VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 19th day of October, 2022.

Allen W. Thompson, Appellant,

against Record No. 210990
Circuit Court No. CL21-95

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

From the Circuit Court Nelson County

Upon review of the record in this case and consideration of the argument submitted in support of the granting 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.

Senior Justice Lemons took no part in the consideration of this petition.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: /s/
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF NELSON COUNTY

ALLEN W. THOMPSON, INMATE NO. 1209247,

Petitioner,

v. **Record No. C121-95**

HAROLD CLARKE, Director,

Department of Corrections,

Respondent.

FINAL ORDER

The Court has considered the petition of Allen W. Thompson, for writ of habeas corpus, the Director of the Virginia Department of Corrections' motion to dismiss, and the authorities cited therein, and the reply filed by Thompson. The Court has reviewed the habeas corpus record and the record of the criminal case of Commonwealth v. Allen W. Thompson, CR17000321-00, CR17000322-00, which is hereby made a part of the record of this matter. This Court finds the petitioner is not entitled to habeas corpus relief and pursuant to Code § 8.01-654(B)(5), this Court makes the following findings and conclusions of law:

The petitioner, Allen W. Thompson, is detained pursuant to the sentencing order entered by the Court on August 21, 2018. Following a jury trial, Thompson was convicted of possession of oxycodone, in violation of Code § 18.2-250, and possession

of cocaine, in violation of Code § 18.2-250. This Court sentenced Thompson to a total of 11 years' incarceration, in accordance with the jury verdict.

Thompson appealed his convictions to the Court of Appeals of Virginia, which denied his petition by order dated July 24, 2019. Thompson appealed to the Supreme Court of Virginia, which refused his petition by order dated February 13, 2020.

Thompson filed a petition for writ of habeas corpus in this Court attacking the validity of his convictions. He appears to raise the following allegations in his petition:[1]

1. Ineffective Assistance of Counsel:[2]

    a. Counsel failed "to conduct an independent investigation determine if matters of a defense can be developed and allow time for preparation of trial." (Pet. Mem. at 1, IAC).

    b. Counsel failed "to impeach the testimony of a key witness" where the witness's "testimony changed from trial and preliminary" hearing in regards "to the driver['s] pill bottle." (Pet. Mem. at 1, IAC).

    c. Counsel failed to object to the Commonwealth's "inconclusive evidence" Where there was no "DNA testing, fingerprints or substance (sic)," and where there was no direct connection to petitioner. (Pet. Mem. at 2, IAC).

[1] The court adopts the numbering assigned to the claims by the respondent in the Motion to Dismiss.

[2] Thompson was represented by Ms. Freed and Mr. Zijerdi during his trial.

d. Counsel "fail[ed] to protect petitioner from double jeopardy where the sentence exceeded the maximum penalty." (Pet. Mem. at 2, IAC)

e. "Counsel failed to notify petitioner [of the] denial [of his] appeal with due diligence where the del[ay] deprived petitioner [of] 8 months of preparation time for his habeas corpus." (Pet. Mem. at 2, IAC).

f. "Counsel failed [to] question the jury [panel] on impartiality to punishment as required." (Pet. Mem. at 2 IAC).

g. "Counsel failed to object to the imposed sentence and to challenge on appeal as violation [of] 8th Amendment." (Pet. Mem. at 2, IAC).

h. "Counsel failed to submit a jury instruction on the requirements of [Code§] 19.2-187.01 as relates to the sufficiency of evidence and failed to object at trial when the issue appeared." (Pet. Mem. at 2, IAC).

i. "Counsel failed protect petitioner['s] 14th Amendment right against prosecutorial misconduct at trial when it the issue appeared." (Pet. Mem. at 3, IAC).

j. " Counsel failed to object to the evidence presented at trial." (Pet. Mem. at 3, IAC)

k. "Counsel failed to fil[e] pretrial motions such as [sic] and discovery, where they would have helped with strategy at trial and the admission of illegally obtained evidence" (Pet. Mem. at 3 IAC).

2. Double Jeopardy Violation

a. Petitioner's right against Double Jeopardy was violated when he was sentenced to 11 years in prison which exceeded the maximum penalty of 10 years. (Pet. Mem. at 2, Double Jeopardy).

b. Petitioner's right against Double Jeopardy was violated where he was convicted of two offenses involving Schedule II controlled substances. (Pet. Mem. at 2, Double Jeopardy).

3. Prosecutorial Misconduct

a. During the opening statement the commonwealth referred to statements made by petitioner in order to mislead the jury that the "statement was made on scene and in the presence of [the Commonwealth's] key witness." (Pet. Mem. at 1-2, Prosecutorial Misconduct).

b. The Commonwealth suborned perjury when its witness, Danny Jones, testified differently at preliminary and at trial about " the name on the second pill bottle." (Pet. Mem. at 3-4, Prosecutorial Misconduct).

c. The Commonwealth asked improper question during voir dire which deprived petitioner of an impartial jury. (Pet. Mem, at 6, Prosecutorial Misconduct).

d. The Commonwealth made improper statements during closing argument to the jury. (Pet. Mem. at 6, Prosecutorial Misconduct).

4. Sufficiency of Evidence

a. The "evidence in [petitioner's] case was purely and speculative" and the evidence presented by the Commonwealth was "incomplete and incompetent,

where the [was} no evidence showing petitioner's awareness of such evidence." (Pet. Mem. at 1, 4, sufficiency).

b. The Commonwealth's evidence demonstrated the possibility "of other people being present during both searches of the home and car." (Pet. Mem. at 1-2, Sufficiency).

c. The Commonwealth failed to "meet the requirements of Code § 19.2-187.01" regarding the chain of custody. (Pet. Mem. at 3, Sufficiency).

d. The Commonwealth failed to prove that the cocaine had not been "altered," there was no field test, and the jury was not instructed on the requirement of a field test. (Pet. Mem. at 1, Sufficiency).

