APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 29th day of January, 2018.

Joel M. Hicklin, No. 1507801, Petitioner,

against Record No. 170667

Harold Clarke, Director of VDOC, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed May 16, 2017, the rule to show cause, and the respondent's motion to dismiss, the Court is of the opinion that the motion should be granted and the writ should not issue.

Petitioner was convicted in the Circuit Court of the City of Richmond of possession of a firearm by a violent felon and was sentenced to five years' imprisonment. In the same proceeding, petitioner was found not guilty of attempted malicious wounding and the use of a firearm in the commission of a felony. Petitioner's appeals to the Court of Appeals of Virginia and to this Court were unsuccessful and he now challenges the legality of his confinement pursuant to this conviction.

In a portion of claim (a), petitioner contends he was denied the effective assistance of counsel because counsel failed to investigate the scene of the crime, specifically the car into which petitioner allegedly fired a gun during an altercation with Shardae Harkless. Petitioner contends he did not possess a gun and none of the photographs police took of the car on the day of the offense substantiate Detective Greg Russell's testimony that there was a circular hole above the front passenger door. Petitioner contends further investigation of the car itself might have produced physical or photographic evidence counsel could have used to impeach the detective's testimony regarding the presence of a hole. In support of his claim, petitioner provides copies of the two photographs of the car that the Commonwealth produced in discovery. Neither photograph was introduced at petitioner's trial. Petitioner asserts the photograph of the passenger side of the car indicates there may not have been a hole, as the detective claimed, and that such a revelation would have strongly supported his defense.

The Court holds this portion of claim (a) does not satisfy the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The record, including the trial transcript, demonstrates that at trial, Harkless testified she and petitioner dated, but broke up when she learned he had a girlfriend. Harkless testified she agreed to meet with petitioner following the breakup and that, when she arrived at the agreed-upon location, he entered her car, sat in the passenger seat, put a gun to her head, and asked for her purse. When Harkless said her purse was not in her car, petitioner got out, walked to the driver's side of the car, opened the door, and put the gun against the side of Harkless' face. Harkless further testified petitioner fired the gun in front of her face toward the passenger side of the car, but said she was unsure whether the bullet struck anything in her vehicle. She testified petitioner then dragged her out of her car, kicked her, and shot the ground next to her. Harkless testified she did not go inside the car after the altercation because the police impounded it and, because she had left the sunroof open, rain had gotten into the car and damaged it, so she never checked for damage caused by the gunshot.

Detective Russell's testimony at trial regarding the condition of Harkless' car corroborated her claim that petitioner fired a weapon inside of the vehicle. He testified he found two .40 caliber shell casings near where the altercation occurred and he saw a circular hole in Harkless' car just above the door jamb of the passenger door.

Petitioner disputed Harkless' testimony at trial, testifying in his defense that he and Harkless met in the parking lot of the apartment complex and argued, but he did not have a gun during the altercation. He further testified he ran away from Harkless when she tried to hit him with her car and he heard gunshots as he was running.

Iteka Epps also testified in petitioner's defense as a witness to the altercation. She testified she had no relationship with petitioner, but she was visiting someone at the apartment complex where the altercation occurred. She testified she saw a woman hit petitioner in the face, get into a car, and hit several other cars. She further testified she saw a man who appeared to be the owner of one of the damaged cars saying, "who the F hit my car," and then she heard gunshots. She said she did not see petitioner fire the shots.

The two low-quality, black-and-white photographs petitioner provides show Harkless' car from the driver's side and the passenger's side. The photograph of the passenger's side is of

such poor quality and was taken at such a distance that it is equivocal regarding the presence or absence of the hole the detective testified he observed. Accordingly, the photograph alone cannot satisfy petitioner's burden of establishing counsel's further investigation would have yielded beneficial information. *See Anderson v. Collins*, 18 F.3d 1208, 1221 (5th Cir. 1994) ("[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 . . . nearly impossible to determine whether the petitioner was prejudiced by any deficiencies in counsel's performance.") (internal quotation marks omitted). Additionally, petitioner has not proffered that any additional, presently available evidence or witness might be able to corroborate petitioner's speculation that additional investigation of the car would have been fruitful. Thus, petitioner has failed to demonstrate there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In another portion of claim (a), petitioner contends he was denied the effective assistance of counsel because counsel failed to challenge the detective's "perjured" testimony. Petitioner argues counsel should have exposed the detective's perjury with the photographs of Harkless' car, which petitioner suggests do not show the hole in the car the detective described. Petitioner also argues counsel should have objected to the detective's testimony as speculative because there was no evidence the hole in the car was a bullet hole, and there were no bullets recovered inside or around the car.

