NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 11, 2022

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Re: *Jason Alexander Miller* v. *Harold W. Clarke*, CL 2020-19027

Dear Mr. Engle and Ms. Campbell:

This matter is before the court on Petitioner Miller's *Petition For A Writ of Habeas Corpus*, which consists of nine (9) claims. Petitioner was convicted of strangulation[1] (sentenced to 2 years and 6 months with 18 months suspended), domestic assault and battery,[2] third

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[1] "Any person who, without consent, impedes the blood circulation or respiration of another person by knowingly, intentionally, and unlawfully applying pressure to the neck of such person resulting in the wounding or bodily injury of such person is guilty of strangulation, a Class 6 felony." Code § 18.2-51.6.

[2] "Any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor." Code § 18.2-57.2(A).

OPINION LETTER

or subsequent offense (sentenced to 5 years), and stalking[3] (sentenced to 9 months) after a jury trial which began on April 29, 2019. Petitioner did not appeal his convictions. He now seeks to overturn his convictions on the ground of ineffective assistance of counsel.

The court held an evidentiary hearing on November 17, 2021 at which the court heard testimony from Petitioner's former counsel, Faraji Rosenthall, and a witness for Respondent, Bennett Brasfield, who had prosecuted Petitioner. On Respondent's motion to strike, the court dismissed Claims VII and VIII as no evidence was offered to support those claims. During closing argument, the court requested the parties to submit additional briefing on the issue of the "U Visa" (8 U.S.C. § 1101(a)(15)(U)), which the parties timely submitted on December 1, 2021. The matter is now ripe for decision.

ANALYSIS

Each of Petitioner's claims asserts, for different reasons, that Mr. Rosenthall did not provide effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court held that the elements of an ineffective assistance of counsel claim are (1) "that counsel's performance was deficient" *and* (2) "that the deficient performance prejudiced the defense." *Id.* at 687.

When determining whether counsel performed deficiently, "the proper standard for attorney performance is that of reasonably effective assistance." *Id.* The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688-89.

Moreover, even if trial counsel's performance was deficient, that deficiency only prejudices the defendant if:

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

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[3] "Any person . . ., who on more than one occasion engages in conduct directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member is guilty of a Class 1 misdemeanor." Code § 18.2-60.3.

Id. at 694.

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).[4]

Claim I

Petitioner argues that he was deprived of his right to effective assistance of counsel because Mr. Rosenthall did not "object[] to the submission of a felony charge to the jury on a count that set forth only the elements of a lesser-included misdemeanor." *Petition* at 12. The basis of Petitioner's contention is that the *indictment* did not charge a felony because it did not allege either that: 1) Petitioner was twice previously convicted of any of the offenses enumerated in Code § 18.2-57.2(B), or 2) the previous offenses had occurred "within a period of 20 years."

The indictment alleged:

> The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its January Term, 2019, charges that: On or about the 18th day of October, 2018, in the County of Fairfax, Jason Alexander Miller did unlawfully and feloniously assault and batter one [redacted], a family or household member, after having been previously convicted of assaulting a family or household member on different dates, a third or subsequent offense. (Citing Code § 18.2-57.2(B)).

Code § 18.2-57.2 provides in pertinent part:

> A. Any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor.
>
> B. Upon a conviction for assault and battery against a family or household member, **where it is alleged in the . . . indictment on which a person is convicted,** that such person has been previously convicted of two offenses against a family or household member of (i) assault and battery against a family or household member in violation of this section, .

[4] *Williams* v. *Warden*, 278 Va. 641(2009), applied only the only the "prejudice" prong and *Sheikh* v. *Buckingham Correctional Center*, 264 Va. 558 (2002), applied only the "performance" prong.

> . . , all of which occurred within a period of 20 years, and each of which occurred on a different date, such person is guilty of a Class 6 felony. (Emphasis added).

Thus, the plain language of Code § 18.2-57.2 leaves no doubt that there is a statutory mandate that the indictment must expressly allege that the defendant was "convicted of two offenses against a family or household member," that those two offenses may be "assault and battery against a family or household member," and that the predicate offenses must have "occurred within a period of 20 years" and on a different dates.

