VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 18th day of October, 2018.

Present: Lemons, C.J., Goodwyn, Mims, McClanahan, Powell and Kelsey, JJ., and Lacy, S.J.

Mark O. Wright, No. 1141826, Petitioner,

against Record No. 170163

John Woodson, Warden, Augusta Correctional Center, Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus, the record, briefs, and argument of counsel, the Court is of opinion that the writ should not issue and the petition should be dismissed.

I. BACKGROUND AND MATERIAL PROCEEDINGS

Mark O. Wright was indicted upon several charges including, as relevant here, a charge of robbery, in violation of Code § 18.2-58. At the conclusion of trial, the parties proposed jury instructions to the trial court. In proposing a jury instruction on the offense of robbery ("Jury Instruction 10"), the Commonwealth said,

> I have included a lesser[-]included charge later in the body of this describing that if the jury finds that the taking was accomplished without violence or intimidation or the threat of bodily harm and that the property taken was worth $5.00 or more, then there's a lesser[-]included charge of grand larceny from the person and I think we [i.e., Wright and the Commonwealth] are in agreement to that.

Although Wright objected to Jury Instruction 10 on other grounds, he did not object that the offense of grand larceny by larceny from the person of $5 or more, in violation of Code § 18.2-95(i), is not a lesser-included offense of robbery.[1] He also did not dispute that he had

[1] The Court held that grand larceny by larceny from the person is not a lesser-included offense of robbery in *Commonwealth v. Hudgins*, 269 Va. 602, 606 (2005).

agreed with the Commonwealth to include the relevant language in the jury instruction. After overruling Wright's objections, the trial court accepted the jury instruction as proposed.

The jury thereafter returned a verdict of guilty on the grand larceny offense. The signed verdict form in the trial record upon which the foreperson recorded its verdict includes two options: (1) "We the jury find the defendant, Mark Wright, guilty of robbery, as charged," "or" (2) "We the jury find the defendant, Mark Wright, guilty of grand larceny from a person." (Capitalizations omitted.) The signed verdict form in the trial record does not include a third option allowing the jury to find Wright not guilty of either offense, but the word "or" appears again at the bottom of the page. After receiving the verdict, Wright polled the jury, which confirmed it. It thereafter recommended a sentence of ten years' imprisonment.

Wright later moved to set aside the jury's verdict, arguing that there was no evidence that he had taken anything from any person. The trial court denied the motion and imposed the sentence recommended by the jury.

Wright appealed to the Court of Appeals, asserting among other things that the grand larceny offense is not a lesser-included offense of robbery. The Court of Appeals ruled that he failed to preserve that issue because he had not raised it at trial, and this Court declined to review that ruling upon his subsequent appeal here. *Wright v. Commonwealth*, 292 Va. 386, 393-94 (2016), *cert. denied*, 581 U.S. ___ (2017).

Wright thereafter filed the instant petition under this Court's original jurisdiction. In it, he asserts seven claims. First, he claims that his trial counsel was ineffective because he did not object to Jury Instruction 10 on the ground that Wright was not charged with the grand larceny offense. Second, he claims that his appellate counsel were ineffective because they did not assign error to his conviction for the grand larceny offense on the ground that the evidence was insufficient to prove that the value of the property taken was $5 or more. Third, he claims that his appellate counsel were ineffective because they did not assign error, in his appeal to this Court, to the Court of Appeals' application of Rule 5A:18. By applying the Rule, that court refused to consider his assignment of error there asserting that the trial court erred by convicting him of the grand larceny offense because it was not charged and is not a lesser-included offense of robbery. Fourth, he claims that the trial court lacked subject-matter jurisdiction to enter a judgment on the grand larceny offense. Fifth, he claims that evidence relating to another charge

tried simultaneously with the robbery charge was prejudicial, resulting in "retroactive misjoinder." Sixth, he claims that trial counsel was ineffective because he did not object to the verdict form, which he alleges omitted an option for the jury to find him not guilty of both the robbery charge and the grand larceny offense. Seventh, he claims that the trial court abused its discretion by allowing the jury to find him guilty of a crime that he was not charged with.

Pursuant to a rule to show cause why the writ should not be granted, John Woodson, in his capacity as warden of the Augusta Correctional Center ("the Warden"), filed a motion to dismiss the petition.

In consideration of these pleadings, the Court ruled that a determination of facts was required to adjudicate Wright's first and sixth claims. Consequently, the Court directed the Circuit Court of Rockingham County to "determine what justification, if any, counsel had for agreeing to" Jury Instruction 10 and "whether the verdict form was in fact incomplete." *Wright v. Woodson*, Record No. 170163 (Nov. 14, 2017).