The Court holds this portion of claim (a) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. As explained above, the picture petitioner provides is of such poor quality and was taken from such distance that it does not reliably refute the detective's claim he observed a hole. Based on the quality of the photograph, counsel could have reasonably determined it would have been futile or even damaging to petitioner's defense to cross-examine the detective with the photograph. *See Lewis v. Warden*, 274 Va. 93, 116, 645 S.E.2d 492, 505 (2007) (counsel is not ineffective for failing to present evidence that has the potential of being "double-edged"). Additionally, because of the poor quality of the photograph, there is no reasonable probability that such cross-examination would have altered the court's opinion of the detective's credibility.

Further, the record, including the trial transcript, demonstrates the detective testified there was a circular hole in the car, but he did not speculate as to the source of the hole. Thus, it would have been futile for counsel to object to the detective's testimony as speculative. *See Correll v. Commonwealth*, 232 Va. 454, 469-70, 352 S.E.2d 352, 360 (1987) (counsel not ineffective for failing to make argument that lacked legal merit). Thus, petitioner has failed to demonstrate counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (b), petitioner contends he was denied the effective assistance of counsel when counsel failed to object to the admission of ballistic evidence at trial. Petitioner contends Detective Russell was not qualified to testify about the shell casings, and counsel was ineffective for failing to object to his testimony and to question his "exact expertise with bullets." Petitioner further argues counsel could have asked what testing was performed on the shell casings and whether the shell casings could have come from an unrelated shooting, and it was unreasonable for counsel not to ask more questions because there was no forensic evidence linking petitioner to the shell casings.

The Court holds claim (b) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates Detective Russell testified he recovered two .40 caliber shell casings from the grounds of the apartment complex where the incident occurred. The detective did not offer expert testimony regarding the shells. Therefore, it would have been futile for counsel to object to the detective's testimony as improper expert testimony or to challenge his expertise. *See Correll*, 232 Va. at 469-70, 352 S.E.2d at 360. Further, petitioner fails to proffer how the detective would have responded if asked what testing was performed on the shell casings and whether the shell casings could have come from an unrelated shooting. Thus, petitioner has failed to demonstrate counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (c), petitioner contends he was denied the effective assistance of counsel because counsel failed to present forensic evidence from the shell casings through expert testimony. Petitioner contends counsel should have hired an expert to test the shell casings for DNA and

fingerprints because the tests would have shown petitioner did not possess the casings and might have implicated someone else.

The Court holds claim (c) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including counsel's affidavit, demonstrates counsel decided not to have the shell casings tested because, in his experience, DNA and fingerprints are rarely recovered from spent shell casings. Furthermore, counsel believed it was possible petitioner's DNA or fingerprints would be found on the shell casings, which would have left no doubt petitioner possessed the firearm. Police did not recover a firearm or other physical evidence linking petitioner to a gun; thus, the shell casings were the only physical evidence that could have proven petitioner possessed a gun. Under the circumstances, petitioner cannot show counsel's tactical decision not to test the shell casings was unreasonable. Additionally, petitioner fails to proffer what DNA and fingerprint testing would have revealed. Accordingly, petitioner has not satisfied his burden of establishing testing the shells would have yielded beneficial information. *See Anderson*, 18 F.3d at 1221. Thus, petitioner has failed to demonstrate counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (d), petitioner contends he was denied the effective assistance of counsel when counsel failed to object to the admission of his prior conviction for attempted robbery because it was irrelevant to the proceedings. Petitioner contends counsel knew the prior conviction would prejudice petitioner and, had counsel objected, the outcome of the proceedings would have been different.

The Court holds claim (d) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and the affidavit of counsel, demonstrates petitioner was charged with attempted malicious wounding, use of a firearm in the commission of a felony, and possession of a firearm by a violent felon, and elected to have his case heard by the trial court, without the intervention of a jury. Because petitioner was tried by the court, counsel reasonably determined there would be no benefit to having the charge of possession of a firearm by a violent felon tried separately. *See Eckhart v. Commonwealth*, 222 Va. 213, 216, 279 S.E.2d 155, 157 (1981) ("A judge, unlike a juror, is

uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both."). Further, having reasonably elected not to move to sever the charges, counsel reasonably could have determined any objection to admission of the prior conviction order would be futile, as petitioner's status as a convicted felon was an element of the offense, which the Commonwealth was required to prove. Thus, petitioner has failed to demonstrate counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (e), petitioner alleges the cumulative effect of counsel's errors deprived him of the effective assistance of counsel.

The Court holds claim (e) is without merit. As addressed previously, petitioner's individual claims that he was denied the effective assistance of counsel are without merit. "Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." *Lenz v. Warden of the Sussex I State Prison*, 267 Va. 318, 340, 593 S.E.2d 292, 305, *cert. denied*, 542 U.S. 953 (2004).

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

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk