NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SEAUN FARTHING - PETITIONER

vs.

B . CABELL, WARDEN - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

SEAUN FARTHING
P.O. BOX 16482
ST. BRIDES CORRECTIONAL CENTER
CHESAPEAKE, VIRGINIA 23328

QUESTIONS PRESENTED

I. Under Jackson v. Virginia 443 U.S. 307 (U.S.Va.1979) Was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from violating clearly established federal law as determined by the Supreme Court for failing to prove all the essential elements of attempted statutory burglary beyond a reasonable doubt in order to obtain the conviction. See statutory burglary code 18.2-90 and 18.2-91

II. Under Blockburger v. United States 248 U.S. 299 (U.S.Ill.1932) Was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from violating the Double Jeopardy Clause of the Fifth Amendment by convicting Farthing of attempted statutory burglary with intent to commit assault & battery. Assault & battery a lesser included offense of malicious wounding. See assault and battery code 18.2-54 and malicious wounding code 18.2-51

III. Under Blockburger v. United States 248 U.S. 299 (U.S. Ill.1932) Was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from violating the Double Jeopardy Clause of the Fifth Amendment by convicting Farthing of attempted statutory burglary with intent to commit assault and battery with one count of a use of a firearm and attempted malicious wounding with a subsequent count of a use of a firearm when assault and battery is a lesser included offense of malicious wounding which constitutes a single offense not multiple offenses. See assault and battery code 18.2-54 and malicious wounding code 18.2-51

IV. Under Federal Rule of Evidence 403 was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from improperly admitting Farthing's prior felony conviction order during the commonwealth's case in chief by not offering to stipulate to the nature of the prior convictions. Trial counsel failed to file a motion to sever or bifurcate trial in regards to felon in possession of a firearm offense.

V. Under Federal Rule of Evidence 404 (b) was trial counsel ineffective for failing to IMPEACH the false testimony of the commonwealth's false witness Johnson who testified to matters unrelated to Farthing's charges which violated the Due Process Clause of the Fourteenth Amendment which guarantees a U.S. citizen a constitutional right to a fair trial.

VI. Was trial counsel ineffective for failing to IMPEACH the commonwealth's witness in chief false testimony for committing numerous acts of perjury.

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from Federal courts:

The opinion of the United States court of appeals at Appendix A to the petition and is

[ ] reported at _____;

[x] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or

[x] has been designated for publication but is not yet reported; or,

[x] is unpublished

[x] For cases from State courts:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,

[x] has been designated for publication but is not yet reported; or

[x] is unpublished.

The opinion of the Virginia Court of Appeals court appears at Appendix D to the petition and is

[ ] reported at _____: or

[x] has been designated for publication but is not yet reported; or,

[x] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my was February 23, 2018;filed March 19, 2018.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C 1254 (1)

[x] For cases from state court:

The date on which the highest state court decided my case was July 13th 2016

A copy of that decision appears at Appendix C

[ ] A timely petition for rehearing was thereafter denied on the following date: _____,and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No._____ A _____

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue if the petitioner shows, at least, that jurists of reason would find it debateable whether the petition states a valid claim of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling See Slack v. McDaniel, 529 U.S. 473 (U.S. Nev. 2000) 28 U.S.C.A. 2253 (c)

Where a district court has rejected a habeas petitioner's constitutional claims on the merits, the petitioner, to obtain a certificate of appealability (COA), must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debateable or wrong. Under controlling habeas principles, a COA should issue only if the applicant has made a substantial showing of the denial of a constitutional right. See Miller-El v. Johnson, 261 F.3d 445, 449 (quoting 28 U.S.C. 2253 (c)(2)

See Martinez v. Ryan 132 S.Ct. 1309 (U.S. 2012) Justice Scalia filed dissenting opinion (Thus as a consequence of today's decision the States will always be forced to litigate in federal habeas, for all defaulted ineffective-assistance-of-trial-counsel claims [and who knows what other claims], either (1) the validity of the defaulted claim (where collateral-review counsel was not appointed), or (2) the effectiveness of collateral-review counsel (where collateral-review counsel was appointed).

See Price v. Johnston 334 U.S. 266, (U.S.Cal. 1948) The court cannot impose on prisoners unlearned in the law and often acting as their own counsel in habeas courpus proceedings the same high standards of the legal art that might be imposed on members of the legal profession, particularly where such imposition would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition.