In discussing the requirements of Code § 18.2-57.2, *Lewis v. Commonwealth,* 295 Va. 454 (2018) stated:

> The requirements imposed by the statutory language are clear and unambiguous. . . . [T]he statute requires that the . . . indictment charging the defendant with a felony offense **must allege** that he or she "has been previously convicted of two" of the listed predicate offenses on different dates within twenty years. Thus, when a defendant is tried upon an indictment charging a felony offense of assault and battery of a family or household member, as Lewis was, **he or she cannot be convicted of the felony unless the indictment alleged the two predicate convictions.**

295 Va. at 461 (emphasis added).

In the case at bar, the indictment did not expressly allege that the defendant was "convicted of two offenses against a family or household member," that those two offenses may be "assault and battery against a family or household member," and that the predicate offenses must have "occurred within a period of 20 years" and on a different dates.

Respondent argues that the indictment was good enough to meet the statutory requirement that the defendant was "convicted of two offenses against a family or household member" because it "allege[d] the two predicate convictions" in that it "alleged that Miller had previously been convicted of assaulting a family or household member 'on different dates' (plural)." *Motion To Dismiss* at 12.

Moreover, according to Respondent, the indictment:

> certainly directed Miller to the correct statute he was being charged under, Code § 18.2-57.2, the only statute for assault and battery of a family or household member, and made out the

appropriate allegations to put him on notice of the charge and the Commonwealth's intent to prove the predicate offenses and elevate the punishment for the offense.

Motion To Dismiss at 13.

With regard to the first contention, the fact that the indictment "directed Miller to the correct statute" is not compliant with the plain language of Code § 18.2-57.2 if the Commonwealth seeks a felony conviction; the statute requires that the indictment allege that the defendant "has been previously convicted of two" of the listed predicate offenses on different dates within twenty years.

As to the contention that the indictment "made out the appropriate allegations to put him on notice of the charge and the Commonwealth's intent to prove the predicate offenses and elevate the punishment for the offense," that again is not what is required by Code § 18.2-57.2 if the Commonwealth seeks a felony conviction; the statute requires that the indictment allege that the defendant "has been previously convicted of two" of the listed predicate offenses on different dates within twenty years. Indeed, the indictment here does not even allude to the "within a period of 20 years" element of the felony charge, let alone expressly allege it. The fact that there is reference to "after having been previously convicted of assaulting a family or household member on different dates, a third or subsequent offense" -- which is apparently what Respondent believes put Petitioner "on notice of the charge and the Commonwealth's intent to prove the predicate offenses and elevate the punishment for the offense" -- is not adequate in light of the very specific language of Code § 18.2-57.2, which specifies what must be "alleged in the . . . indictment . . . ."

The court thus concludes that the indictment did not charge a felony.

Having found that the indictment did not charge a felony, the court must next address whether counsel's performance was deficient, *i.e.*, did he provide reasonably effective assistance in not objecting to the submission of a felony charge to the jury on a count that set forth only the elements of a lesser-included misdemeanor.

First, it is clear that Petitioner's counsel did not object to the submission of a felony charge to the jury on an indictment that set forth only the elements of a lesser-included misdemeanor as Petitioner's counsel agreed to Instruction 7A (*Trial Tr.* 128), which stated:

Instruction number 7A. The Defendant Jason Alexander Miller

is charged with the crime [of] assault and battery against a family or household member, third or subsequent offense.

The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime.

One, the Defendant committed an assault and battery against [redacted]; and, two, that [redacted] was an individual with -- who was cohabitating with or who within the previous 12 months cohabitated with the Defendant; and, three, that the Defendant has at least two prior convictions against a family or household member of one, assault and battery against a family member or household member, or, two, malicious wounding or unlawful wounding; and, four, that such prior offense occurred on a different date within 20 years of the current offense.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the Defendant guilty of assault and battery of a family or household member, third or subsequent offense, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has proved beyond a reasonable doubt the first two elements of the crime as charged, but you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the remaining elements, then you shall find the Defendant guilty of assault and battery of a family or household member.

But you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has proved beyond a reasonable doubt the first element of the offense as charged, but you find that the Commonwealth has failed to prove that the person assaulted was a family or household member, then you shall find the Defendant guilty of assault and battery, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the first element of the offense then you shall find the Defendant not guilty.

