NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
703-246-2221 • Fax 703-246-5496 • TDD 703-352-4139

BRUCE D WHITE CHIEF JUDGE
RANDY I BELLOWS
ROBERT J SMITH
JAN L BRODIE
BRETT A KASSABIAN
MICHAEL F DEVINE
JOHN M TRAN
GRACE BURKE CARROLL
DANIEL E ORTIZ
PENNEY S AZCARATE
STEPHEN C SHANNON
THOMAS P MANN
RICHARD E GARDINER
JUDGES

COUNTY OF FAIRFAX CITY OF FAIRFAX

THOMAS A FORTKORT
JACK B STEVENS
J HOWE BROWN
F BRUCE BACH
M LANGHORNE KEITH
ARTHUR B VIEREGG
KATHLEEN H MACKAY
ROBERT W WOOLDRIDGE JR
MICHAEL P McWEENY
GAYLORD L FINCH JR
STANLEY P KLEIN
LESLIE M ALDEN
MARCUS D WILLIAMS
JONATHAN C THACHER
CHARLES J MAXFIELD
DENNIS J SMITH
LORRAINE NORDLUND
DAVID S SCHELL
RETIRED JUDGES

May 24, 2017

LETTER OPINION

Jonathan P. Sheldon, Esq.
Kelsey Peregoy, Esq.
10621 Jones Street, Suite 301A
Fairfax, Virginia 22030
Counsel for Petitioner

Rosemary V. Bourne, Esq.
Senior Assistant Attorney General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Counsel for the Commonwealth

Re: *David Roganti, Petitioner v. Harold W. Clarke, Director*
Petition for Writ of Habeas Corpus
Civ. Case No. CL-2016-17279
Crim. Nos. FE-2013-1034 & 870

Dear Counsel:

Before the Court is the Petitioner's Petition for Writ of Habeas Corpus. For the reasons stated herein, the petition is DISMISSED in part for lack of jurisdiction and the remainder is DENIED on the merits.

Procedural History

On June 9, 2013, Petitioner was arrested for actions stemming from a custody exchange earlier that day.[1] On July 15, 2013, Petitioner was indicted on one count of malicious wounding

[1] Record in FE-2013-870 vol. 1, at 1.

of Kristeen Cook, and one count of child endangerment of [redacted], in Case Number FE-2013-870.[2] Those charges were subsequently amended to two misdemeanors, domestic assault and contributing to the delinquency of a minor.[3] On August 19, 2013, Petitioner was indicted on one count of malicious wounding of Robert Gary Cook, in Case Number FE-13-1034.[4]

Petitioner waived his right to a jury trial[5], and the matter was tried by this Court on September 16-17, 2013. Petitioner was found guilty of all three charges – felony malicious wounding, misdemeanor domestic assault, and misdemeanor contributing to the delinquency of a minor.[6] William Pickett represented Petitioner in the trial and Jamie Hiles represented the Commonwealth.[7]

Mr. Pickett filed a Motion to Set Aside the Verdict on behalf of Petitioner on November 8, 2013.[8] The Defense argued that there were *Brady*[9] violations as the Commonwealth did not produce a Child Protective Services ("CPS") report before trial and that there was also newly-discovered evidence in the form of a photograph taken by Petitioner's father of Petitioner's arm which was alleged to show a bite mark.[10] The Commonwealth responded on November 15, 2013 and argued that there were no *Brady* violations because the CPS report was not material to the incident and the Commonwealth was not aware of the bite mark photograph as it was taken by Petitioner's father, Al Roganti, and was never in the possession of the Commonwealth.[11] On December 6, 2013, the Defense filed a Supplement to the Motion to Set Aside the Verdict,[12] which the Commonwealth opposed.[13] In its Opposition, the Commonwealth noted that the police reports in the CPS file had been produced prior to trial in discovery.[14]

---

[2] Id. at 44.

[3] Id.

[4] Record in FE-2013-1034, at 1.

[5] Record in FE-2013-870 vol. 1, at 82.

[6] Id. at 101.

[7] Id.

[8] Id. at 115.

[9] Brady v. Maryland, 373 U.S. 83 (1963).

[10] Record in FE-2013-870 vol. 1, at 116.

[11] Id. at 121-24.

[12] Id. at 130.

[13] Id. at 142-62.

[14] Id. at 144.

On December 20, 2013, the Court denied the motion after oral argument.[15] The Court held that there was no *Brady* violation regarding the police reports because they were produced in discovery before trial.[16] The Court also held that the CPS file was not material as the information contained in it would not have changed its decision.[17]

The trial Court sentenced Petitioner on June 27, 2014.[18] On the malicious wounding conviction, Petitioner was sentenced to six years in prison with all but six months suspended, and he was placed on probation for five years. On the two misdemeanors, Petitioner was sentenced to six months incarceration on each count of conviction. All periods of active incarceration on both the misdemeanors and the felony convictions were to run concurrently. The final sentencing order was entered on July 14, 2014.[19] A timely notice of appeal was filed on July 25, 2014.[20]

The Court of Appeals denied Petitioner's appeal on April 27, 2015.[21] On December 17, 2015, the Supreme Court of Virginia issued an order denying Petitioner's petition for appeal.[22]

Petitioner filed his habeas Petition on December 16, 2016.[23] The petition asserts that Petitioner's trial counsel was constitutionally ineffective and that there were material *Brady* violations as well.

