RECORD NUMBER:

United States Supreme Court

MICAH PATTERSON,

Petitioner,

- V. -

HAROLD W. CLARKE, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent

PETITION FOR CERTIORARI FROM JUDGMENT OF THE VIRGINIA SUPREME COURT

PETITION FOR CERTIORARI

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Questions Presented for Review

A. Did the Virginia Supreme Court err by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to present adversarial expert testimony?

B. Did the Virginia Supreme Court err by effectively affirming a lower court holding that Petitioner's state Petition for Writ of Habeas Corpus was untimely when uncontroverted evidence showed timely receipt in that lower court?

C. Did the Virginia Supreme Court err by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to properly investigate the case?

D. Did the Virginia Supreme Court err by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to properly contest the testimony of Robert Fromberg?

E. Did the Virginia Supreme Court err by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to pursue DNA testing?

F. Did the Virginia Supreme Court err by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to object to statements made in violation of Patterson's constitutional rights?

List of All Parties to the Proceeding

All parties are as listed in the caption hereof. Micah Patterson is an individual for which no corporate disclosure statement is required by Rule 29.6.

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I. Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in this Case by Courts

On March 20, 2017, the Virginia Beach Circuit Court (the "Circuit Court") denied a Petition for Writ of Habeas Corpus (the "Habeas Petition") filed by Micah Patterson ("Patterson"). The denial was not entered into an official report. Patterson timely filed a Petition for Appeal with the Virginia Supreme Court.

On January 23, 2018, the Virginia Supreme Court denied Patterson's Petition for Appeal. The denial was not entered into an official report. Patterson timely filed a Petition for Rehearing with the Virginia Supreme Court.

The Virginia Supreme Court entered its Order refusing Patterson's Petition for Rehearing on March 23, 2018. The Order was not entered into an official report.

II. Statement of the Basis of Appellate Jurisdiction

The Virginia Supreme Court entered its final Order for the case on March 23, 2018.

This Court has appellate jurisdiction in this appeal pursuant to 28 U.S.C. § 1257.

III. Constitutional Provisions and Statutes Involved in the Case

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution are involved in this case.

Va. Code §§ 1-210, 8.01-229, 8.01-654, and 8.01-654.1 are involved in this case.

Statement of the Case

A. Procedural Posture

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. The injuries were determined to have been caused by abusive head trauma. There was no forensic evidence proving who inflicted the injuries.

On August 12, 2013, Patterson was tried by jury in the Circuit Court. Patterson was convicted of object sexual penetration; child neglect, and murder in the first degree.

Patterson timely appealed his convictions, but the Virginia Court of Appeals denied Patterson's Petition for Appeal on October 15, 2014. Patterson demanded consideration of his petition by three-judge panel, which denied Patterson's Petition on February 2, 2015. The Virginia Supreme Court denied Patterson's Petition for Appeal on November 20, 2015.

Patterson timely filed a Petition for Writ of Habeas Corpus on November 20, 2016 in the Circuit Court. App. A. Patterson's Petition for Writ of Habeas Corpus was denied on March 20, 2017. App. E.

Patterson timely petitioned for appeal to the Virginia Supreme Court. App. F.

On January 23, 2018, the Virginia Supreme Court denied Patterson's Petition for Appeal. App. H.

The Virginia Supreme Court denied Patterson's Petition for Rehearing on March 23, 2018. App. J.

This Petition for Writ of Certiorari is filed seeking reversal of the decision of the Virginia Supreme Court.

B. Statement of Facts

On January 10, 2012, Patterson called emergency services to seek medical assistance for Aubrey Hannsz. One Sgt. Thomas Shattuck responded to that call. Upon arrival at 1120 Ocean Trace Arch, Apartment 103, Virginia Beach, Virginia, Sgt. Shattuck observed, "Mr. Patterson was in the kitchen standing with Officer Savino. They were having a conversation, and Bill Morrow was just kind of standing back by the front door."

Sgt. Shattuck testified at Patterson's trial that as has been his experience, "as part of the investigation ... it's possible there could be a Shaken Baby Syndrome case or an abuse case." Sgt. Shattuck testified that he asked Patterson if it was okay "for police to be in the apartment." Under cross-examination Sgt. Shattuck testified that at that point the apartment "became … a crime scene."

Prior to the arrival of Sgt. Shattuck, the responding Officer, Darrin C. Savino, was on scene, and had actually been the first Officer to come into contact with Patterson and the victim. Officer Savino testified, "I know my job description pretty much changed after the child left." Savino testified:

> … and once the child left and, as I said, the condition of the baby, I felt the investigative part would now begin."
> Q. Based on your years as a police officer you thought it was maybe criminal activity?"
> A. Yes, Sir.
> Q. Okay. And you indicated you secured the scene and you limited the movement of the defendant, is that correct?
> A. Yes.