5. Denial of an Impartial Jury

a. The was not asked about racial bias. (Pet. Mem. at 1, jury).

b. The jury did not consist of a "fair cross section of the community. There was 1 Black, 11 whites and no Hispanic." (Pet. Mem. at 1 Jury).

c. The jury "didn't lay aside their preconceived views on how person(s) may or may not remember thing[s.] [T] hat [a]ffected their ability to weight the evidence and credibility of witnesses. (Pet. Mem. at 1, Jury).

6. Improper Jury Instructions

a. The jury was given improper instructions when it was provided instructions O and P. (Pet. Mem. at 1, Instructions).

7. Eighth Amendment Violation

a. Petitioner's sentence violated his 8th Amendment right against cruel and unusual punishment. (Pet. Mem. at 1, Eighth Amendment).

Findings of Facts

In disposing of Thompson's appeal and rejecting Thompson's claims that the evidence was insufficient to convict him, the Court of Appeals found:

> On January 3, 2017, Deputy Sheriff Jones encountered a car parked in the yard next to appellant's house. Appellant's was sitting in the front passenger seat, and a man named Truslow was in the driver's seat. Jones, dressed in his uniform and badge, pulled into appellant's driveway and spoke to Truslow from his patrol car. As he spoke with Truslow, he noticed appellant moving around in the car.
>
> Jones exited his patrol car, instructed Truslow to keep his hands on the steering wheel, and walked around the back of Truslow's hatchback. AS he did, Jones saw appellant "make a motion of leaning forward and then sitting back up". Jones directed appellant to show him his hands and exit the car. When Jones frisked appellant for weapons, he felt a "bulged" in his jacket, and upon removing it, discovered a pouch containing nearly $2400 in predominantly twenty-dollar denominations.
>
> Jones searched the passenger seat and found two pill bottles, a scale, and a bag of cocaine beneath it. One of the pill bottles bore appellant's name, and appellant admitted that it was his. Appellant told Jones that the bottle contained his diabetes medication, but in fact, the pills were a mixture of oxycodone and acetaminophen. The bag of cocaine was found the pill bottles and the scale.
>
> When the police search the appellant's house, they found a razor blade bearing white power in the kitchen with a box of sandwich bags next to it. A box cutter was on top of the sandwich bags, and an open box of

baking soda was next to a razor blade a box of baggies. In the master bedroom a tied-off bag containing white powder and a "green leafy material" was in the drawer next to men's clothing. Also, on the top the master bedroom dresser the police discovered a Q-tip and a razor blade with white powder. In addition, they found a "ripped off piece of a corner baggie" under the bed in the master bedroom.

In a shed located approximately fifteen to twenty feet from the house the police discovered another razor blade bearing white residue and a "vial container" containing white residue and a green leafy substance in plain view on top of a toolbox. Further, they found a torn, knotted, corner baggie that had been cut open at one end. The contents of the vial tested positive for cocaine residue and marijuana.

Special Agent Burkhead, an expert in drug distribution, testified that the street value of the cocaine found beneath appellant in the was approximately $ 1,500. Burkhead also noted that razor blades were used to separate cocaine into smaller amounts for consumption. He stated that baking soda was "often used as a cut for cocaine". Further, Burkhead explained that cocaine is stimulant that accelerated "body processes," while oxycodone is a central nervous system depressant that "slowed you down..." Finally, he stated that twenty-dollar bills were the currency "most commonly-used" to purchase drugs.

Non-cognizable Claims

Thompson's Claims 2, 3, 4, 6, and 7 all allege error which could have been addressed or were addressed in the trial court or on appeal, therefore these claims are procedurally defaulted and are hereby dismissed.

"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 process for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction." Id. at 30,205 S.E.2d at 682.

> "The function of a writ of habeas corpus is to inquire into jurisdictional defects amounting to want of legal authority for the detention of a person on whose behalf it is asked. The court in which a writ is sought examines only the power and authority of the court to act, not the correctness of its conclusions, and the petition for writ may not be used as a substitute for appeal or writ of error."

Elliott v. Warden, 274 Va. 598,625,652 S.E.2d 465, 487 (2007) (quoting Brooks v. Peyton, 210 Va. 318, 321, 171. S.E.2d 243, 246 (1969)).

Turning first to Claim 2, Thompson's claims of double jeopardy violations are not properly before this court, because "when a petitioner had the opportunity at trial and on direct appeal to raise constitutional issues but failed to do so, the petitioner "lacks standing to raise the claims in a petition for writ of habeas corpus." Dodd v. Clarke, Record 200091, 2021 Va. Unpub. LEXIS. 2 at *3, (February 4, 2021) (noting that a claim of a violation of double jeopardy that could have been raised at trial or on direct appeal is not cognizable in habeas proceeding pursuant to Parrigan, 215 Va. 29, 205 S.E.2d at 682) (citations omitted).[3] Accordingly, because Thompson could have raised these claims at trial or on appeal, Claim 2 is procedurally defaulted and is hereby dismissed.

[3] To the extent that Thompson argues that his attorney was ineffective because his sentence was unlawfully in excess of the statutory maximum in violation of his right against double jeopardy, the Court finds this claim is without merit and will be addressed more completely in the discussion of Claim 1(d) below.