After an evidentiary hearing, the circuit court reported its findings of fact. As to the first question, it found that Wright's trial counsel

> was unaware [at trial] that larceny from the person is not a lesser[-]included offense of robbery. He did not object to [Jury Instruction 10] because it gave the jury the ability to find culpability but not be constrained to impose a sentence beginning at five years in the penitentiary. [He] wanted the jury to have the option of perspective and a lighter sentence. There was a strategy coupled with a lack of knowledge.

As to the second question, the court found that "the verdict form was correctly prepared and at the time of its preparation, included a second page with language allowing the jury to find Wright not guilty of either charge." (Emphasis omitted.) It continued by surmising that the clerk "only scanned in the portions of verdict forms that had the signature of the foreperson, as the second page [of the verdict form for a separate charge] also is not scanned into the file, yet the record reflects that [that] form in fact provided for a not guilty verdict." It concluded that "it is more likely than not that the verdict form was complete at the time of the jury's deliberations, and that the second page was somehow later lost or destroyed."

II. ANALYSIS

Whether a petitioner is entitled to habeas relief is a question of law this Court reviews de novo. *Dominguez v. Pruett*, 287 Va. 434, 440 (2014). When this Court considers a petition for a

writ of habeas corpus under its original jurisdiction and has referred factual questions to the circuit court, it is bound by the findings reported by that court unless they are plainly wrong or without evidence to support them. *Yarbrough v. Warden*, 269 Va. 184, 195 (2005).

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

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

An ineffective assistance of counsel claim may fail on either the deficient performance or the prejudice prong. *Spencer v. Murray*, 18 F.3d 229, 232-33 (4th Cir. 1994.) To prevail, the petitioner bears the burden to prove both prongs by a preponderance of the evidence. *Sigmon v. Director of the Dep't of Corr.*, 285 Va. 526, 535 (2013).

A. CLAIM 1

Wright asserts that his trial counsel was constitutionally ineffective for failing to object to Jury Instruction 10 on the ground that the grand larceny offense is not a lesser-included offense of robbery. Wright argues that trial counsel's failure to object could not be considered a tactical decision because the circuit court found that he did not know at the time of trial that the grand larceny offense was not a lesser-included offense of robbery, and therefore did not know that it was a basis upon which to object.

The Warden responds that the circuit court found that Wright's trial counsel decided not to object for tactical reasons. Citing several federal decisions, the Warden also argues that mere ignorance of the law is insufficient alone to constitute deficient performance. Rather, a habeas petitioner must also show that a professionally competent attorney would not have taken the same approach as the petitioner's allegedly ill-informed attorney. Consequently, he concludes, although it is settled Virginia law that the grand larceny offense is not a lesser-included offense of robbery, a professionally competent attorney could still have decided that it was in Wright's

best interest to allow the jury to consider the grand larceny offense so it could recommend a sentence within the lower sentencing range provided for that offense.

The circuit court found as a factual matter that although Wright's trial counsel was unaware at trial that the grand larceny offense was not a lesser-included offense of robbery, he did not object to Jury Instruction 10 in part as a matter of trial strategy. It found that he "wanted the jury to have the option of perspective and a lighter sentence. There was a strategy coupled with a lack of knowledge."

The sentencing range upon conviction of robbery is imprisonment for a term of between five years and life. Code § 18.2-58. The range upon conviction of the grand larceny offense is confinement in jail for not more than twelve months, or imprisonment for a term of between one and twenty years. Code § 18.2-95. The transcript of the evidentiary hearing reveals that trial counsel admitted that he did not know at the time of trial that the grand larceny offense was not a lesser-included offense of robbery. However, he also testified that

> at that point in the trial . . . we'd done two motions to strike [the robbery charge] and I was surprised the first one wasn't granted. I was more surprised the second one wasn't granted. And I knew that we were having a robbery with a five to life sentence range going to a jury, and a zero to twenty looks a whole lot better than five to life. That's really what was on my mind.

He later reiterated that "the main thing I was trying to do was get a jury to have a possibility of a sentence range that started at zero and didn't go up to life." The record therefore supports the circuit court's factual finding.