With respect to the ineffectiveness claim, the petition asserts and alleges the following:

- Trial counsel failed to record or arrange for a court reporter for the preliminary hearing. Consequently, trial counsel was unable to impeach Gary Cook and Kristeen Cook with allegedly inconsistent statements made at the preliminary hearing.
- Trial counsel failed to impeach Gary Cook with statements he was alleged to have made to a police officer, which were contained in a police report produced prior to trial.
- Trial counsel failed to adequately investigate the case and failed to present a coherent defense.

---

[15] 12/20/2013 Transcript, at 18.

[16] Id.

[17] Id. at 19.

[18] See generally 6/27/2014 Transcript.

[19] Record in FE-2013-870 vol. 1, at 191-92.

[20] Id. at 194-95.

[21] 4/27/2015 Court of Appeals of Virginia Opinion, at 1.

[22] Supreme Court of Virginia's Mandate Refusing Petition for Appeal.

[23] Petition, at 1.

With respect to the *Brady* claim, the petition asserts and alleges the following:

- The Commonwealth failed to produce photographs of Petitioner which would show the bite marks that he claims were inflicted by Gary Cook.
- The Commonwealth failed to produce the CPS report which contained additional exculpatory material.

The Commonwealth filed a Motion to Dismiss the habeas petition on March 3, 2017. Petitioner filed a reply to the Motion to Dismiss on March 27, 2017.

Jurisdiction

The Court holds that it does not have jurisdiction to decide the habeas petition regarding the two misdemeanor convictions but does have jurisdiction to decide the habeas petition as it relates to the felony conviction.[24]

To consider a habeas petition, the circuit court must have subject matter jurisdiction.[25] "A court's jurisdiction is determined at the time the litigation is filed."[26] This is dependent on whether Petitioner is detained.[27] If Petitioner is detained when he files his petition, the court will have jurisdiction over the matter.[28]

Although detention is classically thought of as being in active incarceration, Virginia Code Section 8.01-654(B)(3) provides the court jurisdiction to decide habeas matters when Petitioner is subject to a suspended sentence.[29] "An individual is [considered] detained so long as

---

[24] The Court issued an Order on April 20, 2017 regarding jurisdiction. Petitioner's counsel filed its response on April 21, 2017, asserting that under Virginia Code Section 8.01-654(B)(3), the Court did have jurisdiction based on Petitioner's suspended sentence. The Commonwealth filed its response on April 28, 2017, which asserted that the Court had jurisdiction to hear the habeas petition regarding the felony conviction but no jurisdiction to hear the habeas petition regarding the misdemeanor convictions.

[25] See E.C. v. Va. Dep't of Juvenile Justice, 283 Va. 522, 527 (2012) (citations omitted).

[26] Id. at 529 (citations omitted).

[27] Va. Code Section 8.01-654.

[28] Id.

[29] Id at (B)(3) ("Such a petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.").

he was sentenced to a term of incarceration and the Commonwealth retained the power over him that could result in immediate physical detention."[30]

With regard to Petitioner's felony conviction, Petitioner was found guilty of malicious wounding on September 17, 2013,[31] and was sentenced on June 27, 2014 to both a period of active incarceration and a period of suspended incarceration.[32] He remains today under that suspended sentence. Therefore, the Court has subject matter jurisdiction to hear the habeas petition with regard to Petitioner's felony conviction.

With regard to Petitioner's misdemeanor convictions, Petitioner was found guilty of domestic assault and contributing to the delinquency of a minor on September 17, 2013,[33] and was sentenced on June 27, 2014 to two concurrent six month terms of active incarceration.[34] These terms of active incarceration were to run concurrently with the felony term of active incarceration. No time was suspended in connection with the misdemeanor convictions.[35] Therefore, Petitioner is not in "detention" as that term is used in the statute and the Court does not have subject matter jurisdiction with regard to the misdemeanors.

Consequently, the Petition for a Writ of Habeas Corpus is DISMISSED for lack of jurisdiction with respect to the misdemeanors.

Petitioner's Request for Discovery and for an Evidentiary Hearing

Petitioner seeks discovery and an evidentiary hearing.

Discovery

As to discovery, Petitioner alleges that law enforcement "took photographs of injuries that David Roganti suffered and failed to provide these photographs to Roganti. The photographs included a photograph taken of the bite-mark inflicted by Gary Cook on Roganti's arm while he was being processed into the Fairfax adult detention center and shortly after the incident." Petitioner seeks discovery of the alleged photographs.

---

[30] Escamilla v. Superintendent, 290 Va. 374, 380-81 (2015).