With respect to Claim 3, Thompson raises various allegations of prosecutorial misconduct. Specifically, Thompson alleges the Commonwealth made improper statements during opening and closing, asked improper questions during voir dire which deprived Thompson of a fair jury, and suborned perjury when a Commonwealth witness testified differently at preliminary hearing and at trial "concerning the name on the second pill bottle." Because Thompson was aware of this alleged misconduct during trial, Parrigan bars these claims from habeas review. See Bowman v. Johnson, 282 Va. 359, 367-68, 718 S.E.2d 456, 461 (2011) (citing Lenz v. Warden, 267 Va. 318, 326, 593 S.E.2d 292, 296 (2004) (holding that when petitioner was aware of the alleged prosecutorial misconduct during court proceedings, Parrigan applies). Because these non-jurisdictional claims could have been raised during the criminal proceedings at trial or on appeal, these claims are waived and are not cognizable in this habeas proceeding. Parrigan, 215 Va. at 30, 205 S.E.2d at 682. Therefore, this Court holds that Claim 3 is defaulted and is dismissed.

Turning to Claim 4, Thompson's allegations challenging the sufficiency of the evidence are not properly before this Court because Thompson raised these claims in trial court during his motion to strike and closing argument, as well as on appeal to the Court of Appeals. See Henry v. Warden, 265 VA. 246, 248-49, 576 S.E.2d 495, 496 (2003) ("holding g a non-jurisdictional issue raised and decided either in trial or on a direct appeal from the criminal conviction will not be considered in a habeas corpus proceeding").

Moreover, claims that the evidence was insufficient at trial are not cognizable in a habeas proceeding. See Pettus v. Peyton, 207 Va. 906, 911, 153 S.E.2d 278, 281 (1967) ("it is well settled that such a contention [challenging the sufficiency of the evidence] must be asserted in a direct appeal from, or writ of error to, the original judgment and cannot be made by collateral attack on that judgment in a habeas corpus proceeding.") Therefore, claim 4 is hereby dismissed.

In Claim 5, Thompson alleges that he was denied an impartial jury. Because this claim could have been raised in the trial court or on appeal, it is not properly before this Court through this instant petition for habeas corpus. Parrigan, 215 Va. at 30, 205 S.E.2d at 682; Jackson v. Warden of Sussex I State Prison, 271 Va. 434, 437, 627, S.E.2d 776, 782 (2006) (holding that a habeas claim alleging denial of an impartial jury was procedurally defaulted and not cognizable in habeas pursuant to Parrigan). Therefore, Claim 5 is dismissed.

Turning to Claim 6, Thompson claims the jury was provided with improper instructions. This claim could have been raised in the criminal trial proceedings or appeal, and therefore is procedurally defaulted. Parrigan, 215 Va. at 30, 205 S.E.2d at 682; see also Coppola v. Warden, 222 Va. 369, 373, 282 S.E.2d 10, 12 (1981) (holding that because an objection to a jury instruction could have been made a trial and on direct appeal, the claim is not cognizable in a habeas proceeding pursuant to Parrigan). Therefore, Claim 6 is dismissed.

In Claim 7, Thompson alleges that his sentence violated his right against cruel and unusual punishment pursuant to Eighth Amendment.[4] Because this constitutional claim could have been raised in the trial court or on appeal, it is defaulted and should be dismissed. Parrigan, 215 Va. 30, 205 S.E.2d at 682; Thomas v. Dir. of the Dep't of Corr., Record 082503, 2009 Va. LEXIS 133, at *3 (October 7, 2009) (holding that habeas petitioner's claim of violation of his right against cruel and unusual punishment was not cognizable in habeas corpus pursuant to Parrigan). Therefore, Claim 7 is dismissed.

Claims of ineffective Assistance of Counsel

Standard of Review and Relevant Legal Authority

Thompson alleges he received ineffective assistance from trial counsel; however, this Court holds he failed to meet the highly demanding standard set forth for such claims in Strickland v. Washington, 466 U.S. 668 (1984).

Under Strickland, the petitioner has the burden to show both that his attorney's performance was deficient and that he was prejudiced as a result. 466 U.S. at 687. 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) (citing Strickland, 466 U.S. at

[4] To the extent in Claim 1(g), Thompson alleges his attorney was ineffective for failing to object to his sentence, which he claims violates the Eighth Amendment, the Court find that the claim is without merit, as addressed below.

687). "Unless [the petitioner] establishes both prongs of the two-part test, his claims of ineffective assistance of counsel will fail." Jerman v. Dir., Dep't of Corr. 267 Va. 432, 438, 593 S.E.2d 255, 255, 258 (2004) (citing Strickland, 466 U.S. at 687).

To permit the Court to reach an independent conclusion that he was deprived of the effective assistance of counsel, the petitioner is required to allege specific facts sufficient to establish each of the two prongs of the test announced in Strickland, 466 U.S. 668; See Dep't of Corr. v. Clark, 227 Va. 525, 534-36, 318 S.E.2d 399, 404 (1984). Conclusory allegations are simply not enough. Code §§ 8.01-654(B)(2) and 8.01-655 ¶ 14; Sigmon v. Director, 285 Va. 526, 535-36, 739 S.E.2d 905, 909-10 (2013).

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (citing Strickland, 466 U.S. at 686; United States v. Cronic, 466 U.S. at 648, 655-57 (1884)).

"The first prong of the Strickland test, the "performance" inquiry, "requires showing 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. "The Sixth Amendment's guarantee of assistance of counsel requires the counsel exercise such care and skill as a reasonably competent attorney would exercise for similar services under the circumstances." Frye v. Commonwealth, 321 Va. 370, 400, 345 S.E.2d 267, 287 (1986).

The second prong of the Strickland test, the "prejudice" inquiry, requires a showing 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 (emphasis added). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id.

> [T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U.S. 15, 27 (2009) (per curiam); Strickland, 466 U.S., 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id., at 696. This does not require a showing that counsel's action's "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697. **The likelihood of a different result must be substantial, not just conceivable.** Id., at 693.

Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (emphasis added).