Q. Okay, Was he free to leave?

A. Not at that point.

On January 11, 2012 Aubrey Hannsz died of severe brain injuries. The injuries were determined to have been caused by abusive head trauma. There was no forensic evidence proving who inflicted the injuries.

After the arraignment of Patterson, in which he had pled "not guilty" the court inquired, "All right. I have the Commonwealth's witness list. Is there a defense witness list?" The response from defense counsel was "No Sir, Your Honor."

The Commonwealth attempted to, and successfully presented to the jury, a "timeline of injuries" to the victim. However, the evidence was inconsistent. On the first day of trial the Commonwealth presented the testimony of Wendy Gunther, M.D., Assistant Chief Medical Examiner. Dr. Gunther testified about injuries to the victim in which iron had developed, which, according to expert testimony, indicates older injuries. However, Dr. Gunther also testified (emphasis added), "No one knows exactly because children heal so much faster that adults, but **a reasonable guess would be a few days** before blood starts disappearing to the naked eye and turning to iron."

Dr. Gunther further testified that while she classified some of the injuries as, "fresh." she could not "have a clock on that." Even when asked to narrow the time frame for the victim's injuries to a window of "twelve to eighteen hours" she could not do so.

Contrary to the testimony of Dr. Gunther, the Commonwealth's witness Dr. Michelle Clayton, a doctor specializing in general pediatrics and child abuse pediatrics, purported to narrow down each of

the established injuries to the times in which the victim was likely in the custody of Patterson. Not only was this speculation contrary to Dr. Wendy Gunther's aforementioned expert opinion, it was contrary to Dr. Clayton's earlier testimony as well. Dr. Clayton first testified, the "evolution of a bruise is something that varies somewhat depending on the body area where the bruises are inflicted." Yet, later Dr. Clayton opined that the injuries occurred on Tuesday evening based upon bruises sustained by the victim. The Commonwealth asked Dr. Clayton to "describe the evolution of a bruise." In her response Dr. Clayton stated, "So how a bruise evolves varies depending upon the body area. But in general you may not see a bruise immediately after an injury-has been inflicted."

Under cross-examination Dr. Clayton agreed "that bruising will occur more quickly and disappear more quickly in highly vascular parts of the body". She further agreed, "there's a variance from individual to individual".

Importantly, Dr. Clayton testified, that she questioned Patterson, the mother of the victim, and the grandmother.

Despite having proffered highly prejudicial testimony about the injury timeline that appears to have been largely based upon her presumption of Patterson's guilt, Dr. Clayton admitted that she couldn't "specify a time range," for some of the injuries and "Dr. Gunther is more familiar with the entire range of findings that might be discovered."

It was also Dr. Clayton's testimony that Aubrey Hannsz had "suffered more than one episode of abusive head trauma prior to her death." Defense counsel questioned Dr. Clayton in regard to the conclusion that there was more than one shaking

event of the victim. Defense counsel also questioned Dr. Clayton about her conclusion with regard to her determination of when the victim was alone with Patterson, Gary Murawski, and Samantha Murawski. Dr. Clayton stated that she had talked to Patterson and Samantha Murawski, but did not even bother to speak to the grandfather of the victim, Gary Murawski.

Dr. Clayton testified that she "collected the physical evidence recovery kit" ("PERK") to obtain any DNA evidence that was not the victim's. Dr. Clayton testified that after collecting the PERK she submitted it to the police department.

The Commonwealth presented the testimony of Betty Jane Blankenship, a forensic analyst employed by the Virginia Department of Forensic Science in Norfolk, Virginia. It was Blankenship's testimony that while she did test samples for spermatozoa, which were negative, she "did not take it forward through DNA." In cross-examination Ms. Blankenship testified that there is no test to detect sweat (perspiration).

The Commonwealth called Robert Fromberg, a jail inmate, as a trial witness. Fromberg testified that he had met Patterson in the Virginia Beach Jail. Fromberg testified that the Patterson had told him (emphasis added) "...he was watching his roommates niece who was four years old and while she slept he fingered her and when she woke up crying he put a pillow over her face until she stopped crying and now she can't cry no more."

Under cross-examination, Fromberg was asked, "How many people have you called to get information on this case?" Fromberg responded by repeating the question.

After the conclusion of the Commonwealth's

case defense counsel informed the court, "And Judge, always in discussing the matter with my client at this point—or both of us discussing with our client, we will not be presenting evidence."

In presenting a closing argument to the jury defense counsel stated, "I said earlier, members, that the case was entirely circumstantial, and that was unfair to the Commonwealth because it's not. They have one piece of evidence, but one, that is not circumstantial. One piece of what we call direct evidence. They have a confession. And the source of that confession is Mr. Fromberg..."