[31] 9/17/2013 Transcript

[32] 6/27/2014 Transcript; Record in FE-2013-1034, at 87-89.

[33] 9/17/2013 Transcript.

[34] 6/27/2014 Transcript; Record in FE-2013-870, vol. 1, at 191-93

[35] Record in FE-2013-870 vol. 1, at 191-93.

The Court sees no basis to order discovery in this case. If additional photographs do exist, they are certainly cumulative of the evidence in Petitioner's possession, or available to Petitioner, at the time of trial.

Among the evidence that was in Petitioner's possession, or available to Petitioner, at the time of trial, were the following:

(1) Commonwealth Exhibits 30 and 31 are photos of the Petitioner taken after the incident showing red marks to his face and neck.
(2) Well before trial, Petitioner was in possession of a police report which states that Petitioner "had red marks to his right arm."[36]
(3) The officer who made the police report, Officer Michael Stewart, was available to testify at trial and, in fact, did testify at trial. Officer Stewart testified that Petitioner "had a mark on his face" when observed at the scene by the officer.[37] He further described it as "a lot of redness."[38]
(4) A second officer, Officer Mark Tenally, testified that Petitioner looked "scuffed up a little bit" and had "[m]aybe a little swelling" on his face.[39]
(5) Petitioner testified at trial that Gary Cook bit him during the altercation.[40]
(6) Al Roganti, Petitioner's father, testified at trial that Petitioner had bite marks on his arm.[41]
(7) Al Roganti took a photo of the alleged bite mark on Petitioner's arm.[42] Mr. Roganti testified as a defense witness at trial. While Petitioner asserted in his Motion to Set Aside the Verdict that the photograph had not been provided to the defense, Petitioner – who was, of course, the subject of the photograph –had to know it existed and it was certainly available and accessible to Petitioner.[43]

---

[36] Defense Exhibit 5 to the Supplemental Motion to Set Aside the Verdict.

[37] 9/16/2013 Transcript, at 160.

[38] Id. at 161.

[39] Id. at 175.

[40] David Roganti testified: "He bit my arm extremely hard." Id. at 231.

[41] 9/17/2013 Transcript, at 78.

[42] Attachment to Defense Motion to Set Aside the Verdict; Record in FE-2013-870 vol. 1, at 117-20.

[43] In this respect, the case law governing newly-discovered evidence is instructive. Among other requirements, a party seeking a new trial must show the evidence at issue "could not have been secured for use at the trial in the exercise of reasonable diligence by the movant." Odum v. Commonwealth, 225 Va. 123, 130 (1983). Here, the bite mark photo was taken by Petitioner's own father, who was also Petitioner's witness at trial.

(8) The bite mark photograph taken by Mr. Roganti was attached to the Defense Motion to Set Aside the Verdict.[44]

Thus, if additional bite mark photos exist, it would certainly be cumulative, whether measured against what was available to the defense at trial or measured against what was before the Court at the time it denied the Motion to Set Aside the Verdict. Therefore, the request to order discovery is denied.

Evidentiary Hearing

With respect to an evidentiary hearing, the Court does not find an evidentiary hearing to be warranted. The allegations in the habeas petition is that trial counsel was constitutionally ineffective and that the Commonwealth withheld exculpatory material. Those matters are squarely presented and argued in the pleadings before the Court.

Moreover, for purposes of this Letter Opinion, the Court accepts as true trial counsel's affidavit.[45] In other words, the Court accepts as true that trial counsel's failure to order a court reporter for the preliminary hearing and his failure to cross-examine Gary Cook on an inconsistent statement in a police report were inadvertent mistakes, rather than strategic judgments.[46]

Therefore, the matter is ripe for decision.

Factual Background

The Court of Appeals summarized the evidence at trial in its opinion affirming the trial court as follows:[47]

> On June 9, 2013, appellant had visitation with his [redacted]-year-old daughter, [redacted] Pursuant to a court order, appellant was to return [redacted] to her mother, Kristeen Cook, at 3:00 p.m. Kristeen arrived at the home of appellant's mother at approximately 2:50 p.m., and her father, Gary Cook, met her there approximately ten minutes later. Kristeen and her father parked in the street in front of the Roganti residence. Appellant, who had been at a mall with his father, Al Roganti, and [redacted]

[44] Record in FE-2013-870 vol. 1, at 120.

[45] Declaration of Attorney William Pickett (December 15, 2016), attached to habeas petition.

[46] To be clear, Mr. Pickett's affidavit addresses *why* he did not do these things, rather than the legal or constitutional implications. Even had Mr. Pickett opined regarding his own ineffectiveness, it would not be determinative or controlling. See generally People v. Sanchez, 662 N.E.2d 1199, 1209 (1996); Walls v. Bowersox, 151 F.3d 827, 836 (8th Cir. 1998); Harris v. Dugger, 874 F.2d 756, 761, n.4 (11th Cir. 1989).