Trial Tr. 143-145.[5]

In view of the indictment, Petitioner's counsel was deficient, *i.e.*, he did not provide reasonably effective assistance, in not objecting to this instruction as it opened the door for the jury to find Petitioner guilty of a felony, rather than a misdemeanor.

Turning to the second prong of *Strickland* -- did the deficient performance prejudice the defense, *i.e.*, was there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different -- the question that must be asked to make this determination is what would have happened if Petitioner's counsel *had* objected to Instruction 7A because it allowed for submission of a felony charge to the jury on an indictment that set forth only the elements of a lesser-included misdemeanor.

At the hearing on November 17, 2021, the Assistant Commonwealth Attorney, who prosecuted the case was asked:

> In your experience as a prosecutor if the indictment had been objected to pretrial what would you have done?

Hearing Tr. at 117.

He responded:

> I would have orally moved to amend the indictment and ask the judge to hand-mark it to conform to the charge in a way that would have alleviated any concerns defense counsel might have. Or in the alternative, if the judge did not want to make those hand marks to the indictment itself I would have asked for a brief recess, gone downstairs to my office on the first floor, and enlisted the assistance of my administrative staff in preparing a new indictment. Printed it out and brought it back upstairs to the courtroom.

Id.

The court's authority to amend an indictment is found in Code § 19.2-231, which provides in pertinent part:

> If there be any defect in form in any indictment . . . , or if there shall appear to be any variance between the allegations therein and the evidence offered in proof

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[5] Although the indictment did not charge a felony, this instruction properly instructed the jury on the elements of the felony offense.

> thereof, the court **may permit amendment** of such indictment . . . , **at any time before the jury returns a verdict** . . ., provided the amendment does not change the nature or character of the offense charged. . . . (Emphasis added).[6]

Thus, the Commonwealth plainly had the authority to seek amendment of the indictment -- not just pretrial, but even up to the time the jury was deliberating -- as long as the amendment did not "change the nature or character of the offense charged. . . ."

Petitioner argues that amending the indictment to allege expressly that the defendant was "convicted of two offenses against a family or household member," that those two offenses may be "assault and battery against a family or household member," and that the predicate offenses must have "occurred within a period of 20 years" and on a different dates would change the "nature or character of the offense charged" (and thus bar the court from amending the indictment), relying upon *Evans v. Commonwealth,* 183 Va. 775, 780-781 (1945). *Evans* does not support Petitioner.

The gravaman of *Evans* is the following:

> It was the province of the grand jury to ascertain from the evidence adduced whether or not the prosecutrix was unmarried. The only possible knowledge the trial court possessed was acquired through the motion of the attorney for the Commonwealth to amend the indictment.

183 Va. at 780.

In the case at bar, by contrast, because the evidence did not depend upon testimony of a witness, but simply upon review of judicial records (of prior convictions), the trial court could have ascertained whether Petitioner had been "convicted of two offenses against a family or household member," that those two offenses were "assault and battery against a family or household member," and that the predicate offenses "occurred within a period of 20 years" and on a different dates. Moreover, the grand jury plainly intended to charge Petitioner with a third or subsequent offense because those specific words were in the indictment, as were the words "after having been previously convicted of assaulting a family or household member *on different dates* . . . ."

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[6] Code § 19.2-231 is "remedial in nature and is to be liberally construed in order to achieve the laudable purpose of avoiding further unnecessary delay in the criminal justice process by allowing amendment, rather than requiring reindictment by a grand jury." *Powell v. Commonwealth,* 261 Va. 512, 533 (2001).

(emphasis added). Thus, *Evans* would not have barred the Commonwealth from amending the indictment.

Petitioner also argues that whether the Commonwealth would have sought to amend the indictment is "an entirely speculative distraction." *Reply* at 7. The court disagrees. Had Petitioner's counsel raised the issue of the shortcomings of the indictment prior to the jury's verdict, it is simply not credible that the Commonwealth would have done nothing to correct such an obvious flaw. Indeed, the Assistant Commonwealth Attorney who prosecuted Petitioner so testified. *Hearing Tr.* at 117.