Patterson's Petition for Writ of Habeas Corpus (the "Petition") was submitted to the Circuit Court in two parts. The affidavit of Patterson was hand delivered to the Circuit Court on November 21, 2016. The body of the Habeas Petition was transmitted via United States Postal Service Express Mail on November 18, 2016. Uncontroverted evidence showed that the United States Postal Service delivered the body of the Habeas Petition to the Circuit Court on November 21, 2016. For reasons unknown to, and beyond the control of, Patterson the Habeas Petition was not date stamped by the Circuit Court until November 22, 2016. Once the Habeas Petition was delivered to the Circuit Court, the Commonwealth was solely responsible for any processing delays in date stamping.

IV. Argument

The Virginia Supreme Court erred by effectively affirming the Order dismissing Patterson's Habeas Petition by adopting verbatim an order prepared by the Commonwealth without any apparent review of Patterson's Petition or Patterson's Opposition Brief to the Commonwealth's

Motion to Dismiss. Thereby, the Circuit Court erred and failed to fulfill the role of fair adjudicator. This is particularly egregious in view of the Circuit Court's highly erroneous holding that Patterson's Petition was not timely filed without any apparent consideration of USPS records conclusively proving otherwise. The effectively affirming of a judgment that adopted the Commonwealth's order without any apparent independent review of the law and facts presented by Patterson is a violation of Patterson's due process rights under the Fifth and Fourteenth Amendment, diminishes the integrity of the courts, and cries out for reversal.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.*

The performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

The second prong of the *Strickland* test is often referred to as the "prejudice prong". To establish prejudice, a "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. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Id.* In assessing prejudice, evidence is reweighed against the totality of available evidence. *Id.*

A. Discussion of Questions Presented

1. The Virginia Supreme Court erred by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to present adversarial expert testimony.

Patterson was convicted in a case based upon medical testimony in a shaken baby syndrome case. During the past several years the underlying science in such cases has been challenged and found wanting. Nonetheless, many people like Patterson remain incarcerated based upon such dubious pseudoscientific testimony.

Many news articles have been written during the past few years, which provide a lay commentary on convictions based upon spurious shaken baby syndrome medical testimony. Those articles are illustrative as to why Patterson's Petition for Writ of Certiorari should be granted.

For example, on March 20, 2015 the Washington Post published a thorough and detailed article about a number of cases in which people had been falsely convicted based upon "expert" testimony about Shaken Baby Syndrome. Debbie Cenziper, Prosecutors build murder cases on disputed Shaken Baby Syndrome diagnosis, 2015, available at https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/ (last visited May 3, 2018). The numerous case studies cited in that article are illustrative of the reason why a reasonable investigation of the case was indispensible for

Patterson's representation at trial to pass constitutional muster. See, e.g., *Wiggins*, 539 U.S. at 522.

As just a single example of the false convictions of those similarly situated to Patterson, the Washington Post article cites a case study of a day care operator that was charged and convicted in the death of a 9-month-old child. Scientific testimony in that case established that the scientific testimony used against the day care operator was fundamentally flawed. A judge overturned the conviction and ordered a new trial, finding that a jury hearing that argument could have had "a reasonable doubt" about guilt. See, Cenziper, *supra*. Patterson should have such an opportunity as well.

The underlying science of shaken baby syndrome cases has become so suspect that a federal court opined in 2014 that evidence in that case indicated, "that a claim of shaken baby syndrome is more an article of faith than a proposition of science." *Prete v. Thompson*, 10 F. Supp. 3d 907, 957 n.10 (N.D. Ill. 2014).

It is against this backdrop that the reasonable investigation standard of *Wiggins* and like cases should be viewed regarding Patterson's trial counsel. Patterson's trial counsel made no effort to seek an independent review of the forensic evidence of the case by other experts and utterly failed to present any witnesses in Patterson's defense at trial.

In certain circumstances, a constitutionally adequate defense requires expert witness testimony. *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985). For example, a counsel's failure to pursue an adequate expert investigation of potentially exculpatory serological evidence in a sexual assault case constituted ineffective assistance of counsel. *Baylor*

v. Estelle, 94 F.3d 1321 (9th Cir.1996), cert, denied 520 U.S. 1151 (1997).

It is apparent given the facts cited, *supra*, that Dr. Clayton's analysis and investigation began with a preconceived conclusion that Patterson was guilty and that she had crafted her expert opinion to conform to that preconceived conclusion. This expert opinion carried great weight with the jurors, and was even referenced in the trial court's Final Order dismissing the Patterson's Habeas Petition. App. E.