[47] 4/27/2015 Court of Appeals of Virginia Opinion, at 1-3 (citations omitted).

did not arrive until 3:15 p.m. On his way home, appellant called "911" to have a police officer on the scene when he returned [redacted] When the 911 operator asked why an officer was required, appellant provided no explanation other than he anticipated a potential conflict.

Upon pulling into the driveway, appellant and his father remained in the car with [redacted] Gary Cook waited approximately five to seven minutes before getting out of his car and approaching appellant's car. Gary knocked on the front passenger window where appellant was seated but appellant did not open the door. When Gary opened the door and asked if he could have [redacted], appellant and his father yelled that Gary was trespassing and announced they were calling the police.

Gary returned to his car and informed his daughter that [redacted] was in the car. Kristeen walked up to appellant's car and opened the back passenger door to remove [redacted] from her car seat. Appellant leaned back and tried to slam the back door on Kristeen. Appellant kept the door pinned against her until her father returned to release it.

Upon Gary's return, Al Roganti exited the driver's side and engaged in a physical altercation with Gary. As Kristeen attempted to unbuckle [redacted] from her car seat, appellant produced a seven-and-a-half-inch knife and began waving the knife around inside the car, grazing and cutting Kristeen's hand and fingers. At times, the blade was only a few inches from [redacted]

Kristeen yelled to her father, and Gary grabbed appellant by the arm and wrist. As Gary and Kristeen attempted to force the knife from appellant's hand, appellant yelled he was going to cut Gary and continued to waive the knife around scraping the side of the car. Appellant ignored Gary's command to release the knife. Instead, appellant made a downward motion with the knife and cut Gary's left hand between his thumb and index finger. Gary began bleeding profusely.

With [Al] Roganti trying to choke Gary from behind, Gary pulled appellant from the car. The three men struggled on the ground as appellant continued to wield the knife. The appellant did not surrender the knife until the police arrived.

Claim One: Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, a petitioner must prove (1) that trial counsel's performance was "deficient" and (2) that "the deficient performance prejudiced the defense."[48]

Specifically, proving that counsel's performance was deficient "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to]

[48] Strickland v. Washington, 466 U.S. 668, 687 (1984).

the defendant by the Sixth Amendment."[49] The proper standard for an attorney's performance is "reasonably effective assistance."[50] In other words, to satisfy the first prong, the petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness."[51] However, because of the difficulties in assessing whether counsel was deficient, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[52]

Moreover, defendants are not entitled to an "error-free, perfect trial" and the Constitution does not guarantee one.[53]

Establishing the prejudice prong of the *Strickland* test requires showing there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[54] As defined in *Strickland*, "a reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial.[55]

When determining whether there has been an ineffective assistance of counsel violation, courts should not look at "the cumulative effect of trial counsel's actions and omissions."[56] Instead, proper "cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient."[57]

For the reasons stated below, the Court finds that Petitioner has failed to satisfy either the performance or prejudice prong of *Strickland.*

The trial of this matter took place on September 16-17, 2013. Before the trial, during the trial, and after the trial, Petitioner's trial counsel, William Pickett, was a zealous, competent,

---

[49] Id.

[50] Id.

[51] Shaikh v. Johnson, 276 Va. 537, 544 (2008) (citing Strickland, 466 U.S. at 687-88).

[52] Strickland, 466 U.S. at 689.

[53] United States v. Hasting, 461 U.S. 499, 508-09 (1983) ("[T]he Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.") (citations omitted).

[54] Id. at 694.

[55] Id.

[56] Lenz v. Warden of the Sussex State Prison, 267 Va. 318, 340 (2004).

[57] Fisher v. Angelone, 163 F. 3d 835, fn. 9 (4th Cir. 1998).

effective and engaged advocate. Before turning to the specific claims of ineffectiveness, the Court will review trial counsel's general performance in his representation of Petitioner.

Before the Trial

- On June 10, 2013, trial counsel entered his appearance and immediately filed a motion for bond reduction.[58]
- On July 2, 2013, trial counsel received discovery at the Office of the Commonwealth's Attorney, including a disc containing 911 calls and extensive police reports.[59]
- On August 14, 2013, trial counsel received discovery at the Office of the Commonwealth's Attorney, including numerous photos, five videos, Petitioner's prior record, the prior records of Gary Cook and Kristeen Cook, and other potential impeachment material.[60]
- On August 22, 2013 and again on September 6, 2013, trial counsel requested the Clerk to issue a subpoena for Officer Peter Norris.[61]
- On September 6, 2013, trial counsel sent the Commonwealth a letter, indicating that the Commonwealth had agreed to amend two of the charges to misdemeanors, thanking the Commonwealth for its "open discovery that you have graciously provided," and making several specific *Brady* requests.[62]
- On September 6, 2013, trial counsel submitted an agreed Discovery & Inspection Order[63] and that same day received a formal response to the Discovery Order from the Commonwealth.[64]
- On September 11, 2013, trial counsel received additional discovery from the Commonwealth, which responded to trial counsel's specific September 6th *Brady* requests, provided information about the Child Protective Services case, and provided other information as well.[65]

---

[58] Record in FE-2013-870 vol. 1, at 3-4.