A similar situation existed in *Martin v. Warden,* 2 Va. App. 6 (1986), where "trial counsel stated that to object would have resulted in an amendment of the indictment under Code § 19.2-231." 2 Va. App. at 12. Thus, the Court of Appeals held that, "with respect to the attempted sodomy indictment, such defective language, if any, denoting fellatio instead of cunnilingus was subject to a curative amendment under Code § 19.2-231. . . . Therefore, trial counsel's failure to object to any defect in the indictment resulted in **no prejudice** to petitioner." 2 Va. App. at 13 (Emphasis added).

In sum, had Petitioner's counsel's performance not been deficient, *i.e.*, had he objected to the submission of a felony charge to the jury on an indictment that set forth only the elements of a lesser-included misdemeanor, the result of the proceeding would have been the same -- the jury would have been properly instructed as it was and Petitioner would stand convicted of a felony. Accordingly, the court finds that Petitioner was not prejudiced by Petitioner's counsel's deficient performance. The court thus DISMISSES Claim I.

Claim II

Petitioner asserts that, "because the indictment charged only a misdemeanor, there was no legal basis to admit Mr. Miller's [four] prior convictions." *Petition* at 13. While Petitioner's counsel may have been deficient in not objecting to the admission of these prior convictions based upon the indictment, Petitioner was not prejudiced by Petitioner's counsel's deficient performance because there was no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different in light of the court's decision on Claim I. The court thus DISMISSES Claim II.

Claim III

Petitioner asserts that Petitioner's counsel was ineffective for withdrawing a question during cross-examination of the victim.

Petitioner's counsel asked, in the presence of the jury: "But a household member would make you eligible for a U-visa?" The Commonwealth's Attorney then asked to approach the bench and objected, stating:

> So I don't think this was done maliciously (unintelligible) I used to do immigration work. For it to be eligible for a U visa you have to be a victim of qualifying criminal activity. You do not have to be a family or household member that has no effect.

Trial Tr. at 246.

At that point, the judge asked defense counsel "[d]o you know the difference?" and defense counsel answered: "No." *Id.* The prosecutor then stated:

> So, Your Honor, like I said I did this work for a couple of years. And legally in Fredericksburg I did U visa petitions. You do not necessarily have to be a cohabit – or a family or a household member under 16.1-228 to be eligible for a U visa. So I think the question is misleading to the jury. I don't think Mr. Rosenthall did that intentionally but I think the jury needs to be made –

Id.

Petitioner's counsel then withdrew the question and the court so informed the jury.

Petitioner asserts that Petitioner's counsel was ineffective for withdrawing the question. *Petition* at 15-16.

A "U visa" is a visa issued pursuant to 8 U.S.C. § 1101(a)(15)(U). To decide if Petitioner's counsel was ineffective for withdrawing his cross-examination question, the court needs first to determine whether, to be eligible for a "U visa," a victim must be a family or household member.

8 U.S.C. § 1101(a)(15)(U) provides in relevant part:

> (a) As used in this chapter –
>
> * * *
>
> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant

aliens –

* * *

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that –

> (I) the alien has suffered substantial physical or mental abuse as a result of having been a **victim of criminal activity** described in clause (iii) . . .; [and]
>
> * * *
>
> (IV) the criminal activity described in clause (iii) violated the laws of the United States or **occurred in the United States** (including in Indian country and military installations) or the territories and possessions of the United States;

* * *

(iii) the **criminal activity** referred to in this clause is that involving **one or more of the following** or **any similar activity** in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; **domestic violence**; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; **felonious assault**; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes . . . . (emphasis added).

The terms "any similar activity," "domestic violence," and "felonious assault" are not defined by Title 8. Thus, the terms must be interpreted "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock* v. *Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). One source of that ordinary public meaning could be the state statute relating to domestic violence.

Virginia's domestic violence statute, Code § 18.2-57.2, provides: "A. Any person who commits an assault and battery against a **family or**

household member is guilty of a Class 1 misdemeanor." (Emphasis added).[7]

Accordingly, in Virginia, to the degree that a victim is claiming eligibility for a "U visa" because she was the victim of "domestic violence," she would have to show that she was a family or household member of the abuser, making the Commonwealth's Attorney's statement to the court that "[y]ou do not *necessarily* have to be . . . a family or a household member under 16.1-228 to be eligible for a U visa" (emphasis added) true, to the extent that a victim of domestic violence is seeking to show that the relevant criminal activity was something other than "domestic violence."[8]

But the assertion of the Commonwealth's Attorney that being a family or household member "has no effect" is untrue. Thus, Petitioner's counsel's question ("But a household member would make you eligible for a U-visa?") was a proper question, was not "misleading to the jury," and should not have been withdrawn. Petitioner's counsel's performance in this respect was, therefore, deficient.