STATEMENT OF THE CASE

A FUNDAMENTAL MISCARRIAGE OF JUSTICE

INEFFECTIVE ASSISTANCE OF COUNSEL HABEAS CORPUS CONSTITUTIONAL CLAIMS

I. Under Jackson v. Virginia 443 U.S. 307 (U.S. Va. 1979) Was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from violating clearly established federal law as determined by the Supreme Court by failing to prove all the essential elements of attempted burglary beyond a reasonable doubt in order to sustain a burglary conviction. See Va. Code 18.2-90 and 18.2-91

See Document 14-7 Filed 01/10/17 page 19 of 154 pageID# 317 #32 and #33 where the assistant attorney general of Virginia contends that Farthing correctly notes that the Court of Appeals held in Hitt v. Commonwealth, 43 Va. App. 473, 598 S.E.2d 783 (2004), that individual room s and compartments within a private residence usually do not count as " dwelling houses " under Code 18.2-90. (Petition Memorandum at 27). However, Hitt contains an important caveat that has relevance here. In Hitt, the Court held that the statutory definition of dwelling house does not " contemplate individual rooms or compartments within.... a ' residence,' that are not ' dwelling houses ' in and of themselves (such as a rented room within a larger dwelling, intended to be the place of habitation/residence for the individual residing therein)." 43 Va. App. at 481-82, 598 S.E.2d at 787 (emphasis added). In this case, the evidence established that Farthing broke into a rented room. Warner testified that the building where he, Johnson and White lived was a boarding house that had a landlord. (Exhibit B at 18, 20). Given these facts, counsel reasonably could have

concluded that Warner's room constituted a " dwelling house " under Code 18.2-90, and that any argument to the contrary would likely prove unsuccessful.

Farthing asserts that the word boarding house means: a house at which persons are boarded. Trial counsel abandoned his dereliction of duty. A "person who lives in a boardinghouse dont have a seperate residence alone by themselves" within the boarding house. Trial counsel's failure to reserch the burglary statutes affected the outcome of the Farthing's trial.

Moreover Farthing argues he suffers from ineffective assistance from the court appointed counsel on the direct appeal because he failed to apply Rule 5A:18 which is the application of the ends of justice exception that is appropriate where the accused was convicted for conduct that was not a criminal offense or the record affirmatively proves that an element of the offense did not occur. Redman v. Commonwealth 25 Va. App. 215, 221-22, 487 S.E.2d 269, 272-73 (1997)

This argument was directed to the Commonwealth's contention that this claim was procedurally barred because trial counsel didn't preserve this argument during trial. Furthermore in order to overcome a claim that has been procedurally barred a petitioner has to apply the Martinez v. Ryan doctrine (SCALIA , J., filed dissenting opinion stated as a consequence of today's decision the States will always be forced to litigate in the federal habeas, for all defaulted ineffective-assistance-of-trial counsel claims (and who knows what other claims), either (1) the validity of the defaulted claim (where collateral-review counsel was not appointed), or (2) the effectiveness of collateral-review counsel (where collateral- review counsel was appointed.

The miscarriage of justice occured when the overzealous prosecutor convicted Farthing of statutory burglary when there was no burglary and Farthing indicated on the habeas corpus that trial counsel was ineffective for failing to argue that according to code 18.2-90 and 18.2-91 Farthing cannot be convicted on statutory burglary because it was the burden of the commonwealth to prove two elements in order to obtain and sustain a burglary conviction. In Hitt's case which was similar to Farthing's Hitt was a guest at his friends father's house where he had spent the night on numerous occasions. On the day of the incident everbody left the house for work and Hitt was the only one left inside the house where he had permission to be. Hitt broke into his friend's father locked bedroom while he was inside of the house. Hitt argued during trial that the commonwealth's own evidence did prove he had consent to be in the residence that morning and that the commonwealth failed to establish he had broken into a " seperate residence " by breaking into his friend's father locked bedroom [43 Va.App. 478] the court thus found Hitt guilty of burglary but allowed counsel to submit briefs before sentencing, addressing the issue of whether a bedroom may be classified as a " dwelling house," pursuant to code 18.2-90 and 18.2-91. Hitt's public defender provided effective counsel by researching the burglary statutes and preserved the argument for the direct appeal. Hitt's statutory burglary conviction was reversed and dismissed because the Court or appeals, Robert J. Humphreys, J., held that as matter of first impression, breaking into locked bedroom did not constitute breaking into " dwelling house " within meaning of burglary statutes prohibiting breaking and entering dwelling house in daytime with intent to commit larceny. Farthing contends that he was convicted of attempted statutory

