and ad&d insurance," which were consistent with the Google report entered into evidence at trial which showed similar incriminating searches. (Pet. Ex F.). Those searches included "homicide," "accidental death and dismemberment insurance," and "death by natural causes." The report does indicate that there were artifacts found for "divorce lawyer" and searches related to divorcing a bipolar spouse conducted during the early morning hours of September 5, from approximately 1:00 a.m. to 5:00 a.m. (Pet. Ex. F). The Court finds that while these searches may have occurred after the murder of his wife, the behavior is consistent with Jadav's other attempts to conceal his guilt.

Jadav alleges his counsel should have introduced evidence of these divorce searches at trial, but that evidence points to additional evidence consistent with Jadav's

behavior of attempting to conceal his guilt and also performing incriminating searches. Jadav texted his mother and father-in-law, pretending to be looking for his wife and even texted the victim's own cell phone pretending she had gone to her parents' home. It is further evidence of the defendant's attempt to conceal his guilt after committing a murder. It does not tend to prove an "alibi" for the crime or raise a reasonable hypothesis of innocence that he did not commit the crime.

The Court further finds that Jadav fails to show that but for counsel's alleged failure to present this evidence, the result of the proceeding would have been different. See Stokes v. Warden, 226 Va. 111, 119, 306 S.E.2d 882, 886 (1983) (requiring petitioner to show "actual prejudice" to satisfy Strickland); see also United States v. Frady, 456 U.S. 152, 170-71 (1982) (holding petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a ***possibility*** of prejudice, but that they worked to his ***actual*** and substantial disadvantage, infecting his entire trial with error of constitutional dimensions") (emphasis in original). As the record shows, the evidence against Jadav was overwhelming.

The Court therefore finds that Jadav fails to demonstrate deficient performance or prejudice as required by Strickland. Claim III is dismissed.

Claim VI

In claim VI, Jadav alleges that trial counsel was ineffective for failing to investigate and impeach Investigator LaPlaga. Jadav alleges that trial counsel failed to properly investigate the investigator's report and to use evidence to show he was untruthful or biased.

The Court finds that the record belies this claim. Trial counsel admitted he thoroughly discussed the luminol testing prior to trial with the investigator. Counsel and the investigator discussed the efforts the investigator took and why he had not include the attempt at testing the vehicle in the report because of the inconclusive nature. Trial counsel then able discussed the potential remedies with his client and whether they should go forward with trial or seek a continuance. Counsel attempted to suppress the entirety of the testimony by the investigator, arguing that it was tainted. The Court ultimately ruled that the defendant is not entitled to the reports, and therefore, the fact that the lack of luminol testing was missing from the report did not require excluding the testimony. Trial counsel also affirmed with the Court that he had discussed the luminol testing with Jadav and that they had agreed to go forward with trial and that they were not seeking a continuance.

The Court then arraigned Jadav, who never mentioned not wanting to proceed with trial. Jadav also affirmed he was entirely satisfied with the services of his counsel. "Where a defendant, fully informed of the reasonable options before him, agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel." United States v. Weaver, 882 F.2d 1128, 1140 (7th Cir. 1989); United States v. Williams, 631 F.2d 198, 204 (3d Cir. 1980) (no ineffective assistance of counsel where defendant ultimately concurred in his trial counsel's tactical decision). "To allow that would be to exempt defendants from the consequences of their actions at trial and would debase the right to effective assistance of counsel enshrined in the sixth amendment." Weaver, 882 F.2d at 1140.

In light of his sworn statement to the Court that he was satisfied with counsel and ready to go forward with trial after the luminol results were discussed, Jadav fails to demonstrate deficient performance or prejudice and this claim is dismissed.