The second part of the *Strickland* test, however, is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

The court concludes that there is not a reasonable probability that the result of the proceeding would have been different had Petitioner's counsel understood 8 U.S.C. § 1101(a)(15)(U) and not withdrawn the cross-examination question ("But a household member would make you eligible for a U-visa?"). The court bases this upon the fact that Petitioner's counsel both presented evidence, and closing argument, that the victim was not credible because she had a motive to lie to remain in the United States.

For example, the victim was asked on cross-examination:

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[7] Code § 18.2-57.2(D) adopts the definition of the phrase "family or household member" from Code § 16.1-228.

[8] Conviction of the alleged abuser of a violation of Code § 18.2-51.6 or Code § 18.2-60.3 would not support a contention that the alleged abuser was guilty of an offense in which the victim was a family or household member, although conviction of a violation of Code § 18.2-51.6 would support a contention that the alleged abuser was guilty of felonious assault, but, because Petitioner's counsel's question did not involve felonious assault, that fact is not germane to the instant Petition.

Q: Okay. Are you familiar what a U visa is?

A: I heard about it.

Q: Okay. And what do you understand that to be?

A: I think if someone is married and they get hurt, they can get it. That's what I know about it or someone is a victim of something that happened in the United States.

Q: But you've never done any research on that process?

A: Never.

Q: You've never talked to my client about it?

A: No.

Q: You never talked to the domestic shelter - I'm sorry, the domestic staff in Maryland about it?

A: No, cause it's not something I wanted.

Q: Why is that?

A: Cause I already have a cased built up with asylum.

Trial Tr. (April 29, 2019) at 237-238.

The issue came up again moments later:

Q: But you are aware that there may be another path to get a visa?

A: I am.

Q: Okay. And that path would be identifying or cooperating with the police as a victim of a crime?

A: True.

Q: Okay. And you're saying that you've never researched that path that could help you avoid potential death in Saudi Arabia?

A: No.

Q: Not even a Google search, nothing?

A: I don't need to.

Q: Because you're very confident about your asylum claim?

A: It's not cause I'm confident cause if it doesn't work out the first time, you can appeal it twice before you get deported.

Q: Okay. And so you would do all that before you would even look at the benefit of this case to you?

* * *

A: I still wouldn't do it cause it's not worth it.

Q: It's not worth -- getting the U visa is not worth it?

A: Yeah, I don't want a U visa.

Q: And again, why is that?

A: Cause I have faith in my case.

Trial Tr. (April 29, 2019) at 240-241.

Finally, on redirect, was the following questioning:

Q: [redacted] have you applied for a U visa?

A: No.

Q: Have you contacted any law enforcement officer, whether in Fairfax County or anywhere else --

A: Unh-unh.

Q: -- about a U visa?

A: No.

Q: Have you contacted me about a U visa?

A: No.

Trial Tr. (April 29, 2019) at 260.

In closing argument, Petitioner's counsel argued about the "U visa":

> And it would be completely implausible to believe that she has at no point done a Google search of how a U visa process works.
>
> That she communicated this fear to her friend because she knows that she is in a life or death situation, that if the asylum is not granted, that she does risk certain punishment to include death, and that she doesn't even take the time to do a Google search?
>
> That wouldn't have even been that big of a deal. It just doesn't make any sense to simply believe we think that you don't even recognize what the possible advantage to this would be.
>
> It simply is implausible. And in that circumstance, ladies and gentlemen, it is not that you have to completely disbelieve her.
>
> You just have to believe there is a possibility that she is embellishing the sotry (*sic*) or is fabricating it in order to get my client in trouble and get her to avoid the certain punishment that would happen if the asylum request did not come through.

Trial Tr. (April 30, 2019) at 171-172.

In view of the above, Petitioner's counsel was more than able to develop his defense theory: that the victim had a motive to lie and did lie.

The court thus DISMISSES Claim III.