burglary for allegedly breaking and entering the rented room bedroom of the commonwealth witness in chief Carl Warner that was in a boarding house. Also known as a residence. The commonwealth adduced no evidence that the boarding house was broke and entered which would constitute burglary because the boarding house is a dwelling house not Warner's rented room bedroom inside of the boarding house. This conclusion also comports with the common law application of burglary in similar contexts. Specifically, breaking and entering of private " dwelling houses " used as residences. See Lockhart v. State, 3 Ga.App. 480, 60 S.E. 215 216 (1908) (Applying the common law to interpret the terms of a *788. burglary statute and finding that " as to a private dwelling-house, a breaking into the house is necessary to be shown, in order to constitute a burglary. The breaking and entering of one of the rooms of such private dwelling-house , where the entrance into the house is accomplished without breaking, is not burglary.") This was a plausible line of defense that trial counsel failed to pursue. The Sixth Amendment to the Constitution of the United States provides that " the accused shall enjoy the right.... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The United States Supreme Court has interpreted the right to counsel as providing a defendant with" ' the right to effective assistance of counsel.' Strickland v. Washington 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) Farthing asserts that his attempted statutory burglary conviction should be reversed and dismissed because his case is just like Hitt's case to where Hitt's statutory burglary conviction was reversed and dismissed because a locked bedroom within a residence does not constitute a dwelling house according to code 18.2-90 and 18.2-91.

The commonwealth failed to prove that Warner's bedroom rented room was a " dwelling house " which was the essential element that the commonwealth had the burden to prove beyond a reasonable doubt. Jackson v. Virginia 443 U.S. 307 (U.S. Va. 1979)

[1] " To sustain a conviction for statutory burglary under Code 18.2-91, the Commonwealth must [thus] prove: the accused .... broke and entered the dwelling house in the daytime; and (2) the accused entered with the intent to commit any felony *786 other than murder, rape, robbery or arson." Robertson v. Commonwealth, 31 Va. App. 814, 820-21,525 S.E.2d 640, 644 (2000)

Code 18.2-91 provides as follows:

If any person commits any of the acts mentioned in 18.2-90 with intent to commit larceny, or any felony other than murder, rape, robbery, or arson in violation of 18.2-77, 18.2-79 or 18.2-80, or if any person commits any of the acts mentioned in 18.2-89 or 18.2-90 with intent to commit assault and battery, he shall be guilty of statutory burglary, punishable by confinement in a state correctional facility for not less than one or more than twenty years or, in the discretion of the jury or the court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than $ 2,500, either or both. However, if the person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Code 18.2-90 provides:

If any person in the nightime enters without breaking or in the daytime breaks and enters or enters and conceals himself in a dwelling house or an adjoining, occupied outhouse or in the nightime enters without breaking or at any time breaks and enters

and enters or enters and conceals himself in any office, shop, manufactured home, storehouse, warehouse,bankinghouse, church as defined in 18.2-127, or other house, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation, with intent to commit murder, rape, robbery or [43 Va.App. 479] arson in violation of 18.2-77, 18.2-79 or 18.2-80, he shall be deemed guilty of statutory burglary which offense shall be a Class 3 felony. However, if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Farthing argues that there's nothing that indicates in either code that a rented room bedroom inside of a boarding house is considered a seperate dwelling house of its own. Therefore trial counsel could not reasonable infer that Warner's rented room bedroom inside of a boarding house be considered a dwelling house especially with the known fact that counsel did not research the burglary statute prior to trial nor did trial counsel send a investigator to view the bedroom rented room to determine what was broke and entered other than just believing the police. Under United States v. Cronic Farthing contends that automatic reversal is required " at a critical stage of the criminal process " where the denial of counsel ' affects and contaminates ' the entire subsequent proceeding." This is a miscarriage of justice because Farthing has been wrongfully convicted of burglary from which he suffers a mandatory three year sentence and one count of a use of a firearm in the commission of a felony conviction. Code 18.2-91 embodies the code statutes for 18.2-90. The

commonwealth wrongfully stated that these were two seperate codes as far as claiming that Farthing was convicted under code 18.2-91. See under code 18.2-90 breaking and entering a dwelling house at nighttime seems that it also includes daytime. But in none of the statutes does it state that a rented room bedroom constitute a residence. The assistant attorney general is not justified by stating that counsel could reasonably infer that a rented room bedroom is a dwelling house even when the Virginia Supreme Court legislation says its not.