Patterson was prejudiced with regard to defense counsel's failure to subject the Commonwealth's testimonial evidence to the jury to a true adversarial test. The expert opinions of Dr. Gunther and Dr. Clayton, with regard to a timeline of injuries to Aubrey Hannsz were polar opposites. Given how critical the timeline was to the case against Patterson, it was imperative for defense counsel to conduct a reasonable investigation and present adversarial medical expert testimony, which, based upon Dr. Gunther's testimony alone, could have been obtained to challenge the spurious timeline relied upon by the Commonwealth. Such testimony would have buttressed, reinforced, and expanded upon the basic medical principles upon which Dr. Gunther's testimony was based. Other cases, such as those cited in the aforementioned Washington Post article provide an indication of how disputed the underlying science in Patterson's case is.

The catastrophic impact of trial counsel's errors is brought into relief by examining the testimony of two of the Commonwealth's expert witnesses. On the first day of trial the Commonwealth presented the testimony of Wendy Gunther, M.D., Assistant Chief Medical Examiner.

Dr. Gunther testified about injuries to the victim in which iron had developed, which, according to expert testimony, indicates older injuries. However, Dr. Gunther also testified (emphasis added), "No one knows exactly because children heal so much faster that adults, but a reasonable guess would be a few days before blood starts disappearing to the naked eye and turning to iron."

Dr. Gunther further testified that while she classified some of the injuries as "fresh." she could not "have a clock on that." Even when asked to narrow the time frame for the victim's injuries to a window of "twelve to eighteen hours" she could not do so.

Contrary to the testimony of Dr. Gunther, Dr. Michelle Clayton claimed to narrow down each of the established injuries to the times in which the victim was likely in the custody of Patterson. Not only was this speculation contrary to Dr. Wendy Gunther's expert opinion, it was contrary to her own testimony as well. Dr. Clayton first testified, the "evolution of a bruise is something that varies somewhat depending on the body area where the bruises are inflicted." This testimony is at odds with her later testimony in which Dr. Clayton claimed that she had an expert opinion about exactly when the injuries occurred.

Significantly, Dr. Clayton testified that her timeline was not just based upon forensic evidence, but was also based upon having been given information about times when Patterson was alone with the victim, Aubrey Hannsz. So, Dr. Clayton's analysis began with a conclusion about who committed the crimes against Aubrey Hannsz. She then made the facts of her examination of Aubrey Hannsz conform to that preconceived conclusion and was unwilling to allow any other possibilities enter

her mind.

In view of how critical the timeline was to the case against Patterson, it was imperative that Patterson's trial counsel retain a medical expert to testify concerning the injuries and the inherent variability of attempting to establish when injuries occurred based upon bruising. The underlying science pertaining to such inherent variability is discussed at some length in *Prete*. *Prete*, 10 F. Supp. 3d 907. The evidence in *Prete* showed, *inter alia*, that "it has recently been recognized in medical literature that a child can remain conscious even after suffering abusive head trauma." *Id.*, 10 F. Supp. 3d 949. In addition, the evidence further showed that "an infant … could experience a significant lucid interval following an incident of abuse. *Id.*

The utter failure of Patterson's counsel to even retain and expert or have anyone else review the medical evidence was certainly well below objective performance standards and is even worse than the lack of investigation that resulted in the granting of a petition for writ of habeas corpus in the *Wiggins* case. Even a very cursory Internet search made by the undersigned counsel revealed an article that in pertinent part states "Symptoms vary among children based on how old they are, how often they've been abused, how long they were abused each time, and how much force was used." See, "Shaken Baby Syndrome – Topic Overview", which is attached hereto as Exhibit 2. The article further states (emphasis added), "Symptoms can start quickly, especially in a badly injured child. Other times, it may take a few days for brain swelling to cause symptoms." Given the ease with which this medical article was found, it would not have been difficult at

all for Patterson's trial counsel to find a medical expert that would have both supported Dr. Gunther's inability to establish a time for the injuries and specifically refute Dr. Clayton's contrived timeline testimony.

It was imperative for defense counsel to challenge the speculation of a timeline offered by the Commonwealth to create the reasonable doubt necessary to convince the jury of Patterson's innocence. The failure to perform any independent investigation of the timeline evidence, retain an expert, or present any evidence at all contesting the Commonwealth's speculative timeline, was objectively unreasonable and highly detrimental to Patterson's defense. Nothing was offered to contradict the Commonwealth's theory of the facts, and the jury verdict was based solely on the presentation of the prosecution. The Sixth Amendment to the Constitution demands that a trial must comport to the basic tenets of due process and a fair trial, a trial in which the prosecution's case is subjected to adversarial testing.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins*, 539 U.S. at 521. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. Id.