Applying the Strickland standard of review, this Court finds that Thompson is not entitled to the relief he seeks.

Claim 1(a)

In Claim 1(a), Thompson alleges that his counsel failed "to conduct an independent investigation to determine if matters of a defense [could] be developed and [to] allow time for preparation of trial.' (Pet. Mem. at 1, IAC). Specifically, Thompson claims that a witness, Gray Crawford, "had witnessed the event and would testify to the location of both [Thompson] and the officer which was contradictory to the testimony given at the preliminary [hearing] then at trial." (Pet. Mem. at 1, IAC). He claims that although he told his counsel that Gary Crawford was his neighbor,

trial counsel failed to call Gray Crawford as a witness or investigate Gary Crawford. (Pet. Mem. at 1, IAC).

The Court finds that this claim should be dismissed. Thompson's claim is insufficient to demonstrate a cause for habeas relief where it is merely conclusory and unsupported any evidence. Sigmon, 285 Va. at. 535, 739 S.E.2d at 910 (finding no prejudice where petitioner failed to provide "affidavits or other evidence" to demonstrate what testimony his "witness would have provided"); Muhammad, 274 VA. at 19, 646 S.E.2d at 195 (holding the petitioner could not show ineffective assistance of counsel for failure to present expert testimony without providing an affidavit "to demonstrate what information these experts could have provided at trial").

"[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, 18F.3d 1208, 1221 (5th Cir. 1994) (quotation and citation omitted) (emphasis added); see also Burger v. Kemp, 483 U.S. 776, 793 (1987) (holding that petitioner could not show prejudice where he did not submit an affidavit from the witness establishing that the witness would have offered substantial mitigating evidence if he had testified). As discussed by the Fourth Circuit,

> The great failing of the appellant on his claim that other evidence should have been presented during the sentencing phase of his trial is the

> absence of a proffer of testimony from a witness or witnesses he claims his should have called. He claims that his counsel conducted an inadequate investigation to discover persons who would have testified in his favor, but he does not advise us of what an adequate investigation would have revealed or what theses witnesses might have said, if they had been called to testify. Appellant cannot establish ineffective assistance of counsel under Strickland v. Washington on the general claim that additional witness should have been called in mitigation.

Bassette v. Thompson, 915 F.2d 932, 940-41 (4th Cir. 1990) (citations omitted).

In any event, during arraignment, Thompson expressed that "all the witnesses" he "need[ed] for trial" were present, that he was ready for trial, and that his lawyers have "done everything [he] asked them to do." Thompson does not claim that theses previous statements were inaccurate or untruthful. This Court finds that Thompson fails to offer a valid reason why he should not be bound by his representation that he was ready for trial and that his attorneys had done what he asked prior to trial. Anderson v. Warden, 222 Va. 511, 516, 281 S.E.2d 885, 888 (1981); see also Jones v. Taylor, 547 F.2d 808, 810 (4th Cir. 1977) applying this principle to a defendant's statement prior to plea of not guilty).

Consequently, where for the foregoing reasons Claim 1 (a) is hereby dismissed.

Claim 1(b)

In Claim 1(b), Thompson alleges that his counsel failed "to impeach the testimony of a key witness" Where Danny Jones testimony changed between the trail and preliminary hearing "in regards to the driver[']s, pill bottle." (Pet. Mem. at 1, IAC). The Court holds that this claim lacks merit.

This Court finds that trial counsel's cross-examination of Deputy Jones was reasonable. First, Trial counsel established that Deputy Jones vehicle's "dash cam"

was not operable, and Deputy Jones did not have an "operable body cam" during his interaction with Thompson. Trail counsel the challenged Deputy Jones on his collection of the money and the photographs he took on the scene of the money. Trial counsel impeached Deputy Jones testimony regarding which bills he recovered from Thompson's jacket. When asked by trial counsel whether "it was fair to say that you actually don't know-you never really laid out all the money in the pouch and took a picture of that. Is that safe to say?" Deputy Jones admitted, "No". I guess, not all of it, based on that." Referring to photograph taken by Jones and admitted into evidence by the Commonwealth, trail counsel then asked, "[T]his picture is not a fair and accurate presentation of the money found in his jacket?" Deputy Jones responded, "I-yes, that's correct."

Trial counsel questioned Deputy Jones on his failure to seek forensic analysis of the pill discovered in a prescription bottle with Truslow's name on it. Further, trial counsel confronted Deputy Jones's identification of a photograph received as Commonwealth's 14, and his sworn testimony that the baggie in the photograph contained a white powdery substance. Trial counsel asked Deputy Jones to look closely at the photograph, and when asked if he saw white powder "at all in this close-up, "Deputy Jones stated, "Not in the close-up, no."

Trail counsel additionally questioned Deputy Jones on his failure to conduct a fingerprint or DNA analysis of the baggie of cocaine discovered in the car. Further, trial counsel questioned Deputy Jones on his failure to seek fingerprints analysis of the digital scale he recovered from the vehicle. Trial counsel cross-examined Deputy

Jones about the lack of evidence discovered during the search of the house such as "high value material goods" or a "large amounts of money." Trial counsel confirmed that Deputy Jones never sent the razor blades or empty baggies he found inside the house to the Department of Forensic Science for analysis. "as the Supreme Court has explained, 'to support a defense argument that the prosecution has not proved its case. its sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.'" Valentino v. Clarke, 972 F.3d 560, 582, (4th Cir. 2020) (citing Harrington, 562 U.S. at109) (discussing defense counsel's reasonable strategy to discredit the Commonwealth's investigation).