See Hitt v. Commonwealth 43 Va.App. 473 (Va.App. 2004) (although the legislature may, and often has, extended the traditional common law notion of burglary of a " dwelling house," it has not chosen to extend this definition to rooms or compartments within a private " Dwelling House," which do not constitute seperate residences in and of themselves. There is no evidence in the record suggesting that Farthing " broke " and entered the boarding house that was owned by someone.

Contrary to the Commonwealth's contention, the Supreme Court of Virginia's decision in Davis v. Commonwealth, 132 Va. 521, 110 S.E. 356 (1922), does not dictate otherwise. In fact, in Davis, our Supreme Court held that Davis could not be convicted of burglary because there was no evidence that she committed a " breaking " upon entering the " house " at issue. Id. at 524, 110 S.E. at 357. The court did not hold, nor did it in any way indicate, that a locked bedroom within a private dwelling constitutes a " dwelling house " within the meaning of the burglary statutes. The assistant attorney general decision is contrary to clearly established federal law under Jackson v. Virginia in violation of the Due Process Clause of the Fourteenth Amendment for failing to correct the wrong

when Farthing brought it to the commonwealth's attention. Trial counsel's performance was deficient in this matter and such performance affected the outcome of Farthing's trial. THE INEFFECTIVE trial counsel violated the Sixth Amendment and the assistant prosecuting attorney of Newport News, Va. maliciously prosecuted Farthing of statutory burglary in contrary to what the commonwealth's required to prove in codes 18.2-90 and 18.2-91 in order to sustain the conviction.

When a habeas applicant seeks a COA, the court of appeals, should limit its examination to a threshold inquiry into the underlying merit of his claims. E.g., Slack, 529 U.S., at 481, 120 S.Ct. 1595. This does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precendent and the statutory text, the prisoner need only demonstrate " a substantial showing of the denial of a constitutional right." 2253 (c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. E.g., id., at 484 120 S.Ct. 1595. He need not convince a judge, or, for that matter three judges, that he will prevail, but must demonstrate that reasonable [537 U.S. 324] jurists would find the district court's assessment of the constitutional claims debatable or wrong, ibid. Pp. 1039-1040 The district court was not suppose to rule on the merits on my habeas corpus claims. A COA will issue if 2253 requirements have been satisfied with constitutional claims that are debatable.

II. Under Blockburger v. United States 248 U.S. 299 (U.S.Ill..1932) Was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from violating the Double Jeopardy Clause of the Fifth Amendment by convicting Farthing of attempted statutory burglary with intent to commit assault and battery and attempted malicious wounding when assault and battery is a lesser included offense of malicious wounding. see code 18.2-54 for the assault and battery statute

The commonwealth contends that attempted statutory burglary with the intent to commit assault and battery is not a lesser included offense of malicious wounding because each crime requires proof of a fact the other does not. Under Blockbuster, the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

See Brown v. Commonwealth 222 Va. 111 (Va. 1981) (where Brown was convicted of assault and battery under the indictment charging attempted murder, and was also convicted of unlawful wounding of the same victim under indictment charging malicious wounding arising out of the same incident. It was held that [222 Va. 116] assault and battery and unlawful wounding are lesser included offenses of malicious wounding.) Farthing asserts that this case is similar to Brown's case in regards of being convicted of assault and battery under the indictment charging attempted statutory burglary and also convicted under indictment attempted malicious wounding of the same person arising out of the same incident. Trial counsel's performance was deficient in this matter because he failed to research code 18.2-54 for

the assault and battery statutes in order to determine if it is a lesser included offense of malicious wounding. Code 18.2-54 states: that assault and battery requires proof of an overt act or an attempt with force and violence, to do physical injury to the person of another, whether from malice or from wantoness, together with the actual infliction of corporal hurt on another willfully or in anger. Jones v. [14 Va.App.133] Commonwealth 184 Va. 679, 681-82 (1946)