These factual findings do not conclude the Court's analysis of the legal question of whether trial counsel's ignorance of the law supersedes his tactical decision, however. An attorney's legal error may, but does not necessarily, render his or her performance constitutionally deficient. "[A habeas] petitioner must establish that *no competent counsel* would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1320 (11th Cir. 2003) (emphasis added) (internal quotation marks omitted); *accord Rivera v. Thompson*, 879 F.3d 7, 12 (1st Cir. 2018) ("[T]he performance of trial counsel is deficient only where, given the facts known at the time, counsel's choice was so patently unreasonable that *no competent attorney* would have made it." (emphasis added) (internal quotation marks omitted)); *see also Strickland*, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective

assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were *outside the wide range of professionally competent assistance.*" (emphasis added)).

Thus, a court considering the question must consider the totality of the circumstances, to determine whether the attorney's representation was objectively unreasonable. *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir. 2002). In considering the totality of the circumstances in this case the Court concludes that trial counsel's representation was not objectively unreasonable. At the evidentiary hearing, he testified that he was taken aback by the trial court's denial of his motions to strike the robbery charge and was anxious that Wright would be convicted and exposed to the possibility of a life sentence. He explained that he agreed to Jury Instruction 10 because a conviction on the grand larceny offense would allow the jury to impose a sentence that limited incarceration to a term of no more than twenty years, and included the possibility of no incarceration at all. Wright therefore has not met his burden to prove the deficient performance prong of the *Strickland* test on this claim.

B. CLAIM 6

Wright asserts that his trial counsel was constitutionally ineffective for failing to notice that the verdict form omitted an option for the jury to find him not guilty of both the grand larceny offense and the robbery charge. He argues that there was no reasonable justification for failing to notice the omission of the option and object to it.

Wright's claim is predicated on his assertion that the verdict form was incomplete, and he bore the burden of proving it by a preponderance of the evidence. However, the circuit court found as a factual matter that "it is more likely than not that the verdict form was complete at the time of the jury's deliberations, and that the second page was somehow later lost or destroyed." Consequently, the record does not establish that there was any defect for his trial counsel to notice and object to. Wright therefore has not met his burden to prove the deficient performance prong on this claim.

C. REMAINING CLAIMS

1. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Claim 2, Wright asserts that appellate counsel were constitutionally ineffective for failing to assign error to the trial court's judgment on the ground that the evidence was insufficient to establish that the value of the property taken was $5 or more. In Claim 3, he asserts that they were constitutionally ineffective for failing to assign error in this Court to the Court of Appeals' application of Rule 5A:18. The Warden responds that appellate counsel "is not constitutionally obligated to raise every possible claim on appeal, and failure to do so does not render counsel's performance deficient."

An appellate attorney has wide latitude to select the issues he or she will pursue on appeal both because page limits constrain the scope of argument on brief and time limits constrain it at oral argument, and because the inclusion of weak arguments dilutes and conceals the merit of strong ones. *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983). However, that latitude does not amount to unassailable, plenary authority. Appellate counsel must still exercise "reasonable professional judgment[]" when deciding which issues to exclude. *Id.* at 754; *accord Strickland*, 466 U.S. at 690. Thus, a habeas petitioner may assert that counsel's performance was deficient when he or she failed to do so. However, neither of the claims here establish deficient performance.

As to Claim 2, trial counsel did not object to the sufficiency of the evidence on the grand larceny offense until the motion to set aside the verdict. He asserted then that the evidence was insufficient only because it established neither that Wright personally took anything from anyone nor that he was a principal in the second degree to the taking by his co-defendant. There was no objection on the ground that the evidence did not establish the value of the property taken.

Accordingly, under Rule 5A:18, the Court of Appeals could not have considered an assignment of error on that ground, except under the good cause or ends of justice exceptions. Wright does not identify any good cause for trial counsel's failure to object and the Court of Appeals has repeatedly noted that application of the ends of justice exception is "rare," and "may be invoked only where a miscarriage of justice would otherwise result." *McDuffie v. Commonwealth*, 49 Va. App. 170, 177-78 (2006) (internal quotation marks omitted); *accord M. Morgan Cherry & Assocs. v. Cherry*, 37 Va. App. 329, 340 (2002). Consequently, Wright has not met his burden to prove that the decision by his appellate counsel not to assign error where trial counsel failed to preserve a timely objection was not a reasonable professional judgment.

As to Claim 3, Wright's appellate counsel assigned error in the Court of Appeals to his conviction for the grand larceny offense, asserting that he had not been charged with it and it was not a lesser-included offense of robbery. That court refused to consider the assignment of error under Rule 5A:18 because trial counsel had made no objection below. Appellate counsel renewed the argument in an appeal to this Court, which declined to consider it because they did not assign error to the Court of Appeals' application of the Rule.