Here, it was objectively unreasonable that Patterson's trial counsel failed to investigate the Commonwealth's timeline or retain an expert to contest that timeline. In view of the testimony of Dr. Gunther and the ease with which timeline uncertainties associated with shaken baby syndrome can be found online, it is certain that Patterson's

trial counsel could and should have found a medical expert that would contest the timeline of Dr. Clayton, which was contrived to fit the Commonwealth's theory of Patterson's guilt. Accordingly, the performance prong of Strickland is met.

Since Patterson was found guilty based almost entirely on circumstantial evidence, the contrived testimony of Dr. Clayton was crucial to the jury's conviction of Patterson. Objectively, it would not have required much evidence contrary to that of Dr. Clayton to create a reasonable doubt. There is a reasonable probability that if Patterson's trial counsel had properly investigated the Commonwealth's timeline and obtained expert testimony challenging that timeline, that the trial result would have been different.

Accordingly, Patterson has met the prejudice burden under Strickland as well.

To demonstrate that it would have been reasonably possible to strongly contest the obviously biased findings of Dr. Clayton's timeline, the undersigned counsel presented an article from WebMD concerning "Shaken Baby Syndrome - Topic Overview." (Exhibit 2, Opposition to Motion to Dismiss) to the Virginia state courts. An article from the American Academy of Pediatrics discussing Shaken Baby Syndrome was also presented to the Virginia state courts. These articles establish that "Symptoms vary among children based on how old they are, how often they've been abused, how long they were abused each time, and how much force was used" and "Symptoms can start quickly, especially in a badly injured child. Other times, it may take a few days for brain swelling to cause symptoms." THE CIRCUIT COURT DID NOT EVEN CONSIDER OR

ADDRESS THIS EVIDENCE IN ITS ORDER DISMISSING PATTERSON'S HABEAS PETITION. It is very apparent that the Circuit Court never so much as read Patterson's Habeas Petition, much less consider it on the merits. This lack of consideration violated Patterson's due process rights. The Virginia Supreme Court denied Patterson relief for this obvious error committed by the Circuit Court, which should be reversed.

Defense counsel did not present his own expert in support of Dr. Gunther's testimony that people with injuries heal at different rates due to their metabolic rate, the area of the body where the injury occurs, whether the person is asleep or active, and the degree to which a person is susceptible to bruising. Given these many factors, a medical expert testifying on Patterson's behalf would have provided evidence that supported Dr. Gunther's testimony and provided further persuasive proof that Dr. Clayton's timeline was speculative and such expert testimony had a probability of changing the outcome of Patterson's case.

Such performance was clearly met both performance and prejudice prongs of the *Strickland* standard. It was objectively unreasonable given the gravity of the charges and the nature of the prosecutions case to not adequately investigate the case and retain an expert to contest the highly questionable timeline proffered by the Commonwealth.

There is a reasonable likelihood that Patterson would not have been convicted had such expert testimony been presented in Patterson's trial.

Accordingly, this Petition for Certiorari should be granted and the denial of Patterson's Habeas Petition reversed.

2. The Virginia Supreme Court erred by effectively affirming a lower court holding that Petitioner's state Petition for Writ of Habeas Corpus was untimely when uncontroverted evidence showed timely receipt in that lower court.

The Virginia Supreme Court erred by effectively affirming the Circuit Court Order dismissing Patterson's Petition as being untimely filed.

That dismissal of Patterson's Habeas Petition violated Patterson's right to due process under the Fifth and Fourteenth Amendment.

Chief Justice William Howard Taft explained the purpose behind the due process clauses as follows:

> The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Hurtado v. California, 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not

withhold.

Truax v. Corrigan, 257 U.S. 312, 332, 42 S. Ct. 124, 129 (1921).

The arbitrary dismissal of Patterson's Habeas Petition by the state courts of Virginia arbitrarily and capriciously prevented Patterson from having his day in court and should be reversed.

By Virginia's own law, if statutory language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it. See, e.g., *Brown v. Lukhard*, 229 Va. 316, 321 (1985).

Here, Va. Code § 8.01-654 states in pertinent part (emphasis added):

A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, **shall be filed** within two years from the date of final judgment **in the trial court** or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

There is no dispute that the Virginia Supreme Court dismissed Patterson's appeal on November 20, 2015. Patterson avers that under the statutory language, his earliest possible deadline in this case was not until November 21, 2016 (Since November 20, 2016 fell on a weekend, any deadline on that date was extended until the following business day pursuant to Va. Code § 1-210). Patterson's Habeas Petition was timely filed.