In situations where a defendant is improperly convicted for a lesser included offense, the proper remedy is to vacate both the conviction and sentence on the included offense leaving the conviction on the greater offense intact. see United States v. Buckley 440 U.S. 982, 99 S.Ct. 1792 60 L.ed. 2d 242 (1972); United States v. Michel 444 U.S. 825, 100 S.Ct. 47, 62 L.ed. 2d 32 (1979); United States v. Rosenthal 406 U.S. 931, 92 S.Ct. 1801, 32 L.ed. 2d 134 (1972) Moreover, after determining that assault and battery was a lesser included offense of malicious wounding in Brown's case when code 18.2-54 revealed that malice is a element of the assault and battery offense Brown's attempted murder indictment was dismissed and his conviction of assault and battery was vacated and the jail sentence and the fine imposed on Brown was set aside. Therefore, trial counsel's failure to argue that conviction of two offenses, one which is lesser included in the other, offends the double jeopardy guarantee. In such case, the constitution requires that the conviction of the lesser offense and the sentence imposed upon that conviction be vacated. See also Brown v. Ohio 432 U.S. 161, 97 S.Ct. 2221 (U.S. Ohio 1977) The Supreme Court authoritatively defined that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment held to bar prosecution and punishment for the crime of stealing

an automobile following prosecution and punishment for the lesser included offense for operating the same vehicle without the owner's consent. Pp. 2224- 2227. As can be seen here the Commonwealth's ruling in regards to Farthing's attempted statutory burglary with intent to commit assault and battery conviction and Farthing's attempted malicious wounding conviction are both contrary to clearly established federal law in line with that test, the Double Jeopardy Clause generally forbids successive prosecution and cumulative punishment for a greater and lesser included offense. Pp. 2225-2227 Brown's joyriding conviction which was the lesser included offense was reversed.

In Slack, supra, at 483, 120 S.Ct. 1595, it was held for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must " sho [w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed.' 529 U.S., at 484, 120 S.Ct. 1595

The court look to the District Court's assessment to the petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based [537 U.S. 337] on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. To that end, the court opinion in Slack held that a COA does not require a showing that the appeal will succeed.

III. Under Blockburger v. United States 248 U.S. 299 (U.S.Ill.1932) Was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from violating the Double Jeopardy Clause of the Fifth Amendment by convicting Farthing of attempted statutory burglary with intent to commit assault and battery with one count of a use of a firearm in the commission of a felony and attempted malicious wounding with a subsequent count of a use of a firearm in the commission of a felony when assault and battery is a lesser included offense of malicious wounding which constitutes a single offense not multiple offenses. see code 18.2-54 for the assault and battery statute

The commonwealth contends that under code 18.2-53.1 in determining whether statute prohibiting use of pistol while committing murder, burglary, malicious wounding, or robbery has been violated, and if so, how many times, it is the identity of offenses which is dispositive, not the number of underlying felonies, and, if single act results in injury to two or more persons, corresponding number of distinct offenses may result.

Under Blockburger the applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. U.S.C.A. CONST. AMENDMENT FIVE

According to code 18.2-54 where it states that assault and battery requires proof of an overt act or an attempt with force and violence, to do physical injury to the person of another, whether from malice or from wantoness, together with the actual infliction of

corporal hurt on another willfully or in anger. Jones v.[14 Va.App.133] 184 Va. 679, 681-82 (1946) Malice is an element of the offense assault and battery therefore assault and battery is a lesser included offense of malicious wounding. Moreover Farthing's trial counsel's deficient performance affected the outcome of the trial. Farthing suffers from multiple punishment from the same offense because trial counsel failed to argue that when the indictment in this case charges one offense or two; in either event, the result is the same. If only one offense is charged, the indictment can support only one conviction and sentence; but even if two offenses are charged, because they are contained in a single count, only one conviction and one sentence are permissible. The conclusion as a result of the logical extension of a rule long applicable in an analogous situation, viz., where a single-count indictment charges both housebreaking and grand larceny as part of the same act or transaction.

Under the decisions of this court, while two seperate and distinct charges, one of housebreaking with intent to commit larceny, and the other of grand larceny, may be made in a single count, an accused may be found guilty of either of the offenses but there can be only one penalty imposed. See Robinson v. Commonwealth 190 Va. 134, 138-39, 56 S.E.2d 367, 369 (1949); Jones v. Commonwealth 208 Va. 370, 375, 157 S.E.2d 907, 911 (1967); Clark v. Commonwealth 135 Va. 490, 496, 115 S.E. 704, 706 (1923) It is permissible to include to include both housebreaking and grand larceny in single-count housebreaking indictment " because the charge of larceny in such case [is] the best evidence of the intent with which the breaking was committed. " Clark, 135 Va. at 496, 115 S.E. at 706. citing Morris v. Commonwealth 228 Va. 210 (Va. 1984) code 18.2-53.1 statute

Assault and battery is a lesser included offense of malicious wounding. See Brown v. Commonwealth 222 Va. 111 (1981) code 18.2-54

In Harris v. Oklahoma 433 U.S. 682 (U.S.Okla.1977) petition for writ of certiorari was granted and the Supreme Court of the United States held that proof of underlying felony i.e. robbery with firearms was necessary to establish intent necessary for felony murder conviction of petitioner for fatal shooting of grocery store clerk during armed robbery the double jeopardy clause barred subsequent prosecution and conviction for robbery with firearms. When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one.