[59] Id. at 22-41.

[60] Id. at 46-63.

[61] This document is in the Court file.

[62] This document is in the Court file.

[63] Record in FE-2013-870 vol. 1, at 64-66. The Discovery Order was signed on September 9, 2013.

[64] Id. at 67-81.

[65] Record in FE-2013-1034, at 7-9.

- On September 16, 2013, trial counsel received additional discovery from the Commonwealth.[66]

During the Trial

- Trial counsel aggressively and thoroughly cross-examined Kristeen Cook.[67]
- Trial counsel cross-examined Ms. Cook about her email communications with Petitioner, about her alleged failure to comply with the custody order, about statements that Petitioner made at the preliminary hearing, about phone calls made by Petitioner to Ms. Cook, about her refusal to have the exchange take place at the University Mall, and about efforts by Ms. Cook to obtain proof of Petitioner's alleged unfitness to parent.
- Trial counsel cross-examined Ms. Cook as to whether her true motivation in pursuing the case was her perception that Petitioner was a drug addict and abuses alcohol.
- Trial counsel cross-examined Ms. Cook about her alleged persistent texting to Petitioner's mother, about whether she had been instructed to stay off the Roganti property, about whether a police officer had told her in the past to consider a different exchange point other than the Roganti residence, about whether she knew that the police were on the way at the time of the confrontation, about whether Ms. Cook had forcibly tried to regain physical custody of her daughter, and about whether Ms. Cook had grabbed, scratched and pulled Petitioner.
- Trial counsel cross-examined Ms. Cook about her reaction and that of her father to seeing the knife, about whether his father had bitten Petitioner, about her alleged efforts to swear out a warrant on Petitioner's father, about whether the criminal case was essentially a visitation and custody dispute, and about whether the criminal case has assisted her in her alleged goal of keeping her daughter away from Petitioner.
- Trial counsel aggressively and thoroughly cross-examined Gary Cook.[68]
- Trial counsel cross-examined Mr. Cook about how he came to be present at the confrontation, about whether it was his view that he and Ms. Cook could take her daughter "by force," about whether he accompanied Ms. Cook that day because he expected trouble, and about whether Mr. Cook had previously been charged with assault arising out of another incident at the Roganti residence.
- Trial counsel cross-examined Mr. Cook about whether an officer had instructed him to stay off the Roganti property, about whether he knew he was not supposed to be on the Roganti property, about whether it was Mr. Cook who initiated the first contact, about whether it was Mr. Cook who opened the passenger door of the Roganti car, about whether he knew the police were on their way, about whether he knew he was trespassing, and about whether he saw Ms. Cook trying to obtain her daughter by force.

---

[66] Record in FE-2013-870 vol. 1, at 83-93.

[67] 9/16/2013 Transcript, at 70-97.

[68] Id. at 124-149.

- Trial counsel cross-examined Mr. Cook about whether he observed Ms. Cook scratching and hitting and pulling at Petitioner, about whether he grabbed Petitioner's shirt, about whether he laid hands on Petitioner, about whether he refused to back off when he saw the knife and tried to take the knife away from Petitioner, and about whether he bit the petitioner.
- Trial counsel cross-examined Mr. Cook about whether Petitioner could have stabbed Mr. Cook or Ms. Cook had he wanted to do so, about whether Mr. Cook struck Mr. Roganti's ribs, and about whether he was cursing at Petitioner and calling him a drug addict.
- Trial counsel also put Petitioner on the stand, along with Petitioner's father, Al Roganti, and Petitioner's mother, Patricia Slack. Each was fully and competently examined by trial counsel.

After the Trial

- On September 19, 2013, following revocation of Petitioner's bond after his conviction,[69] trial counsel filed a Motion to Reinstate Bond.[70]
- On October 25, 2013, trial counsel requested the Clerk of the Court to issue a subpoena duces tecum to Child Protective Services, accompanied by an affidavit from trial counsel.[71]
- On November 8, 2013, trial counsel filed a Motion to Set Aside the Verdict and Memorandum in Support Thereof.[72]
- On November 15, 2013, trial counsel submitted a sentencing memorandum to the Court, consisting of both argument and several letters in support of Petitioner.[73]
- On November 22, 2013, trial counsel persuaded the Court to continue sentencing for several months and to release Petitioner on bond so that Petitioner could enter residential treatment at the Edgehill Recovery Treatment Center program, to be followed by the Oxford House program.[74]
- On December 6, 2013, trial counsel filed a Supplemental to Motion to Set Aside the Verdict and Memorandum in Support Thereof.[75]

---

[69] 9/17/2013 Transcript, at 139; Record in FE-2013-870 vol. 1, at 101.

[70] Record in FE-2013-870 vol. 1, at 94-98.

[71] Id. at 104-07.