Uncontroverted evidence shows that the body of the Habeas Petition was received by, and therefore filed in, the Circuit Court at 11:11 am on November 21, 2016. App. C, Exh. 1. That filing was within the statutory time limit. Also on November 21, 2016, the

signed oath of Patterson that completed the Habeas Petition was hand delivered to the Circuit Court by a paralegal. *Id.* The same paralegal also advised the Circuit Court's clerical staff of mailed receipt of the body of the Habeas Petition on that date. *Id.* This hand delivery was done in order to avoid having to argue this very issue improperly relied upon by the Circuit Court in dismissing the Habeas Petition. The person purporting to be responsible for intake of petitions for writs of habeas corpus refused the request of the undersigned counsel's paralegal to locate the Habeas Petition that was already filed in the Circuit Court and properly record a filing date on November 21, 2016. *Id.*

The Respondent admitted as much in an "Objection and Response" filed with the Circuit Court concerning Patterson's Opposition to the Motion to Dismiss. The Objection and Response admitted, "it appears Patterson's pleading may have been misdirected" and that for some unstated reason that Patterson was responsible for the delays caused by Circuit Court personnel that allegedly "misdirected" the Habeas Petition. Incredibly, the "Objection and Response" actually argued that Patterson's Opposition to the Motion to Dismiss should not be considered by the Circuit Court for procedural reasons, which was yet another example of the Commonwealth's bad faith in denying Patterson due process rights. In view of the dispositive evidence of timely filing of the Habeas Petition, such an "Objection" if sustained (and the order of the Circuit Court is silent about whether it was or not) was yet another example of the state court violations of Patterson's right to due process under the Fifth and Fourteenth Amendment. It is unclear from the Circuit Court's Order dismissing the case whether

the "Objection" of the respondent was actually sustained. App. E. What is clear is that the Circuit Court utterly ignored dispositive proof that the Habeas Petition was timely filed and unlawfully ordered dismissal. Incredibly, the Virginia Supreme Court did not grant Patterson's Petition for Appeal and effectively affirmed the Circuit Court's blatant violation of Patterson's right to due process under the Fifth and Fourteenth Amendment.

Notably, the governing statute, Va. Code § 8.01-654, DOES NOT require that a petition be placed in the hands of any specific person at a court, such as a specific clerk. Instead, the statute requires that the Habeas Petition be filed "in the circuit court" and no Virginia state court case has held otherwise.

Patterson presented clear and dispositive proof to the Virginia state courts that the Habeas Petition was filed in the court on November 21, 2016, at 11:11 AM. App. C, Exh. 1. The Circuit Court's reliance on a state court case of *Lahey v. Johnson*, which involved the failure to pay a filing fee, thus delaying the filing, is misplaced since there was no such issue in the instant case. Failure of Court personnel, in the employ and under the control of the Commonwealth, to timely receive and date-stamp a pleading when it was initially received is not the same as "refusing to accept it for failure to pay a filing fee." The focus of this inquiry should have been on the day the Habeas Petition was delivered, and therefore filed, with the Circuit Court. What transpired afterward was solely a result of negligence or misconduct on the part of the Commonwealth, for which the Commonwealth is solely responsible. The Habeas Petition was received at 11:11 AM, and Circuit Court personnel were presumably working for several hours after that

time. It is apparent that Patterson's Petition was timely filed, but was not accorded its proper filing date by the Circuit Court.

Circuit Courts, and pleadings to those courts, are inherently time sensitive. Any employee, or agent, of the court that is made aware of time limitations and fails to timely process a pleading tendered to the court obstructs that filing.

Support for this premise is found in Va. Sup. Ct. R. Rule 3:3 (a), which states in pertinent part:

The clerk shall receive and file all pleadings when tendered, without the order of the court. The clerk shall note and attest the date of filing thereon … Any controversy over whether a party who has filed a pleading has a right to file it shall be decided by the court.

It is clear that the Circuit Court violated Virginia law and the Circuit Court ruling was erroneous.

If the Habeas Petition is not deemed filed on November 21, 2016, Circuit Court personnel obstructed such filing and the statute of limitations was tolled pursuant to Va. Code § 8.01-229, which states in pertinent part:

> When the filing of an action is obstructed by a defendant's … using any other direct or indirect means to obstruct the filing of an action, then the time that such obstruction has continued shall not be counted as any part of the period within which the action must be brought.