The trial record confirms the Court of Appeals' ruling that Wright's trial counsel did not object that Wright had not been charged with the grand larceny offense or that it was not a lesser-included offense of robbery. Consequently, the only ground for reviewing the Court of Appeals' application of Rule 5A:18, had appellate counsel assigned error to it, is that court's refusal to apply the exceptions. However, the record establishes that Wright did not ask the Court of Appeals to apply them. *Wright v. Commonwealth*, Record No. 0585-13-3, slip op. at 3 (Dec. 6, 2013) (unpublished). That court has held that it does not consider the exceptions sua sponte, and this Court has affirmed that holding. *Hill v. Commonwealth*, 68 Va. App. 610, 616 n.1 (2018) (citing *Edwards v. Commonwealth*, 41 Va. App. 752, 760 (2003) (en banc) and *Jones v. Commonwealth*, 293 Va. 29, 39 n.5 (2017)).

Consequently, even if appellate counsel had assigned error in this Court, it would have affirmed the Court of Appeals' application of Rule 5A:18. Thus, Wright has not met his burden to prove that appellate counsel's failure to assign such error resulted in prejudice because the outcome would have remained the same.

2. LACK OF SUBJECT-MATTER JURISDICTION

In Claim 4, Wright asserts that the trial court lacked subject-matter jurisdiction to convict him of the grand larceny offense. A lack of subject-matter jurisdiction would render his conviction void, and it may be raised at any time. *Morrison v. Bestler*, 239 Va. 166, 170 (1990). Subject-matter jurisdiction "is the authority granted through constitution or statute to adjudicate a class of cases or controversies." *Porter v. Commonwealth*, 276 Va. 203, 228 (2008) (quoting *Morrison*, 239 Va. at 169). Code § 17.1-513 confers subject-matter jurisdiction on all circuit courts to try all felonies, wherever committed within the Commonwealth. *Id.* at 229.

Consequently, the trial court had subject-matter jurisdiction to convict Wright of the grand larceny offense.[2]

3. DUE PROCESS

In Claim 5, Wright asserts that the trial court denied him due process by allowing the Commonwealth to try him for the grand larceny offense with other charges, specifically malicious bodily injury by caustic substance, in violation of Code § 18.2-52. He asserts that the evidence adduced to prove that charge prejudiced the jury's consideration of the grand larceny offense. Because this Court reversed his conviction on the malicious bodily injury charge, *Wright*, 292 Va. at 399, he argues that he is entitled to a new trial on the grand larceny offense under a theory of "retroactive misjoinder." *See United States v. Vebeliunas*, 76 F.3d 1283, 1293-94 (2d Cir. 1996) (citing *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994)).

Each of the cases discussing "retroactive misjoinder" cited by Wright was decided on direct appeal. *Vebelinas*, 76 F.3d at 1285; *United States v. Wapnick*, 60 F.3d 948, 949 (2d Cir. 1995); *United States v. Rooney*, 37 F.3d 847, 850 (2d Cir. 1994); *Jones*, 16 F.3d at 489; *United States v. Novod*, 927 U.S. 726, 727-28 (2d Cir. 1991); *United States v. Friedman*, 854 F.2d 535, 541 (2d Cir. 1988). Under Virginia law, whether a defendant may be tried for multiple offenses in a single trial is a matter committed to the sound discretion of the trial court, which is reviewable on direct appeal. *See Scott v. Commonwealth*, 274 Va. 636, 644 (2007). Consequently, this issue may not be raised for the first time in a petition for a writ of habeas corpus. *Slayton v. Parrigan*, 215 Va. 27, 29-30 (1974).

Similarly, on Claim 7, Wright asserts that the trial court abused its discretion by allowing the jury to find him guilty of the grand larceny offense, with which he had not been charged. This issue, too, was reviewable on direct appeal, so it may not be raised for the first time now. The associated arguments that Wright's trial and appellate counsel were constitutionally ineffective for failing to object or appeal on this ground have been addressed in Claims 1 and 3 above.

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[2] Wright also asserts in this claim that the trial court never acquired personal jurisdiction over him for the grand larceny offense. Unlike lack of subject-matter jurisdiction, lack of personal jurisdiction merely renders a judgment voidable, not void. *Bowman v. Concepcion*, 283 Va. 552, 561 (2012). It therefore may not be raised for the first time in a petition for a writ of habeas corpus. *Slayton v. Parrigan*, 215 Va. 27, 29-30 (1974).

III. CONCLUSION

For the foregoing reasons, the petition is dismissed.

A Copy,

Teste: Patricia L Harrington

Clerk