In U.S. v. Edmonds 524 F.2d 62 (C.A.D.C. 1975) (it was held where armed assault was an essential part of proof establishing armed rape, the armed assault was a lesser included offense within the armed rape, and the assault conviction would be vacated and conviction of assault with dangerous weapon was vacated as included offense.)

Farthing argues his case and argument is similar to what Darius Tremayne James argued in his case where James was convicted of attempted robbery and for attempted use of a firearm during the commission of attempted robbery under Code 18.2-53.1 See Jay v. Commonwealth 275 Va. 510,526 659 S.E.2d 311 (Va.2008) In James case in order to convict James for the crime of attempted robbery, the Commonwealth had to prove beyond a reasonable doubt [275 Va. 526] not only that James intended to rob Detective Sloan but also that he undertook some " direct, but ineffectual, act " toward the consummation of taking property from Detective Sloan against her will by force, violence, or intimidation.

The evidence viewed in the light most favorable to the Commonwealth established James intent to commit the crime of robbery, but it did not establish beyond a reasonable doubt the other necessary element of attempted robbery, i.e. a direct overt act that could fairly be characterized as " well calculated to accomplish the result intended." We therefore hold as a matter of law that the evidence in this case was insufficient to prove beyond a reasonable doubt that James committed the crime of attempted robbery.

The Virginia Supreme Court decision to reverse James attempted robbery conviction necessarily requires a reversal of the conviction for attempted use of a firearm during the commission of attempted robbery under Code 18.2-53.1. Under the plain language of Code 18.2-53.1, there can be no conviction for use or attempted use of a firearm when there has been no commission of one of the predicate offenses enumerated in that statute. Bundy v. Commonwealth 220 Va. 485, 488, 259 S.E.2d 826, 828 (1979) (a violation of Code 18.2-53.1 occurs only when a firearm is used with respect to the felonies specified in the statute); Jay v. Commonwealth 275 Va. at 527, 659 S.E.2d at 321 (2008)

Farthing asserts this was a plausible line of defense that trial counsel failed to pursue and such failure affected the outcome of Farthing's trial because this conviction enabled the Commonwealth to convict Farthing of the subsequent count of a use of a firearm in the commission of a felony. If trial counsel would have used code 18.2-54 that states assault and battery was a lesser included offense of attempted malicious wounding Farthing would be finish his not prison sentence because the three year mandatory sentence that the first count carried would be complete and there would not have been a subsequent count of a use of a firearm in the commission of a felony.

Therefore, the language in Flythe v. Commonwealth 221 Va. 832 275 S.E.2d 582, (Va. 1981) reads where several convictions results from the same act, each conviction is seperate and distinct from the other. It is identity of the offense and not the act which is dispositive. In Flythe it was held that if two or more persons are injured by a single criminal act, this results in a corresponding number of distinct offenses. Moreover, Farthing argues that Flythe's case dont apply to Farthing's argument because assault and battery under indictment charging attempted statutory burglary is a lesser included offense of attempted malicious wounding so that would reverse and dismiss and vacate the attempted statutory burglary with intent to commit assault and battery with one count of a use of a firearm conviction because according to the commonwealth's evidence when it stated that it was one incident involving one person and a single offense. code 18.2-54

Farthing contends as a consequence of trial counsel's ineffective assistance the court " determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court," and the U.S.C.A. denied Farthing's request for a COA. This is a miscarriage of justice and this conviction should be reversed and dismissed. Trial counsel and appeal's counsel performance was deficient in this matter because trial counsel could have preserved Rule 5A:18 argument for the direct appeal and the appeal's counsel could have argued that Farthing recieved ineffective assistance of counsel during trial then the appeal counsel should have interjected Rule 5A:18 Application of the ends of justice exception is appropriate where [the accused]

was convicted for conduct that was not a criminal offense" or "the record..... affirmatively prove[s] that an element of the offense did not occur." Redman v. Commonwealth 25 Va. App. 215, 221-22, 487 S.E.2d 269, 272-73 (1997)

The Supreme Court has consistently found constitutional error without any showing of prejudice where counsel was totally absent or prevented from assisting the defendant during a critical stage of the proceeding. Cronic 466 U.S. at 659

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable. The issue here Farthing argues is that the District Court dismissed the petition based on procedural grounds and rejected the constitutional claims on the merits. In regards to the procedual grounds ruling the court held that if the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find if debatable whether the district court was correct in its procedural ruling.