Incredibly, in its Order dismissing Patterson's Petition, the Circuit Court completely ignored the USPS records, which were provided as a part of Patterson's pleadings. Even though the USPS

records clearly show that the Habeas Petition was timely filed with the Circuit Court, although apparently improperly date stamped by clerical personnel of the Court as having been received the following day, the Circuit Court falsely stated that there was no obstruction to timely filing. App. E, p. 6-7. That Circuit Court's ruling is erroneous in view of the filing of Patterson's Petition on November 21, 2016 as documented by USPS records and uncontroverted evidence presented to the Circuit Court. App. E. The Habeas Petition was not accorded a proper filing date due to the obstruction of Circuit Court personnel, which had the Habeas Petition at 11:11 am on November 21, 2016, but failed to properly acknowledge or record its timely delivery until the following day. Such an obstruction to filing was certainly beyond the control of Patterson or his counsel and falls squarely within the type of exception invoking statutory tolling of the statute of limitations pursuant to Va. Code Ann. § 8.01-229(D).

Accordingly, the Circuit Court erred in its judgment; the Virginia Supreme Court erred in denying Patterson's Petition for Appeal.

Accordingly, this Petition for Certiorari should be granted and the denial of Patterson's Habeas Petition reversed.

3. The Virginia Supreme Court erred by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to properly investigate the case?

In Virginia a person on trial for a criminal offense has the right to introduce evidence of his good character, this follows the theory that it is

improbable that a person who bears a good reputation would be likely to commit the crime charged against him. *Gardner v. Commonwealth*, 288 Va. 44 (2014); *Byrdsong v. Commonwealth*, 2 Va. App. 400, 402 (1986).

Virginia Practice of Criminal Procedures § 17:33, Defenses, states that a criminal defendant may prove his good reputation for a particular character trait by presenting evidence of good character. A witness may testify that he or she has never heard that the accused has the reputation of possessing a certain trait.

Patterson contends that because he had an established right to present witness testimony that defense counsel had a duty and obligation to perform a reasonable investigation into possible witness testimony for the defense including character testimony.

Given the gravity of the charges against Patterson at trial, and the voluminous testimony against him, defense counsel had a duty to conduct an investigation to obtain both expert testimony and character testimony to assure that Patterson had a fair trial. Among other things discussed herein, defense counsel should have presented character testimony that Patterson was not prone to violence, was enlisted in the Navy, did not have a criminal background, and was not abusive in past relationships with women. Defense counsel could have also developed evidence as to Patterson's demeanor and behavior around children.

It was imperative for defense counsel to challenge the speculation of a timeline offered by the Commonwealth to create the reasonable doubt of Patterson's guilt. The failure to perform any investigation or present any evidence at all, expert or

character, fell below the Strickland standard. The Sixth Amendment to the Constitution demands that a trial must comport to the basic tenets of due process and a fair trial, a trial in which the prosecution's case is subjected to adversarial testing.

Trial testimony proved that Patterson had a daughter that was three years old at the time of Aubrey Hannsz tragic death. Patterson's trial counsel had a responsibility to perform a reasonable investigation and identify exculpatory evidence. Among other things, testimony from the mother of Patterson's daughter should have been obtained to show that Patterson had interacted with his daughter and never abused his daughter.

Patterson avers that a witness, Kimberly Brook Williams ("Williams"), called to testify after the jury found Patterson guilty but prior to the jury's sentencing verdict, should have been called as a character witness in Patterson's defense during the trial itself.

The failure of Patterson's trial counsel to adequately investigate and present character witnesses to testify on Patterson's behalf was objectively unreasonable and thus fell below the *Strickland* standard.

The outcome of Patterson's trial would likely have been different if evidence in Patterson's favor would have been prepared and presented. The jury at Patterson's trial was presented with an uncontroverted barrage of negative testimony about Patterson. Positive testimony about Patterson's character, which was readily available if trial counsel would have pursued it, would likely have created a reasonable doubt in the case.

The overall performance of Patterson's trial counsel was objectively for unreasonable under

prevailing professional norms. See, e.g., *Wiggins*, 539 U.S. at 523.

Accordingly, this Petition for Certiorari should be granted and the denial of Patterson's Habeas Petition reversed.

4. The Virginia Supreme Court erred by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to properly contest the testimony of Robert Fromberg.

A significant element Fromberg's testimony, with relation to ineffective assistance of counsel, is that during cross-examination defense counsel asked him, "How many people have you called to get information on this case?" Fromberg simply repeated the question and never answered.

Given that trial counsel knew that Fromberg's testimony was the only non-circumstantial evidence presented in the case, that trial counsel had a responsibility to perform a reasonable investigation into that testimony.

Here, trial counsel should have subpoenaed recorded phone calls of Robert Fromberg and determine whether their was evidence his testimony was derived from sources other than Patterson. By not doing so, defense counsel failed to meet the Strickland performance standard.

Had Patterson's trial counsel properly investigated and impeached Fromberg, it is likely that the jury would have found reasonable doubt in Patterson's case

Accordingly, this Petition for Certiorari should be granted and the denial of Patterson's Habeas

Petition reversed.