The Court finds that during cross-examination, trial counsel did question LaPlaga about the luminol testing of the Prius. Trial counsel questioned LaPlaga about the inconclusive results of the testing of the Prius based on the inability to photograph the result. Trial counsel questioned LaPlaga about why the result was not included in the report. Trial counsel also questioned LaPlaga about the lack of luminol testing in the house. Therefore, the Court finds that Jadav fails to show trial counsel's actions related to LaPlaga's testimony were deficient.

The Court further finds that Jadav makes only a series of conclusory claims regarding his counsel's failure to investigate and impeach the investigator. These types of conclusory claims cannot search as a basis for habeas corpus relief. See Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (allegation of inadequate investigation, standing alone, is not an adequate basis for habeas relief); Sigmon v. Director, 285 Va. 526, 535-36, 739 S.E.2d 905, 909-10 (2013) (same). Therefore, Jadav fails to demonstrate that trial counsel was deficient where Jadav fails to proffer accurate evidence trial counsel could have discovered in a further investigation or effort to impeach LaPlaga.

The Court further finds that Jadav fails to demonstrate that but for counsel's alleged failure the outcome of his trial would have been different. First, Jadav fails to show that the report was inaccurate. Second, as discussed above, the evidence of Jadav's

guilt was overwhelming and any additional attempt at discrediting the inconclusive luminol testing related to the vehicle would have had no effect on the outcome of his trial. Therefore, the Court finds that Jadav has failed to demonstrate deficient performance and prejudice as required by Strickland and his claim VI is dismissed.

Claim VII

In claim VII, Jadav alleges that trial counsel was ineffective for failing to investigate the Commonwealth's evidence and hire expert witnesses.

Jadav argues that trial counsel should have further investigated the alleged time of death and presented an "exculpatory" police report. The Court finds that the police report is plainly not exculpatory and not useful to Jadav as they all indicate screaming at the same time. Jadav relies on a neighbor's statement in the report, attachment G to his petition, that states they heard fireworks around 10:00 p.m. and screaming around 11:00 p.m., but thought it sounded like kids. In Pet. Ex. I, another neighbor also stated he heard screaming around 11:00 p.m., what sounded like a woman screaming, but could not see anyone.

At trial, Willie Stroble, a resident of the Honey Meadows subdivision testified that he heard a woman scream around 11:00 p.m. on Sunday September 4, 2016. Roger Hultgren, a neighbor of Dr. Stroble, testified that he also heard the scream and that it sounded like it came from an area behind his house. The victim's body was discovered behind Mr. Hultgren's residence in the early morning hours of September 5, 2016. Therefore, the Court finds that the police reports were not exculpatory, and Jadav fails to

demonstrate deficient performance and certainly fails to demonstrate prejudice in light of multiple witnesses having heard a woman screaming at approximately 11:00 p.m.

The Court also finds that Jadav merely speculates that if trial counsel had hired an expert to investigate the time and manner of death it would have been beneficial to him. The petitioner has failed to offer any proof which is fatal to his claim that counsel rendered ineffective assistance and he was prejudiced by that deficient performance. See Muhammad, 274 Va. at 18, 646 S.E.2d at 195; 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).

Jadav further speculates that if trial counsel had requested a physical evidence recovery kit (PERK) it would have revealed helpful evidence. Jadav suggests that because the victim was a woman, a PERK kit should have been done. In fact, a PERK kit was collected from the victim and trial counsel questioned multiple investigators about the PERK kit. Trial counsel ultimately argued in closing that the investigator's decision not to test the PERK kit, along with other testing such as further luminol testing, showed reasonable doubt about the quality of their investigation into the homicide and lack of evidence against Jadav. Jadav fails to demonstrate what additional questioning or investigation would have revealed, or how it would have been beneficial to him. Again, the failure to proffer evidence in support of this allegation is fatal to his claim. See Muhammad, 274 Va. at 18, 646 S.E.2d at 195. The Court finds that Jadav fails to demonstrate the trial counsel's performance was deficient regarding the PERK kit.