[72] Id. at 115-20.

[73] Record in FE-2013-870 vol. 1, at 179-85.

[74] Id. at 139-40.

[75] Id. at 131-41, and Defense Attachments 1-5 and Transcript Excerpts.

- On December 20, 2013, trial counsel argued Petitioner's Motion to Set Aside the Verdict, which was denied.[76]
- On June 2, 2014, trial counsel submitted a supplemental sentencing memorandum to the Court, consisting of additional argument and additional letters in support of Petitioner.[77] Much of this memorandum was devoted to Petitioner's efforts to address his opiate addiction.[78]
- On June 26, 2014, trial counsel submitted supplemental letters and a photograph to the Court as an indication of Petitioner's continuing efforts at rehabilitation.[79]
- On June 27, 2014, Petitioner was sentenced. Even though the guidelines called for a sentence in the range of one year and nine months to four years and eleven months, the Court imposed a sentence of active incarceration of six months, well below the low end of the guidelines.[80] The stated grounds for this downward departure was as follows: "Defendant is addressing his substance abuse problem."[81] In deciding to impose a sentence well below the guidelines, the Court relied significantly on trial counsel's extensive efforts to persuade the Court to impose a sentence that reflected both Petitioner's efforts at addressing his opiate addiction and his ongoing need for treatment.
- On July 25, 2014, trial counsel filed a timely Notice of Appeal.[82]

The Specific Claims of Ineffectiveness

A. Failure to Obtain the Preliminary Hearing Transcript or Record the Preliminary Hearing

Petitioner's first claim is that trial counsel failed to record or obtain a court reporter for the preliminary hearing. Petitioner alleges that this prevented trial counsel from using the preliminary hearing to challenge the testimony of Gary Cook and Kristeen Cook. The Court finds this claim to be without merit.

First, the failure to record a preliminary hearing is analyzed like any other *Strickland* claim, in other words: was it deficient and, if so, was is prejudicial.[83]

---

[76] Id. at 163.

[77] Id. at 165-77.

[78] Id.

[79] Id. at 186-189.

[80] Record in FE-2013-1034, at 58-61, 87-89.

[81] Id. at 59.

[82] Id. at 90-91.

[83] See Herring v. Clarke, 2016 U.S. Dist. LEXIS 51193, *22-24 (E.D. Va. April 14, 2016)(upholding a Supreme Court of Virginia's denial of a habeas ineffective assistance of counsel claim for failure of counsel to record a preliminary hearing.)

Second, trial counsel cross-examined both Mr. Cook and Ms. Cook on discrepancies between their trial and preliminary hearing testimony.[84]

Third, this issue cannot be examined in isolation but must be examined in the context of trial counsel's aggressive, thorough, and comprehensive cross-examination of both Mr. Cook and Ms. Cook.

Fourth, trial counsel called other witnesses (Al Roganti and Patricia Slack) in an effort to further impeach the credibility of Mr. Cook and Ms. Cook.

Fifth, an examination of the specific preliminary hearing statements which are the focus of Petitioner's habeas petition indicate that a transcript would not have made a material difference.

Petitioner attributes the following two statements to Mr. Cook at the preliminary hearing: (1) He opened the car door and that it was closed when he and Ms. Cook approached the car; and (2) he did not know how his hand was cut. Petitioner attributes the following statement to Ms. Cook at the preliminary hearing: David Roganti had not opened the car door. Even assuming the accuracy of each of these representations, the Court finds that it would have made no material difference in the Court's assessment of the credibility of the witnesses who testified at trial. Among other considerations, the Court would note that Gary Cook readily admitted at trial that he had opened the car door.[85] More significantly, it would not have altered the Court's judgment "that what happened here was that Mr. Roganti intentionally stabbed Mr. Cook."[86]

In sum, the Court does not find that trial counsel's inadvertent failure to obtain the preliminary hearing transcript, or to make a recording of it, was either deficient or prejudicial.

B. Trial Counsel's Failure to Examine Gary Cook on a Statement Allegedly Made to a Police Officer.

Petitioner asserts that trial counsel was constitutionally ineffective by failing to cross-examine Mr. Cook on a statement attributed to him in a police report, which reads as follows: "He grabbed the edged area of the knife in hopes of pulling the knife from David."[87] Petitioner asserts that this is directly contrary to Mr. Cook's trial testimony that Petitioner stabbed him.

The Court finds this claim to also be without merit.

---

[84] 9/16/2013 Transcript, at 70-97, 124-46.

[85] 9/16/2013 Transcript, at 116.

[86] 9/17/2013 Transcript, at 137.

[87] Exhibit 5 to Supplement to Motion to Set Aside the Verdict; Record in FE-2013-870 vol. 1, at 31.

First, as the Commonwealth notes in its Motion to Dismiss, "[T]he transcript demonstrates that Cook had many injuries and other small cuts on his hand that could have come from an attempt to grab the knife. Therefore, Cook may well have grabbed the knife, but not have received the more serious injury to the back of his hand, from doing so."[88] In other words, grabbing the knife and being stabbed with the knife are certainly not mutually exclusive such that the former excludes the latter.