Thus, this Court finds that trial counsel's cross-examination was reasonable, and impeached deputy Jones documentation of evidence, question his decisions regarding the investigation of the driver's pill bottle, and challenged why he did not seek additional forensic testing for many of the items of evidence. Accordingly, even if trial counsel had impeached Deputy Jones by introducing a prior inconsistent statement about the driver's pill bottle, Thompson fails to demonstrate that the outcome of his trial would have been different. See Morva v. Warden of the Sussex I State prison, 285 Va. 511, 516, 741 S.E.2d 781, 787 (2003) (dismissing habeas claim that counsel failed to establish that a "more comprehensive cross-examination" would have changed the outcome of the proceedings).

Accordingly, this Court holds that Thompson failed to satisfy either prong of the Strickland test and Claim 1(b) is hereby dismissed.

Claims1 (c) and 1(j)

In Claims 1(c) and 1(j), Thompson claims his counsel failed to object to the Commonwealth's "inconclusive evidence" where there was a lack of forensic evidence, such as DNA testing, fingerprints, or "substance," and no direct connection of the drugs to Thompson, and failed to challenge the sufficiency of the Commonwealth's evidence. (Pet. Mem. at 2-3, IAC). This Court holds that these claims have no merit and therefore, they are dismissed.

From opening statement, trial counsel strategically challenged the sufficiency of the Commonwealth's case. Although not evidence, during opening statement, trial counsel prepared the jury to hear that the drugs were not found on Thompson's person, and to be prepared to consider whether Thompson exercised dominion and control over the drugs. Trial counsel told the jury that "there's a few missing dots that are very important" and that "[t]his is a circumstantial case."

During cross-examination of deputy Jones, trial counsel attacked the failure of Deputy of Jones to request an analysis of all the pills he recovered from the pill bottles under the passenger seat, questioned Deputy Jones about his decision not to request fingerprint analysis of the baggie of cocaine found under the passenger seat, highlighted Deputy Jones's failure to request that the Department of Forensic Science perform DNA analysis of the baggie of cocaine, and discussed Deputy Jones's failure to analyze the digital scale recovered from under the passenger for fingerprints. See Valentino, 972 F.3d at 582 (noting that a challenge the Commonwealth's investigation as reasonable defense tactic.) Further, trail counsel

questioned the deputy's testimony on direct regarding the money recovered from Thompson and successfully impeached the deputy by confirming that his testimony did not match the photographs taken of the pills recovered from Thompson.

During the motion to strike, trail counsel acknowledged that the evidence demonstrated that the oxycodone pill was discovered in a pill bottle bearing Thompson's name. However, trial counsel argued that there was 'no evidence whatsoever" to prove Thompson's intent to distribute the oxycodone. With respect to the cocaine, trail counsel argued that the Commonwealth failed to prove either possession or possession with intent distribute. Trial counsel argued that he Commonwealth's photographs did not clearly establish the location of the cocaine in the car, and that the cocaine was discovered next to a bill bottle bearing Truslow's name, not Thompson's. Counsel argued that the did not show that Thompson "knowingly possessed" the vial of cocaine residue found by police upon a search of the home. Finally, defense counsel argued that plastic baggies with residue discovered in the home were not submitted for forensic analysis and that a razor blade could have been used to "cut some of his diabetic medication" and was not dispositive of intent to distribute.

Finally, during closing argument, trial counsel argued that the "evidence has fallen far short, far short of connecting all the dots the Commonwealth wants you to connect." Trial counsel argued that the Commonwealth failed to prove possession of cocaine because they failed to prove that Thompson knew the cocaine was beneath the passenger seat of Truslow's car. Further, trial counsel argued that while the

police were speaking with Thompson outside the vehicle, Truslow had an opportunity to put cocaine under the passenger seat where Thompson had been sitting moments earlier. Without fingerprint evidence, trial counsel argued, the Commonwealth could not prove Thompson possessed the cocaine. Trail counsel argued without proving possession, the Commonwealth was unable to prove possession with an intent to distribute. Trail counsel further argued that he Commonwealth did not present "eye-witness testimony," or cell phone analysis, or analysis of any of the baggies discovered in the home.

Turning to the oxycodone, trial counsel conceded that the Commonwealth had proven that Thompson possessed oxycodone, but that they had not proven he intended to distribute it. Trial counsel argued that it would not make sense for a drug dealer to keep a pill of oxycodone in a pill bottle bearing their name. Trial counsel concluded by explaining the jury instructions, and emphasizing the instruction which states, "It's not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt." Trial counsel highlighted three areas of reasonable doubt to attack the cocaine charge and to attack the element of intent to distribute, and asked the jury to produce a" fair outcome' by only convicting Thompson of possession of oxycodone.

For these reasons, the Court holds that trail counsel actin actions were reasonable as they emphasized the weakness in the Commonwealth's case by continuously challenging the sufficiency of the evidence. Thompson failed to show that even if trial counsel objected in the manner Thompson now suggest that the

outcome of his case would have different. Thus, this Court finds Thompson failed to satisfy either prong of the Strickland analysis.

Therefore, Claims 1(c) and 1(j) are hereby dismissed.

Claim 1(d) and 1(g)

In claims 1(d) and 1(g), Thompson claims his counsel failed to "protect [him] from double jeopardy where the sentence exceeded the maximum penalty" and his counsel "failed to object to the imposed sentence and to challenge on appeal" that his sentence violated the Eighth Amendment: "The first two, which are the most familiar, protect against a second prosecution for the same offense after acquittal, and against a second prosecution for the same offense after conviction...[The third protects] against 'multiple punishment for the same offense' imposed in a single proceeding." Jones v. Thomas, 491 U.S. 376, 381 (1989) (citations omitted).