Claim IV

Petitioner contends that Petitioner's counsel did not object to the following hearsay statement by the victim's boss at Haifa Grill, Mahmud ("Mike") Hamdeh:

> And she's like, "No, I" -- she's like, "You know, I -- I almost got killed today. I had almost a knife put in -- on my neck." And, you know, it's like, "He -- he -- he choked me."

Trial Tr. (April 30, 2019) at 31.

At the hearing on the *Petition*, Petitioner's counsel did not recall whether he made a strategic decision not to raise a hearsay objection (*Hearing Tr.* (November 17, 2021) at 23) and explained that there are times when he does not object because "I feel like that will attract the jury's attention to things" and that there are times he "will let hearsay in just because I think the jury may not believe it" or because he does not "want them to take specific notice." *Id.* at 24.

In defense of Petitioner's counsel, Respondent argues that it was reasonable for counsel not to object to this testimony and draw further attention to it in front of the jury, that it was not being offered for the truth of the matter asserted, and that it was admissible hearsay under the excited utterance exception.

The court disagrees that was reasonable for counsel not to object to this testimony. The statement was plainly inculpatory of Petitioner and served to corroborate and bolster the victim's testimony. Thus, because Petitioner's counsel did not assert that not objecting was a strategic decision and because the objection certainly would have been sustained, the court finds that it was not reasonable for counsel not to have objected to this testimony, unless the statement was not being offered for the truth of the matter asserted or it was an excited utterance.

Turning to Respondent's other arguments, *i.e.*, that the statement was not being offered for the truth of the matter asserted or it was an excited utterance, the court first notes that Respondent does not even attempt to show that the statement was not being offered for the truth of the matter asserted. As the court cannot conjure up any basis for contending that the statement was not being offered for the truth of the matter asserted, the court rejects that argument of Respondent and finds that the statement was certainly being offered for the truth of the matter asserted to corroborate and bolster the victim's testimony.

As to whether the statement was an excited utterance, *Goins v. Commonwealth,* 251 Va. 442 (1996) held that a statement comes within the excited utterance exception to the hearsay rule and is admissible to prove the truth of the matter stated when "the statement is spontaneous and impulsive," and that it "must be prompted by a startling event" and must "be made at such time and under such circumstances as to preclude the presumption that it was made as the result of deliberation." 251 Va. at 460. The statement of the victim recited by Mr. Hamdeh does not qualify as an excited utterance as it was not spontaneous and impulsive and was not prompted by a startling event as it was made the evening following the alleged incident "when [redacted] showed up for work." Petitioner's *Reply In Support of Petition* at 17.

As the statements were inadmissible hearsay, the court finds that it was not reasonable for counsel not to have objected to this testimony.

Nonetheless, even it was not reasonable for counsel not to have objected to this testimony and Petitioner's counsel's performance was deficient in this respect, the court cannot find that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different in light of the testimony of the victim, Ms. Demissie, and Mr. Hamdeh: the victim testified that Petitioner strangled her, leaving marks on her neck (*Trial Tr.* (April 29, 2019) at 152-153, 162) and pointed a knife "on her face" (*Id.* at 157). Ms. Demissie testified that she saw bruises around the victim's neck and face. *Trial Tr.* (April 30, 2019) at 17. Mr. Hamdeh testified that he saw bruises around the victim's neck. *Id.* at 31.

The court thus DISMISSES Claim IV.

Claim V

Petitioner contends that Petitioner's counsel's performance was deficient because he did not impeach Mr. Hamdeh with a prior inconsistent statement when Mr. Hamdeh was asked on direct examination at trial: "Did the Defendant say anything to you at this time?" and Mr. Hamdeh answered that Petitioner stated: "I'm about to shoot everybody. I'll bring a gun and shoot everybody." *Trial Tr.* (April 30, 2019) at 37. The prior statement that Petitioner urges was inconsistent was in response to a question at the preliminary hearing, where Mr. Hamdeh was asked: "[A]t any time that you saw Mr. Miller at the restaurant following – after October 19th, did he ever make any threats to you?" and Mr. Hamdeh responded: "To me, personally?" -- "No, sir."

Mr. Hamdeh's statements were not inconsistent in that, in his statement at trial, he did not state that Petitioner threatened him "personally," which was the gravaman of his statement at the preliminary hearing. Petitioner's counsel's performance was thus not deficient and Claim V is DISMISSED.