5. The Virginia Supreme Court erred by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to pursue DNA testing.

Trial testimony established that samples taken from the body of Aubrey Hannsz were tested for spermatozoa, which were negative; however the samples were not tested for DNA.

The Motion argues that somehow Patterson's claim fails because he did not explicitly state what was very implicit in the Petition. It is axiomatic that since the samples were not tested for DNA, it is impossible to know what tests that were never run would have revealed.

However, proper investigation by Patterson's defense counsel necessarily included investigating the forensic evidence collected including sampleas never tested for DNA. It is objectively unreasonable, in a case like this that was nearly entirely based upon circumstantial evidence, for Patterson's trial counsel not to have performed an investigation and pursued testing evidence that was not tested by the Commonwealth.

The performance prong of Strickland is met by the objectively unreasonable failure to investigate. The testing of those samples could well have implicated someone else in the injuries and death of Aubrey Hannsz. Patterson avers that he is not guilty of the crimes for which he was convicted. Constitutionally competent counsel would have pursued evidence that could have proved Patterson's innocence.

Had the samples taken from Aubrey Hannsz, there is a reasonable probability that the results of the trial would have been different.

Accordingly, this Petition for Certiorari should be granted and the denial of Patterson's Habeas Petition reversed.

6. The Virginia Supreme Court erred by effectively affirming a lower court holding that denied relief for Patterson's ineffective assistance of counsel claim for failure to object to statements made in violation of patterson's constitutional rights.

The initial step of determining whether a person is considered in custody is to ascertain whether, in light of the objective circumstances of the interrogation, whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *Stansbury v. California*, 511 U.S. 318, 322-323, 325 (1994) (per curiam); *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In this case, it is clear that Patterson was not at liberty to terminate the interrogation and leave.

The next inquiry is how Patterson gauged his freedom of movement, in examination of all of the circumstances surrounding the interrogation. *Stansbury*, 511 U.S. at 322, 325.

There is no question that the police viewed Patterson's apartment as a crime scene and were investigating criminal activity when he was interrogated there. The fact that the police remained in Patterson's apartment for an extended period of time after Aubrey Hannsz was taken to the hospital reasonably led Patterson to gauge that he had no freedom of movement. It is clear that Patterson was

not free to leave, for example, to go to the hospital to find out the condition of Aubrey Hannsz.

"Fairly soon after the child had left" the apartment Patterson asked to use the restroom. Officer Savino conducted a "sweep" of the bathroom before allowing Patterson to enter, and then stood outside the door while Patterson used the bathroom. Officer Savino limited Patterson's movements, and detained him in the kitchen while Officer Minter secured the front door. Officer Savino also testified that he limited Patterson's movements. Officer Savino testified that the interrogation was over any hour in duration.

It is objectively unreasonable to assert based on the behavior of the police in this case that any reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. No reasonable person would have felt free to leave under such circumstances, particularly with Officer Minter securing the front door and barring his exit.

Accordingly, Patterson was in custody and should have been advised of his Miranda rights. *Miranda v. Arizona*, 384 U.S. 436 (1966).

At trial, one key part of Sergeant Shattuck's testimony that was very damaging to Patterson was Patterson never asked about Aubrey's condition or inquired about her well-being. Similarly, Officer Savino testified that Patterson did not ask to go meet with the mother or to go to the hospital. In addition, Officer Savino was allowed to testify that he believed that Patterson was acting nervous during questioning.

Particularly because Patterson was never advised of his right to remain silent or that he was entitled to have an attorney present during questioning, no testimony about his statements or

lack of statements should have been admitted and admission of those statements as well as statements about Patterson's silence violated Patterson's Fifth Amendment rights. Indeed, Patterson's trial counsel should have moved to suppress any testimony concerning statements made or not made by Patterson during that interrogation. Patterson's trial counsel failed to do so.

Recognizing basic rights violations during a custodial interrogation is objectively a requisite for constitutionally adequate representation. The performance prong of Strickland is clearly met by such objectively unreasonable failures to properly analyze the custodial questioning and object to testimony based thereon.

It is objectively apparent that the highly prejudicial testimony from both Sergeant Shattuck and Officer Savino had an impression on the jury that was highly detrimental to Patterson. Accordingly, there is a reasonable probability that the result of Patterson's trial would have been different had testimony about Patterson's custodial interrogation been properly excluded. Accordingly, the prejudice prong under Strickland is met.

Accordingly, this Petition for Certiorari should be granted and the denial of Patterson's Habeas Petition reversed.

V. Overall Conclusion

For all of the reasons stated herein, Patterson's Petition for Certiorari should be granted and his convictions vacated.

Dated: May ___, 2018

by *__/s/ Dale R. Jensen__*
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