Jadav's claim VII is dismissed as speculative because it is not supported by any affidavits from prospective expert witnesses or investigators that counsel allegedly should have hired or what their testimony would have shown. It is, therefore, inadequate to demonstrate defective performance or prejudice under Strickland. See Burger v. Kemp, 483 U.S. 776, 793 (1987)(petitioner "has submitted no affidavit from that [witness] establishing that he would have offered substantial mitigating evidence if he had testified"); Nickerson v. Lee, 971 F.2d 1125, 1135 (4th Cir. 1992); Briley v. Bass, 750 F.2d 1238, 1248 (4th Cir. 1984)(petitioner "has never established how any of those potential witnesses might have testified had they been called"); Bassette v. Thompson, 915 F.2d 932, 940-41 (4th Cir. 1990)(ineffective claim insufficient to warrant relief where petitioner alleges counsel ineffective for failing to call certain witnesses but petitioner fails to proffer what witnesses would have said); United States v. Oliver, 865 F.2d 600, 605 (4th Cir. 1989) (same).

And, as the Court previously found above, the evidence against Jadav was overwhelming. Therefore, the Court finds that Jadav has failed to demonstrate deficient performance or prejudice and his claim VII is dismissed.

Claim IX

In claim IX, Jadav alleges that trial counsel was ineffective for failing to investigate and present at trial exculpatory text messages.

As the Court previously found, Jadav's own text messages were not suppressed or exculpatory, because they were equally available to him. Jadav argues that counsel should have used these text messages between him and a police officer to show the officer's actions in arresting him. The Court finds that Jadav fails to demonstrate how

this evidence was relevant. Jadav also fails to proffer the text messages himself, which were always in his possession. This failure of proof is fatal to his claim. See Muhammad, 274 Va. at 18, 646 S.E.2d at 195. Jadav cannot show these text messages were relevant to an issue at trial or beneficial to him. Therefore, the Court finds that Jadav fails to demonstrate that counsel's performance was deficient.

The Court also finds that Jadav fails to demonstrate that but for counsel's alleged failure the result of the proceeding would have been different. In light of the overwhelming evidence at trial, and the record as a whole, Jadav fails to show how the text messages between him and an officer to meet which ultimately ended in his arrest has any bearing on his guilt or innocence. See Muhammad, 274 Va. at 18, 646 S.E.2d at 195.

Therefore, the Court finds that Jadav fails to demonstrate deficient performance or prejudice as required by Strickland and his claim IX is dismissed.

Claim X

In claim X, Jadav alleges that trial counsel was ineffective for failing to authenticate cell phone location records. Jadav alleges that counsel failed to challenge the foundation or authentication of the testimony regarding the cell phone location records and that there were not properly authenticated and admitted.

The Court finds that the record belies Jadav's claim. At trial, Commonwealth's Exhibit 52 was the cell phone location records from AT&T. The exhibit begins with an affidavit from a compliance analyst at AT&T, who swears to the authenticity of the

documents, pursuant to Code § 19.2-70.3, and that they are business records, kept in the ordinary course of business. Code § 19.2-70.3(H) states:

> The provider of electronic communication service or remote computing service may verify the authenticity of the written reports or records that it discloses pursuant to this section by providing an affidavit from the custodian of those written reports or records or from a person to whom said custodian reports certifying that they are true and complete copies of reports or records and that they are prepared in the regular course of business. When so authenticated, no other evidence of authenticity shall be necessary. The written reports and records, excluding the contents of electronic communications, shall be considered business records for purposes of the business records exception to the hearsay rule.

Therefore, the records were properly admitted as authenticated business records pursuant to statute. See Code § 19.2-70.3.

The Court finds that at trial, Investigator Tyler Cary was qualified as an expert in cell phone analysis, after being extensively voir dired on his qualifications, and the methods, technology, and records he utilizes in his field. Cary testified at length about the cell phone records, data, and that his analysis of the data demonstrated the travel patterns of Jadav's cell phone prior to and on the night of the murder. The cell phone records were admitted into evidence through Cary's testimony. Cary authenticated fair and accurate copies of cell phone records and data he had received from AT&T which contained the aforementioned affidavit. The records were properly admitted into evidence as Commonwealth's Exhibit 52.