Second, trial counsel elicited on cross-examination of Mr. Cook a statement that is nearly identical to what Petitioner is now claiming never came out at trial:

> *Q. So now you are admitting that you did lay your hands on him?*
> *A. Oh my gosh, sir. Were you here earlier? The gentleman had a knife I put my hands – I had to grab the knife.*[89]

Trial counsel also elicited the following:

> *Q. You stayed there and you physically tried to take the knife?*
> *A. When I saw the knife and the position that he was in and the strike mode, absolutely. The only thing I could think was to try to control the knife. That's correct.*[90]

This is consistent with Mr. Cook's statement in response to a question from the Court:

> *A. What happened was I started blacking out when I was fighting with David outside the car with the knife. I started blacking out So my only choice was to let go of the knife.*[91]

The Court recognizes that none of these statements is *identical* to the statement attributable to Mr. Cook in the police report, but each one is consistent with grabbing and holding the knife. In other words, even though Mr. Pickett asserts (and the Court accepts) that he overlooked the police report, he repeatedly elicited testimony from Mr. Cook regarding his efforts to take the knife away from Petitioner.

Third, trial counsel elicited what he needed to elicit in order to argue that Mr. Cook grabbed the knife. Thus, in the motion to strike, trial counsel stated the following: "[I]f he takes out a knife to warn someone to back off, he can't presume that Gary Cook is going to stay right there, grab the knife."[92] He went on to argue the following: "[W]hat you have here rather are

---

[88] Motion to Dismiss at 10 (internal citation omitted).

[89] 9/16/2013 Transcript, at 139.

[90] Id. at 140.

[91] Id. at 146-147.

[92] Id at 188.

cuts to hands, scratches and cuts to their hands, where they're trying to take the – they're essentially trying to take the knife from him."[93]

Therefore, the Court finds that trial counsel's failure to cross-examine Mr. Cook specifically on his alleged statement to the police officer was not deficient and was not prejudicial.

These are the two essential ineffectiveness allegations – the preliminary hearing issue and the police report issue. Beyond this, Petitioner makes a more general assertion that trial counsel "failed to investigate and present a coherent defense in this case."[94]

The Court finds no merit in this generic claim. To the contrary, trial counsel sought and received extensive discovery, thoroughly and aggressively cross-examined the key Commonwealth witnesses, and presented a coherent, albeit unsuccessful, defense. After conviction, he persuaded the Court to release Petitioner on bond in order to pursue drug treatment, to delay sentencing by several months for that purpose, and to impose a sentence well below the guidelines.

In short, trial counsel was zealous, competent and effective. Moreover, even if trial counsel had obtained a recording or transcript of the preliminary hearing and used it in cross-examining the Cooks, and even if trial counsel had cross-examined Mr. Cook with regard to the statement he allegedly made to a police officer, and examined the officer as well on the statement attributed to Mr. Cook, it would not have altered this Court's judgment with respect to the credibility of Mr. Cook or Ms. Cook, or altered the Court's findings of guilt.

Claim Two: Alleged *Brady* violations

Under *Brady*, "the prosecution's suppression of evidence favorable to the accused and material to either guilt or punishment violates due process."[95] To prove a *Brady* claim, the defense must establish (1) "the prosecution suppressed the evidence irrespective of the good faith or bad faith of the prosecution;" (2) "the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching;" and (3) "the evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[96]

Petitioner makes two *Brady* allegations: First, he asserts that the Commonwealth committed a *Brady* violation by failing to produce the Child Protective Services report. Second,

---

[93] Id. at 197.

[94] See Roganti's Reply to the Commonwealth's Motion to Dismiss, at 5.

[95] Commonwealth v. Tuma, 285 Va. 629, 634 (2013) (citing Brady, 373 U.S. at 87)).

[96] *Id.* at 634-35 (citations omitted).

he asserts that the Commonwealth committed a *Brady* violation by failing to produce law enforcement photos of bite marks on Petitioner's arm.

A. The Child Protective Services Report

With respect to the first claim, regarding the CPS report, the Court has already addressed this matter in the Motion to Set Aside the Verdict.

On December 20, 2013, the Court held as follows: "I find that the assertions made by Mr. Pickett either involving material that is not exculpatory or that was not withheld from the defendant, or is not material. I was the fact finder in this case, and I can say that having considered the assertions made by Mr. Pickett with regard to Dr. Ling and with regard to the statements made by Mr. Cook, and with regard to the evaluation of Ms. Cook and the assertions that she had made statements about the custody situation, the custody requirements, I don't find those – they certainly would not have affected my judgment at trial regarding Mr. Roganti's guilt. They do not undermine my confidence in the outcome of this case. They would not have altered my decision, and so therefore the motion is denied."[97]

The Court recognizes that habeas counsel disagrees with the Court's judgment and asserts that "the trial court erred."[98] Nevertheless, the matter has already been fully litigated. Indeed, the trial court's decision was appealed and the Court of Appeals held that "the trial court did not abuse its discretion in denying appellant's motion to set aside the verdict."[99] Therefore, this issue is barred from being addressed in a habeas proceeding.[100]

B. Bite Mark Photographs

With respect to the second claim, i.e., the failure to produce law enforcement photos of Petitioner's alleged bite marks, the Court finds this argument to also be without merit.