Here, Thompson was convicted of separated offenses in violation of Code § 18.250: possession of cocaine, a Schedule II controlled substance, and possession of oxycodone, a different Schedule II controlled substance. "[B]ased upon the plain language of Code § 18.2-250, a defendant can be convicted of multiple counts of possession under the statute if he knowingly and intentionally possesses more than one controlled substance." Howard v. Commonwealth, Record No. 0780-17-1, 2018 Va. App. LEXIS 151, at *7 (June 5 2018). Therefore, because he was convicted of separate offenses, Thompson's right against double jeopardy was not violated. See Jones, 491 U.S. at 381.

Furthermore, there is no merit to Thompson's claim that his punishment exceeded the maximum penalty. Because possession of a Schedule II controlled substance is a class 5 felony, the range of punishment upon conviction is "not less than one year no more nor more than 10 years or... confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both." See Code §§ 18.2-10, 18.2-509(A)(a). Accordingly, the maximum punishment Thompson faced upon conviction of possession of cocaine and possession of oxycodone was 20 years in prison. See. Code §§ 18.2-10, 18.2-250(A)(a).

Here, Thompson was sentenced to 5 years in prison for possession of oxycodone and 6 years in prison for possession of cocaine. This Court did not expressly order that the sentences run concurrently, therefore they ran consecutively. See Code § 19.2-308 ("when any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court.")

Consequently, this Court imposed a lawful sentence which did not violate Thompson's right against double jeopardy. Where there was no meritorious double jeopardy argument, trial counsel is not ineffective for failing to lodge a frivolous objection. See Correll v. Commonwealth, 232 Va. 454, 469-70, 352 S.E.2d 352, 361 (1987) (finding no merit in a claim based on counsel's failure to object to otherwise admissible evidence). For these same reasons where Thompson's sentence was lawful and not excessive, this Court finds that he failed to establish a violation of his Eighth

Amendment challenge on appeal. See Moody v. Polk, 408 F.3d 141, 151 (4th Cir. 2005) (holding counsel not required to file frivolous motions).

For these reasons, Claims 1(a) and 1(g) are hereby dismissed.

Claim 1(e)

Thompson claims that his counsel failed to notify him of the denial of his appeal "with due diligence," which cost Thompson eight months of time to prepare for his habeas corpus petition. (Pet. Mem. at 2, IAC).

This Court need not reach the question of whether counsel's representation was unreasonable because Thompson has failed to demonstrate that he was prejudiced by counsel's representation. Thompson timely filed this instant petition, which included numerous claim seeking relief. Thompson fails to allege when he learned of the appellate disposition and he fails to allege what additional preparation was necessary for his habeas petition or what additional claims he would have made had he been timely informed of the appellate disposition. Moreover, Thompson fails to allege that even if counsel had alerted him to the denial of his appeal at an earlier date, that there was a reasonable probability that this Court would grant his request for habeas relief, particularly where, as argued throughout this motion, Thompson's claims are not cognizable or fail to set forth meritorious grounds for relief.

The Court holds that this failure to proffer is fatal to this claim. See Sigmon, 285 Va. at 535 36, 739 S.E.2d 909-10; Muhammad, 274 Va. at 18, 646 S.E.2d at 195

(finding petitioner's failure to "identify with specificity any act or omission of counsel which was objectively unreasonable" and "to demonstrate how these failures were prejudicial" fatal to Strickland claim).

Claim 1(e) is hereby dismissed.

Claim 1(f)

In Claim 1(f), Thompson claims that his counsel failed to question the jury regarding impartiality to punishment, relying on Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981).[5] (Pet. Mem. at 2, IAC). This Court holds that this claim has no merit and it is hereby dismissed.

As a preliminary matter, at the time this matter was tried, it was within the discretion of the trial court whether to permit counsel to inform the jury range of punishment during voir dire of a noncapital case.[6] See Commonwealth v. Hill, 264 Va. 315, 320, 568 S.E.2d 673, 676 (2002) ("neither the defendant nor the Commonwealth in non-capital criminal prosecution has a constitutional or statutory right to ask the members of the jury panel questions about the range of punishment" and the trial judge "retains the discretion" whether to permit that line of inquiry.) As such, where trial counsel would have been required to seek the trial court's

[5] In Patterson, the Supreme Court overturned a death penalty sentence holding that the trial court erred by refusing to ask the venire whether any prospective juror could consider imposing a sentence less than death, finding that the failure to ask that question deprived the defendant of an impartial venire. 222 Va. at 657-59, 283 S.E.2d at 215-16.

[6] In 2020, the General Assembly enacted Code § 19.2-262.01, which states, in part,

> "[T]he court and counsel for either party shall have the right to examine under oath any person who is called as juror... [and] may inform any such person or juror as to the potential range of punishment to ascertain if the person or juror can sit impartially in the sentencing phase of the case."

permission prior to asking questions about the range of punishment in a non-capital case, Thompson fails to demonstrate that the trial court would have granted counsel's request. Hedrick v. Warden of the Sussex I State Prison, 264 Va. 486, 497-498, 570 S.E.2d 840, (2002) ("We also observe that the Supreme Court has held that "Strickland's standard, although by no means insurmountable, is highly demanding.") (citing Kimmelman, 477 U.S. at 382).

In any event, this Court finds that trial counsel's questions to the jury panel were reasonable. Trial counsel reminded the jury that Thompson was innocent until proven guilty, asking the venire if everyone understood that "as Mr. Thompson sits here today, he is an innocent man?" Trial counsel asked, "Do you promise that the presumption of innocence will remain with Mr. Thompson throughout the entire trial?" Moreover, trial counsel discussed the concept of reasonable doubt, asking the venire, "Do you agree that even if you find Mr. Thompson probably guilty, that that is not beyond reasonable doubt?" He further asked whether the potential jurors would stand firm in their individual belief of the verdict, asking them whether they understood "not to succumb to peer pressure?" Furthermore, trial counsel asked the venire many questions designed to determine whether any potential juror would be biased against Thompson based on his prior conviction; strong opinions about the "war on drugs" or legalization of drugs; and experience with drug addiction. In conclusion, trial counsel asked whether there was any reason any member of the venire could not "render a fair and impartial verdict based only on the evidence... and on the Law of Virginia?"