The Court finds that Jadav fails to carry his burden to show that these records were not properly authenticated, and the records themselves fully belie his claim. Trial counsel cannot be ineffective for failing to raise a frivolous motion. See Correll v.

Commonwealth, 232 Va. 454, 470, 352 S.E.2d 352, 361 (1987) (holding counsel had no duty to object to admission of presentence report because it was admissible); Moody v. Polk, 403 F.3d 141, 151 (4th Cir. 2005)(holding counsel not required to file frivolous motions). Therefore, he fails to show both that counsel's performance was deficient and that he suffered prejudice.

The Court finds that because the documents were properly authenticated and admitted regardless of trial counsel's actions, Jadav cannot show that but for counsel's alleged failure the outcome of his proceeding would have been different. Therefore, the Court finds that Jadav fails to demonstrate both deficient performance and prejudice as required by Strickland and his claim X is dismissed.

Claim XI

In claim XI, Jadav alleges that trial counsel was ineffective for failing to protect the petitioner's Miranda rights. Jadav alleges that his interviews with detectives and subsequent statements should have been suppressed.

"Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial." Gonzalez v. United States, 553 U.S. 242, 249 (2008). "[T]he lawyer has — and must have — full authority to manage the conduct of the trial." Taylor v. Illinois, 484 U.S. 400, 418 (1988).

The Court finds that trial counsel made the reasonable tactical decision that he wanted the jury to be able to hear Jadav's statements to police. The defendant's strategy at trial was that Jadav was a fully cooperating husband who had not murdered his wife. Trial counsel crossed the officers extensively on Jadav's willingness to "tell you everything." Counsel highlighted that Jadav was always cooperative and never refused to answer a question.

The Court finds that during closing argument, counsel argued that Jadav was "a man who has participated in every way imaginable that they've asked." Counsel highlighted for the jury the 911 recording where Jadav first said what happened to his wife, then Jadav's statements to the responding officer, and how Jadav had cooperated "with them every single way." Counsel further argued:

> They [the police] break into his house. They search everything. He never tries to stop them. He doesn't lawyer-up. He doesn't say that you can't do this to me, people, I have rights. He cooperates every way he can.

The Court finds that admitting Jadav's statements to police was a tactical decision by counsel, to show Jadav was a cooperating husband with nothing to hide. Jadav fails to demonstrate that this was constitutional deficient performance in light of the record.

The Court also finds that Jadav fails to articulate what statements should have been suppressed, or how those statements ultimately affected his trial. This failure of proof is fatal to his claim. See Muhammad, 274 Va. at 18, 646 S.E.2d at 195.

The Court further finds that, considering the overwhelming evidence of his guilt, as found previously, Jadav cannot show prejudice. Importantly, none of Jadav's statements to law enforcement were statements of fault or confession. As previously

found, there was significant evidence apart from Jadav's statements to convict him of murder. Therefore, the Court finds that Jadav fails to demonstrate but for counsel's alleged failure the outcome of his trial would have been different. Claim XI is dismissed.

Claims IV and XII

Jadav makes two allegations that trial counsel had a conflict of interest. The Court finds that both claims fail to assert a true conflict of interest. In claim IV, Jadav alleges that trial counsel had a conflict of interest because he was Jadav's power of attorney and had a financial interest in his case, causing him not to hire expert witnesses. Jadav argues that this affected his trial because counsel did not want to spend the money required to hire experts in claim IV, and that he did not want to question the victim's parents' about their civil case against him in claim XII.