First, as stated above, there was substantial other evidence before the Court and available to the defense, in support of the claim that Petitioner was bitten by Mr. Cook. This included a police report referencing "red marks" on Petitioner's arm, the testimony of Petitioner, and the testimony of Al Roganti. More significantly, the defense had access to its own alleged bite mark photo. This photo was taken by Petitioner's father and it was attached to Petitioner's Motion to Set Aside the Verdict. Petitioner describes the photo as follows: "[I]t appears to show the bite

---

[97] 12/20/2013 Transcript at 18-19.

[98] Petition for Writ of Habeas Corpus at 30.

[99] 4/27/2015 Court of Appeals of Virginia Opinion, at 7-8.

[100] See Henry v. Warden, 265 Va. 246, 249 (2003) (holding that claims raised at trial or on appeal are not cognizable in habeas corpus.); Motion to Dismiss, at 18.

mark on the defendants arm."[101] He further indicates that it was taken on June 14, 2013, just days after the alleged bite.[102] The fact that it was taken by Petitioner's father, who testified at trial on Petitioner's behalf, indicates that it was both known to Petitioner and available to Petitioner.

Second, even if there was no other evidence indicating that Mr. Cook bit Petitioner, the Court would not find these alleged law enforcement photos to be material. This is because Petitioner admitted that he had already taken out the knife before he was bitten. See the following:

> *The Court: Just so I understand When did Mr. Cook bite you?*
> *Mr. Roganti: That was after I had pulled out the knife.*
> *The Court: Where did he bite you?*
> *Mr. Roganti: Right here on the forearm, Your Honor.*
> *The Court: Is that the arm that you had the knife in?*
> *Mr. Roganti: Yes.*
> *The Court: Okay.*
> *Mr. Roganti: As he was twisting it around.*[103]

In other words, Mr. Cook's biting of Petitioner – if it occurred – could not have provoked Petitioner to pull out his knife, for it was out already.

Third, there is no dispute that there was a struggle between Mr. Cook, Ms. Cook, Mr. Roganti and Petitioner. A photo of a bite mark on Petitioner's arm would have added nothing to the undisputed evidence that there was a struggle for control of the knife.

Fourth, the bite mark photo would simply have been cumulative to the other evidence of Petitioner's injuries: the red marks on his arm, the red splotches on his neck, the red marks on his face, the torn shirt, the testimony of Mr. Roganti, the testimony of Petitioner and the testimony of the police officers. Thus, Petitioner could – and did – argue as follows: "Your Honor, you have the picture of David Roganti taken immediately after this by police, his face with scratches and red marks. His shirt was torn and his arm was bitten."[104]

Fifth, Petitioner had access to a photograph which, by his own admission, captures the very image that he now claims the Commonwealth failed to produce.[105]

---

[101] Record in FE-2013-870, at 117.

[102] Id.

[103] 9/16/2013 Transcript, at 231-32.

[104] 9/17/2013 Transcript, at 116.

[105] See prior discussion of bite mark photo taken by Al Roganti and attached to the Motion to Set Aside the Verdict.

Finally, this matter could have been raised at trial. Petitioner was certainly aware of any photograph taken of him, whether by law enforcement or by his father.[106]

Therefore, the Court finds no *Brady* violation.

Conclusion

WHEREFORE, the Court DISMISSES in part the habeas petition for lack of jurisdiction and DENIES the remainder of the petition on the merits. An ORDER, in accordance with this Letter Opinion, shall issue today.

Sincerely,

[redacted]

Randy I. Bellows
Circuit Court Judge

cc: Raymond Morrogh, Esq., Commonwealth's Attorney
Jamie Hiles, Esq., Assistant Commonwealth's Attorney
William Pickett, Esq., Trial Counsel

[106] See generally Slayton v. Parrigan, 215 Va. 27, 30 (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.").

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX

DAVID ROGANTI,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civ. Case No. CL-2016-17279**
	)	(Crim. Nos. FE 2013-870 &
	)	FE 2013-1034)
HAROLD CLARKE, Director,	)	
Virginia Department of Corrections,	)	
	)	
Respondent.	)	

ORDER

Before the Court is Mr. David Roganti's Habeas Petition. For the reasons stated in the Letter Opinion issued this day, the Petition is DISMISSED in part for lack of jurisdiction, and the remainder is DENIED on the merits.

This is a FINAL ORDER.

SO ORDERED, this 24 day of May, 2017.

[redacted]

JUDGE RANDY I. BELLOWS