Based on all of these questions, Thompson fails to demonstrate that his trial counsel's failure to ask about the jury's impartiality as to punishment in a noncapital case was unreasonable. Trial counsel reasonably focused the jury on the presumption of innocence and the burden of the Commonwealth to prove Thompson's guilt beyond a reasonable doubt. Trial counsel focused on creating an impartial jury who would fairly assess the evidence before returning a verdict as to guilt or innocence. Indeed, had trail counsel discussed the punishment facing Thompson before he was even found guilty, it might have caused the venire to presume the defense was anticipating a punishment phase, rather than an acquittal. See Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991) (noting that because counsel is equally susceptible to allegations if ineffective assistance of counsel based on action or inaction under certain circumstances that a habeas court should credit "plausible strategic judgments" counsel makes.) For these reasons, this Court failed to satisfy the first prong of Strickland.

In addition, this Court holds that Thompson failed to demonstrate the prejudice prong of Strickland analysis. He fails to show that even if his trial counsel had asked about impartiality in sentencing during voir dire, that the outcome of his trail would have been any different. Significantly, Thompson faced "distribut[ion]... or possess[ion] with the intent to distribute" oxycodone, second offense, and "distribut[ion]... or possess[ion] with the intent distribute" cocaine, second offense, at the beginning of trial. Therefore, at the time of voir dire, he faced up two life sentences, with a mandatory minimum time. See Code § 18.2-248 (C). In the end, the

jury rendered guilty verdicts to lesser-included offenses of simple possession of oxycodone and cocaine, which carry significantly lower ranges of punishment and no mandatory minimum time. See Code §§ 18.2-250, 18.2-10 (minimum of a fine, maximum of ten years in prison per count). Accordingly, where after the guilt phase the jury rendered verdicts which significantly diminished Thompson's sentencing exposure, he failed to demonstrate that the outcome of his case would have been different had his trial counsel discussed the range of punishment he faced on the initial charges during voir dire. Therefore, this Court finds that he failed to satisfy prong two the Strickland analysis.

For these reasons, Claim 1(f) is hereby dismissed.

Claim 1(h)

In Claim 1(h), Thompson alleges his attorney failed to submit a jury instruction "on the requirements of [Code §] 19.2-187.01 as relates to the sufficiency of evidence and failed to object at trail when the issue appeared." (Pet. Mem. at 2, IAC).

Code § 19.2-287.01 permits the introduction of a certificate of analysis as prima facie evidence to demonstrate that materials were received by the authorized agent of the laboratory, such as the Department of Forensic Science. Code § 19.2-287.01. Once received by the "authorized agent" of a laboratory, there is a presumption that the chain of custody of those material was maintained. Code § 19.2-287.01. The practical effect of this statutue is to alleviate the burden on the Department of Forensic Science to produce each witness who encountered an item of evidence to

testify at trial simply to establish the chain of custody of the evidence. Code § 19.2-287.01.

With regard to the evidence to support chain of custody of the items in this case, the Commonwealth presented testimony from Brooke Eades, the evidence technician for the Nelson County Sheriff's Office. First, Eades testified to the protocol and procedures in place for maintaining a proper chain of custody of drugs and other narcotics collected by law enforcement from crime scenes. Next, Eades testified in detail related to the custody of specific drugs collected in this case. During her testimony, however, trial counsel said they would stipulate that Eades maintained custody of the evidence before it was sent to the lab for analysis and when she received the evidence back from the lab following analysis. The defense did not have any cross examination.

Accordingly, where there was no reason for trial counsel to challenge the chain of custody of the drugs, Thompson fails to demonstrate that trial counsel's failure to object to the chain of custody was unreasonable. See Correll, 232 Va. at 469-70, S.E.2d at 361. In the same vein, "Counsel are not unreasonable for failing to request an instruction that was not necessary or required." Jackson, 271 Va. at 448, 627 S.E.2d at 788-789.

Moreover, where there was no basis to challenge the chain of custody, Thompson fails to demonstrate that this Court would have sustained an objection by trial counsel to the chain of custody or granted the instruction proposed by Thompson. See Watson v. Commonwealth, 298 Va. 197, 207, 835 S.E.2d 906, 911 (2019) ("[J]ury

instructions are proper only if supported by the evidence, and more than a scintilla of evidence is required.") (citation omitted). Therefore, this Court holds Thompson failed to demonstrate a reasonable probability that the outcome would have been different as required by Strickland.

For all these reasons, Claim 1(h) is hereby dismissed.

Claim 1(i)

In Claim 1(i), Thompson claims his attorney "failed to protect [his] 14th Amendment right against prosecutorial misconduct at trial when it appeared." (Pet. Mem. at 3, IAC). Assuming this claim is related to his claims of prosecutorial misconduct, Thompson alleged the following in that section of his petition:

- The Commonwealth made improper statements during its opening statement and closing argument regarding the statement "that bottle there is my diabetic medication." Thompson claims that the Commonwealth made itself a "declarant" when it attributed that statement to Thompson, and that is was intended to "mislead the factfinder into believing that such statement was made on scene and in the presence of its key witness." However, Thompson claims that the only statement he made regarding the pill bottle was to Officer Sanchez "at the police department." (Pet. Mem. at 2, Prosecutorial Misconduct).