In Miller v. Commonwealth 359 S.E. 2d 841, 5 Va. App. 22 (1987) Code 1950 18.2-51,18.2-53.1 (Unlawful wounding is lesser included offense of malicious wounding, and element of malice constitutes distinction between offenses.)

In Akers v. Commonwealth 525 S.E.2d 13, 31 Va. App. 521 code 1950 18.2-51,18.2-53.1 (Bench trial convictions for unlawful wounding,lesser offense of malicious wounding, and use of firearm in commission of malicious wounding, warranted reversal of firearm conviction arising out of same incident.)

IV. Under The Federal Rule of Evidence 403 was trial counsel ineffective for failing to prevent the prosecuting attorney of Newport News, Va. from improperly admitting Farthing's prior conviction order during the commonwealth's case in chief by not offering to stipualte to the nature of the prior convictions. Trial counsel failed to file a motion to sever or bifurcate trial in regards to felon in possession of a firearm offense.

The Federal Rule of Evidence 403 embodies the concern for a defendant's right to a fair trial and requires the district court to reject evidence whose prejucial effect substantially outweighs it's probative value. See United States v. Simpson, 992 F.2d 1224 (D.C. Cir.) (Finding " the fairness of the entire proceeding" questionable when other-crimes evidence was improperly admitted) cert. denied, 510 U.S. 906, 114 S.Ct. 286 126 L.Ed. 2d 236 (1993)

Farthing asserts that the content of the argument in regards to this matter is the prosecutor introduced the prior felony conviction order during the commonwealth's case in chief during trial before any finding of guilt and before the defense witnesses took the stand which was harmful to Farthing because it made the judge believe that the commonwealth evidence was believeable. Trial counsel made no objection to the malicious prosecution. The same prosecutor also admitted Farthing's prior felony conviction during the preliminary hearing and trial counsel had time to prepare for the illegitimate methods used by the prosecutor in order to obtain a tainted conviction.

The commonwealth contends that because Farthing chose to testify that it was no need for trial counsel to offer to stipulate to Farthing's prior felony conviction order because the judge would

have known that Farthing was a felon but the purpose of the offer to stipulate was to prevent the judge from knowing the nature of the felony because it would make Farthing's trial constitutionally unfair. Furthermore Farthing has no prior burglary charges nor did Farthing have any violent felonies on his record and it was no reason to use the prior felony conviction order during the commonwealth's case in chief to prove that Farthing was convicted of nonviolent firearm offenses from nine years ago. Evidence of gun charges at his trial was highly prejudicial and affected the outcome of the trial. Farthing does not contend the fact of his prior felony conviction would be known when he testified, the content of Farthing's argument is the judge would know the nature of the prior felony before any finding of guilt. " As the Strickland court stated, that a person who happens to be a lawyer is present at trial alongside the accused is not enough to satisfy the constitutional command." Strickland v. Washington 466 U.S. 485 (1984) Federal Rule of Evidence 403 provides; Evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice. See United States v. Foskey 636 F.2d 517, 525 (D.C. Cir. 1980) (holding that district court's admission of evidence over a Rule 403 objection is reviewed for abuse of discretion.)

United States v. Poore 594 F.2d 39,41-41 (4th cir.1979) In like vein, the Fourth Circuit reversed a conviction for possession of an unregistered firearm where the indictment contained unnecessary language describing the defendant's prior felony, which was for carrying a handgun of the same type for which he was standing trial. This was a plausible line of defense trial counsel failed to pursue. The Second and Fourth circuits affirmitively reject admission of

evidence concerning the nature of the prior crime. See United States v. Gilliam 994 F.2d 97, 103 (2d Cir. 1993); United States v. Poore 594 F.2d 39, 41-43 (4th cir. 1979)

In U.S. v Jones 67 F. 3d 320 (C.A.D.C 1995) It was held that district court committed reversible error when it denied defendant's motion to exclude evidence of the nature of his prior felony conviction for possession with intent to distribute cocaine to which defendant offered to stipulate, to the nature of the prior felony conviction was reversed and remanded. In Old Chief v. United States 519 U.S. 172 (U.S. Mont. 1997) (evidence of name and nature of defendant's conviction was not admissible to show prior felony conviction element of offense of possession of firearm by felon.)