Claim VI

Petitioner claims that Petitioner's counsel's performance was deficient because he did not move to strike the stalking charge because, other than the first instance of stalking:

> no reasonable fact-finder could find proof beyond a reasonable doubt that the defendant engaged in threatening conduct directed toward [redacted] on "more than one occasion"

within the Commonwealth of Virginia.

Petition at 24.

Code § 18.2-60.3(A) provides in pertinent part:

> Any person . . . who on more than one occasion engages in conduct directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person . . . is guilty of a Class 1 misdemeanor. . . .

Code § 18.2-60.3(C) provides:

> A person may be convicted under this section irrespective of the jurisdiction or jurisdictions within the Commonwealth wherein the conduct described in subsection A occurred, if the person engaged in that conduct on at least one occasion in the jurisdiction where the person is tried. Evidence of any such conduct that occurred outside the Commonwealth may be admissible, if relevant, in any prosecution under this section provided that the prosecution is based upon conduct occurring within the Commonwealth.

Aside from the evidence of the assault in Fairfax County -- which satisfied the venue requirement of Code § 18.2-60.3(C) -- the Commonwealth's other evidence of conduct directed at [redacted] was emails sent to her by Petitioner.[9] But, as Petitioner points out, there was no evidence that the emails were sent from Virginia, as required by Code § 18.2-60.3(C). That Code § 18.2-60.3(C) requires that the emails sent to [redacted] had to have been sent from Virginia is evident from the fact that it allows conviction "irrespective of the jurisdiction or jurisdictions **within the Commonwealth**" (emphasis added) wherein the relevant conduct occurred. Moreover, the second sentence mandates that, while "conduct that occurred outside the Commonwealth may be admissible," the prosecution must be "based upon **conduct occurring within the Commonwealth.**" (emphasis added). Thus, even had the emails placed [redacted] "in reasonable fear of death, criminal sexual assault, or bodily injury," the evidence was insufficient to find Petitioner guilty of stalking.

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[9] Respondent also points to visits Petitioner made to [redacted] place of employment, but the evidence showed that she was in Maryland at the time. Thus, this conduct was not "conduct directed at" [redacted] and was not relevant to the stalking charge.

Petitioner is then correct that Petitioner's counsel's performance was deficient *if* he did not move to strike the stalking charge because there was no evidence, other than the first instance of stalking, that Petitioner engaged in conduct directed toward [redacted] *within the Commonwealth of Virginia*. In fact, however, Petitioner's counsel *did* move to strike the stalking charge on that basis when he argued: "There's no evidence of where my client was when he sent those emails." *Trial Tr.* (April 30, 2019) at 56. The fact that the trial court did not grant the motion to strike is a matter that could have been raised on appeal, but cannot be laid at the feet of Petitioner's counsel. Accordingly, Petitioner's counsel's performance was not deficient and Claim VI is DISMISSED.

Claim IX

Petitioner urges the court to find that, even if "no issue independently warrants a new trial, the case must be assessed as a whole." Petition at 29. This claim is foreclosed by *Lenz v. Warden of the Sussex I State Prison*, 267 Va. 318 (2004):

> 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.

267 Va. at 340.

Claim IX is thus DISMISSED.

CONCLUSION

AS the court has dismissed all of Petitioner's claims, the court hereby DISMISSES the Petition.

An appropriate order shall enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

OPINION LETTER

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JASON ALEXANDER MILLER	)	
	)	
Petitioner	)	
	)	
v.	)	CL 2020-19027
	)	
HAROLD W. CLARKE, Director, Virginia Department of Corrections	)	
	)	
Respondent	)	

ORDER

THIS MATTER came before the court on Petitioner's *Petition For A Writ of Habeas Corpus* and,

THE COURT having considered the *Petition*, Respondent's *Motion To Dismiss*, Petitioner's *Reply*, the evidence adduced at the hearing on November 17, 2021, and the parties' oral arguments, it is hereby

ORDERED, for the reasons stated in the court's letter opinion of today's date, that the *Petition* is DENIED.

ENTERED this 11th day of March, 2022.

[redacted]

Richard E. Gardiner
Judge

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