- The Commonwealth suborned perjury where its witness, Danny Jones, gave "conflicting testimony under oath concerning the name on the second pill bottle." Jones testified at preliminary hearing that he "did not know" whose name appeared on the pill bottle, while at trail, Jones testified that the "driver's" name appeared on the bottle. Thompson claims this was a misrepresentation which amounts perjury. (Pet. Mem. at 3-4, Prosecutorial Misconduct).

- The Commonwealth improperly questioned the jury venire where because its questions regarding "credibility and forensic evidence were leading and outlined its evidence." Thompson claims this was an "invitation for jury to accept false testimony and its negligence

and reckless police conduct." (Pet. Mem. at 6, Prosecutorial Misconduct).

Thompson fails to demonstrate that there was a meritorious objection to any of these conclusory allegations of prosecutorial misconduct. See Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992) (habeas petitioner must come forward with some evidence claim might have merit; unsupported, conclusory allegations are insufficient). "A prosecutor acts unprofessionally when he or she alludes to evidence in his or her opening statement unless he or she has a good-faith, reasonable basis for believing the evidence will be offered and admitted in to evidence." Smith v. Commonwealth, 40 Va. App. 595, 601, 580 S.E.2d 481, 484 (2003). With respect to the claims about opening statement, during opening, the Commonwealth explained that the police recovered a pill bottle for diabetic medication bearing Thompson's name, and discovered oxycodone pills inside the bottle. The Commonwealth additionally stated that Thompson admitted that the pill bottle was "[his diabetic medicine." During trial, the Commonwealth presented this evidence through Deputy Jones and the forensic scientist. Thus, this Court finds that there was nothing improper about the Commonwealth's opening statement.

Regarding Deputy Jones's testimony, this Court holds that Thompson failed to demonstrate that the Deputy's testimony was knowing false, rather than simply inconsistent, or that Deputy Jones's recollection was refreshed prior to trail by a review of his police report. See e.g., Hairston v. Commonwealth, Record 1878-09-3 2010 Va. App. LEXIS 310, *5-6, (August 3, 2010) (defining perjury as Any person who

material matter or thing and who subsequently gives conflicting testimony under oath as to the same matter or thing.") (internal citation and quotation omitted.)

With regard to voir dire, the Commonwealth had a right to discuss credibility of witnesses and forensic evidence during voir dire, as both topics were relevant to ascertain whether a juror could sit impartially on Thompson's case. See e.g., Smith v. Commonwealth, 40 Va. App. %95, 600-601, 580 S.E.2d 481, 484 (2003) ('we begin with the premise that the purpose of voir dire is to ascertain whether a juror is related to either party, or has any interest in cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein.") (citation omitted).

For all these reasons, this Court holds that Thompson failed to demonstrate any merit to his claims, and counsel is not ineffective for failing to assert a frivolous objection. See Correll, 232 Va. at 469-70, 352 S.E.2d at 361.

This Court holds that Thompson failed to demonstrate that his claim has any merit, therefore, Claim 1 (i) is hereby dismissed.

Claim 1 (k)

In Claim 1(k), Thompson alleges his counsel failed to file pretrial motions, such as a suppression motion and discovery motion, and had his attorneys done so, it would "have helped with strategy at trail and [prevented] the admission of illegally obtained evidence." (Pet. Mem. at 3, IAC).

Thompson fails to provide more that bare conclusions to support this claim. He fails to assert a specific and affirmative showing of legal basis for the motions or responses he now claims trial counsel should have filed. This failure to proffer is fatal

to his claim. See Nickerson, 971 F.2d.at 1136; Sigmon, 285 Va. 535-36, 739 S.E.2d at 909-10; Hedrick, 264 Va. at 521, 570 S.E.2d at 862; Muhammad, 274 VA. at 18, 646 S.E.2d at 195.

Accordingly, this Court holds that Claim 1(k) is hereby dismissed.

This Court finds that Thompson's can be resolved on the basis of the record without the need for an evidentiary hearing. See Code § 8.01-654(b)(4); Friedline v. Commonwealth, 265 Va. 273, 277, 576 S.E.2d 491, 494 (2003) (noting that "where the allegations of illegality if the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue in the basis of the record"); Murray, 249 Va. at 288, 455 S.E.2d at 20 ("[o]f course, if the record of the criminal trial is sufficient itself to show the merit or lack of merit of a habeas petition, the case may be determined upon that record alone") (quoting Walker v. Mitchell, 224 Va. 568, 571, 299 S.E.2d 698, 699 (1993)); Arey v. Peyton, 209 Va. 370, 164 S.E.2D 691 (1968).

This 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 writ of habeas corpus be, and his hereby, denied and dismissed.

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

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

Entered this 2 nd day of August, 2021.

/s/ MICHEAL DOUCTTE
Judge

I ask for this:

/s/ MAUREEN E. MSHAR
Maureen E. Mshar (VSB #85680)
Assistant Attorney General

Office of the Attorney General[7]

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A Copy, Teste:
NELSON COINTY CIRCUIT COURT
Lisa D. Bryant, Clerk

By: /s/ MORGAN PAM
Deputy Clerk

[7] Pursuant to the Virginia Supreme Court's Twenty-Fifth Order Extending Declaration of Judicial Emergency, all courts are authorized to accept pleading bearing electronic signatures. See http:// www. vacourts.gov/news/items/covid/2021_0707_scv_order_twenty_fifth_extending_ declaration_of_judicial_emergency. pdf (last visited July 29, 2021).

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 13th day of February, 2020.

Allen Thompson, Appellant,

against Record No. 191106
Court of Appeals No. 1452-18-3

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refused the petition for appeal'

The Circuit Court of Nelson County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is order that the Commonwealth recover of the appellant the cost in this Court and in the courts below.

Cost due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee $850.00 plus costs and expenses

A Copy,

Teste: Douglas B. Robelen, Clerk

By: /s/
Deputy Clerk