VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 11th day of April, 2024.

Present: All the Justices.

CHRISTOPHER THOMPSON, No. 1536377, PETITIONER,

against Record No. 191075

CHADWICK DOTSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, RESPONDENT.

UPON A PETITION FOR A WRIT OF HABEAS CORPUS

Upon consideration of the petition for a writ of habeas corpus filed August 16, 2019, the rule to show cause, the respondent's motion to dismiss, petitioner's reply, petitioner's supplemental petition, the respondent's supplemental motion to dismiss, and petitioner's reply to the supplemental motion to dismiss, the Court is of the opinion that the sole claim remaining before the Court should be dismissed and the writ should not issue.

I. BACKGROUND AND MATERIAL PROCEEDINGS

The record establishes that on the afternoon of April 7, 2014, Amy Elliott and her two minor children were leaving a shopping center when they were approached by petitioner. He was wearing a hat, a face-covering scarf, and sunglasses. Petitioner asked Elliott for money. When Elliott said she did not have any money, petitioner showed her a gun in his waistband. Elliott closed the door to her minivan so her children, who were already seated, could not see the gun.

Petitioner took Elliott's iPhone and wallet. Finding no money in the wallet, petitioner asked Elliott for her ATM card. Elliott presented her ATM card, and petitioner stated, "Here's what we're going to do. You're going to get in the car and you're going to take me to get money." Elliott drove to a gas station with an ATM across the street.

As petitioner and Elliott approached the ATM, Elliott mouthed "help me" to a nearby woman. Elliott tried to use the ATM to withdraw money, but it was out of service. As petitioner and Elliott walked back to her vehicle, petitioner told Elliott that he knew what she had done, referencing Elliott's mouthing "help" to the woman.

Petitioner then instructed Elliott to drive to another ATM at a bank. Elliott told petitioner there was no money in her account, and again, Elliott was not able to withdraw cash.

Unbeknownst to Elliott, the woman she encountered at the first ATM had called the police. When petitioner heard sirens approaching, he "got really irritated and antsy" and ordered Elliott to drive to an office park. Petitioner once again went through Elliott's wallet, taking her driver's license and warning her not to report the crimes, as he knew where she lived. Petitioner used a towel to wipe the van and Elliott's license for fingerprints. Petitioner then left and took the towel with him. Elliott reported the preceding events at a nearby police station. Approximately $450 was later withdrawn from Elliott's account.

Within hours, police had obtained warrants for petitioner's arrest and to search his apartment. While executing the search warrant, police recovered the towel, wet clothing matching those described by Elliott, and a gun. Elliott's phone was found in a bush in Thompson's apartment complex. After his arrest, Thompson was interviewed twice and eventually gave a detailed confession.

Petitioner was convicted in a jury trial of several charges, including armed robbery, attempted robbery, carjacking, wearing a mask in public, credit card theft, use of a firearm in the commission of a felony, five counts of use of a firearm in the commission of a felony, subsequent offense, and three counts of abduction with intent to extort money. He was sentenced to 113 years and twenty-four months of incarceration.

Petitioner's direct appeals to the Court of Appeals of Virginia and this Court were unsuccessful. Petitioner subsequently filed a habeas corpus petition under this Court's original jurisdiction challenging the legality of his confinement. The Court dismissed part of the petition while retaining jurisdiction to address the following issue: "Whether petitioner was denied the effective assistance of counsel because counsel failed to argue petitioner's convictions for robbery and attempted robbery of the same victim violated the Double Jeopardy Clause."

II. ANALYSIS

Petitioner contends that his simultaneous convictions for robbery of Elliott's cell phone and attempted robbery of Elliott's cash violated his right against double jeopardy, and thus, he was denied his Sixth Amendment right to counsel based on trial counsel's failure to object and move to dismiss the attempted robbery charge.

The Double Jeopardy Clause of the United States Constitution "guarantees protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for

the same offense after conviction; and (3) multiple punishments for the same offense." *Commonwealth v. Gregg*, 295 Va. 293, 298 (2018) (citations omitted). In a simultaneous prosecution, "the role of the [Double Jeopardy Clause] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Stephens v. Commonwealth*, 263 Va. 58, 62 (2002) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

"Robbery is a common-law crime in Virginia, although its punishment is prescribed by Code § 18.2-58." *Pritchard v. Commonwealth*, 225 Va. 559, 561 (1983). Robbery is defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation." *Ali v. Commonwealth*, 280 Va. 665, 668 (2010) (quoting *Durham v. Commonwealth*, 214 Va. 166, 168 (1973)). Attempted robbery requires proof that the defendant intended to commit robbery and "that [the defendant] committed a direct, but ineffectual, act to accomplish the crime.'" *Jay v. Commonwealth*, 275 Va. 510, 524-25 (2008) (quoting *Pitt v. Commonwealth*, 260 Va. 692, 695 (2000)). The parties agree that attempted robbery is a lesser included offense of robbery. Thus, the question to be answered by the Court is whether petitioner was impermissibly punished twice for one criminal act. *See Severance v. Commonwealth*, 295 Va. 564, 571-72 (2018).

"It is well settled that two or more distinct and separate offenses may grow out of a single incident or occurrence, warranting the prosecution and punishment of an offender for each." *Jones v. Commonwealth*, 208 Va. 370, 375 (1967).

> A test of the identity of acts or offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute.

Hundley v. Commonwealth, 193 Va. 449, 451 (1952).

The record demonstrates that the robbery of Elliott's cell phone and the attempted robbery of Elliott's cash were two distinct and separate acts, separated in time and space, and each conviction is sustained by different evidence. *See Severance*, 295 Va. at 573 (holding that a pattern of discrete acts could not be "cobbled together as a single transaction" for double jeopardy purposes); *Stephens*, 263 Va. at 63 (holding that where defendant fired multiple shots from his car into another vehicle, each act of firing his weapon was a separate act for which the defendant could be separately charged).

The robbery of Elliott's cell phone was a distinct and separate act that was completed while petitioner and Elliott were still in the parking lot of the shopping center. Petitioner approached Elliott and asked her for money. When she replied she did not have any, petitioner showed her the butt of the gun in his waistband. Petitioner then took Elliott's cell phone and wallet, which he searched.

Thereafter, a series of separate acts followed in petitioner's attempt to obtain cash from Elliott. Petitioner asked Elliott for her ATM card. Petitioner stated, "Here's what we're going to do. You're going to get in the car and you're going to take me to get money." Petitioner instructed Elliott to drive to two ATMs where she attempted to withdraw money using her card but was unsuccessful.

The Court concludes that petitioner was not punished twice for the same offense. Thus, there is no basis for petitioner's double jeopardy violation claim. Petitioner's claim satisfies neither the "performance" nor the "prejudice" prong of the two-part *Strickland* test. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).*

III. CONCLUSION

For the foregoing reasons, the petition is dismissed.

A Copy,

Teste:

Clerk

* "To prevail on an ineffective assistance of counsel claim, the petition must satisfy both the 'performance' prong and the 'prejudice' prong of the *Strickland* test." *Zemene v. Clarke*, 289 Va. 303, 313 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The performance prong requires that a defendant "show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To satisfy the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Schmuhl v. Clarke, ___ Va. ___, ___, 894 S.E.2d 854, 862 (2023).