"[T]he purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a fair trial, and . . . in evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process, ***not*** on the accused's relationship with his lawyer as such." Wheat v. United States, 486 U.S. 153, 159 (1988) (emphasis added). Therefore, absent objection, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation." Mickens v. Taylor, 535 U.S. 162, 168 (2002); see also Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

In other words, petitioner's burden is two-fold, he must show: (1) an actual conflict; and (2) an adverse effect on counsel's performance. Jadav has not demonstrated either part of this two-part test.

"To establish an actual conflict of interest, the petitioner must show that his interests diverge[d] with respect to a material factual or legal issue or to a course of action." Mickens v. Taylor, 227 F.3d 203, 213 (4th Cir. 2000), aff'd 535 U.S. 162, (internal citation and quotation omitted). In other words, the petitioner "must show that there was some plausible alternative defense strategy or tactic that might have been pursued, an alternative strategy that was inherently in conflict with or not undertaken ***due to*** the attorney's other loyalties or interests." Guaraldi v. Cunningham, 819 F.2d 15, 17 (1st Cir. 1978) (emphasis added); see also United States v. Gilliam, 975 F.2d 1050, 1059 (4th Cir. 1992) (Hamilton, J., dissenting). The Court finds that a power of attorney does not demonstrate that his counsel had a financial interest in his case. The Court finds that Jadav fails to demonstrate that counsel had other loyalties or interests different than his own at trial.

Simply pointing to an ethical breach or lapse, without more, is not sufficient. See Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel").

The Court finds that Jadav has failed to prove an adverse effect on counsel's representation of him. Even assuming an actual conflict existed, "[a]dverse effect cannot be presumed from the mere existence of a conflict of interest." Rubin v. Gee, 292 F.3d 396, 401 (4th Cir. 2002) (citations and quotations omitted). Instead, the burden remains on the petitioner to demonstrate an adverse effect on his defense. See Mickens, 535 U.S.

at 168 (requiring demonstration of adverse effect when, in a capital case, the defense counsel had previously represented the deceased victim).

The Court finds that Jadav has not met this burden. Jadav has not identified a plausible alternate defense strategy or tactic that might have been pursued, but was not, because of the alleged conflict. See Burket v. Angelone, 208 F.3d 172, 186 (4th Cir. 2000) (failure to show that counsel did not pursue a plausible defense strategy or tactic on account of an actual conflict of interest does not entitle petitioner to relief). Jadav fails to proffer meaningful evidence or an expert that would have been beneficial to him, if counsel had chosen to hire one. Petitioner has failed to proffer the names of any experts he contends counsel should have consulted and fails to proffer any experts' affidavits to demonstrate what information these experts could have provided at trial. And Jadav fails to show that attacking the victim's family about their lawsuit and attempting to discredit them would have been sound trial strategy. The Court finds that the petitioner's claims therefore fail both prongs of the Mickens test. Consequently, the petitioner has failed to demonstrate that an actual conflict of interest existed. Claims IV and XIII are dismissed.

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

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

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

It is further Ordered that the Clerk serve by mail a certified copy of this Order to Harshadkumar Nanjibhai Jadav, No. 1851236, petitioner, and Lauren C. Campbell, Assistant Attorney General.

This order is final.

Entered this 27th day of October 2020.

Judge

I ask for this:

Lauren C. Campbell
Assistant Attorney General
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A COPY TESTE
FRANK D. HARGROVE, JR. CLERK
HANOVER CIRCUIT COURT
By A.P. Sheridan
DEPUTY CLERK

EXHIBIT -

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 9th day of April, 2021.

Harshadkumar Nanjibhai Jadav, Appellant,

against Record No. 210105
Circuit Court No. CL20-2620

J. Woodson, Warden,
Buckingham Correctional Center, Appellee.

From the Circuit Court of Hanover County

On February 23, 2021 came the appellant, who is self-represented, and filed a motion to amend.

Upon consideration whereof, the Court grants the motion.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Deputy Clerk

EXHIBIT - 1

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