Trial counsel's failure to motion to bifurcate felon in possession of a gun and trial counsel's failure to motion to sever felon in possession of a gun unfairly prejudiced Farthing. In United States v. Jones 16 F. 3d. 487 (C.A.2(N.Y.)(1994) Defendant suffered prejudice from joinder of felon in possession of a firearm charge with other charges against him to minimize potential prejudice, the district court forbade the government to elicit the underlying facts of the prior conviction; because the prior felony conviction should not be considered " for character or propensity." reversed and remanded In United States v. Dockery 955 F.2d 50 (C.A.D.C. 1992) (the court of appeals held that failure to sever ex-felon firearm count from drug counts was abuse of discretion) Fed. Rules Cr. Proc. Rule 14 Where prosecutor successfully introduced prior conviction with no stipulation or motion to sever convicted felon in possession of a firearm offense prejudiced Farthing and such prejucdice affected the outcome of the trial.

Trial counsel did not know Farthing was going to testify during trial until trial counsel asked Farthing the day of the trial, counsel never mentioned to Farthing that he filed any type of motion that would prohibit the prosecutor from introducing the nature of Farthing prior felonies during trial. In fact trial counsel didnt prepare any type of defense concerning the possession of a firearm charge by convicted felon he mentioned it in the letter he wrote to the assistant attorney general of Virginia by stating that he didnt feel the need to sever the felon in possession of a firearm conviction because Farthing was going to testify but this knowledge of Farthing consenting to testifying was on the day of trial prior to going into the courtroom so that trial counsel's failure to sever caused Farthing 'substantial prejudice' in the form of a miscarriage of justice.

The evidence on the attempted burglary with intent to commit assault and battery conviction element was not proved beyond a reasonable doubt. Farthing's convictions on the other counts are tainted by retroactive misjoinder. Because of the spillover effect occasioned by proof of Farthing's tawdry record, Farthing argues that trial cousel should have severed or at least bifurcated the felon in possession count, in order to utilize this plausible line of defense. See United States v. Joshua 976 F.2d 844 (3d cir. 1992) (courts have held that joinder of an ex-felon count with other charges requires either severance, bifurcation, or some other effective ameliorative procedure.)

In United States v Dockery 955 F.2d 50 (D.C. 1992) (bifurcated trial is appropriate when government joins felon in possession count with other charges and proof of felony would not be admissible at trial on other counts.) See also United States v. Desantis 802 F. Supp. 794 (1992) court ordered severance of ex- felon count because of manifest danger of prejudice) (E.D.N.Y)

V. Under Federal Rule of Evidence 404 (b) was trial counsel ineffective for failing to IMPEACH the false testimony of the of the commonwealth's false witness Johnson who testified to matters unrelated to Farthing's charges which violated the Due Process Clause of the Fourteenth Amendment which guarantees a U.S. citizen a constitutional right to a fair trial.

Under Federal Rule of Evidence 404 (b) it precludes the admission of evidence " of other crimes, wrongdoings or acts..... to prove the character of a person in order to show action in conformity therewith.

Trial counsel assistance was ineffective in this matter because he failed to IMPEACH the false witness false testimony which was highly prejudicial and unrelated to Farthing's charged offenses that Farthing stood trial for. The commonwealth's false witness Larry Johnson falsely testified under oath that he witnessed Farthing pistol whip his girlfriend Ramona White on the night of the date in question. This false evidence damaged the character of Farthing and affected the outcome of the trial. Defense witness Ramona White took the witness stand during cross examination and was questioned about these false allegations and she told the assistant prosecutor Ehrenworth that she was not a victim of a attack of a gun by Farthing. At this point trial counsel failed to object to this questioning that had nothing to do with what Farthing stood trial for made Farthing's trial constitutionally unfair or for the most part trial counsel loyalty was with the commonwealth. Trial counsel was questioned by the assistant attorney general of Virginia about his abandoning his dereliction of duty in this matter. Trial counsel response favored the commonwealth argument just like trial counsel's deficient performance completely prejudiced Farthing when counsel

stated in the letter that defense witness didn't sound believable about not being pistol whipped by Farthing with a gun. But in actuality how can Johnson false testimony be more believable than White besides this is who Johnson alleges was attacked by a gun. Trial counsel never asked the commonwealth's assistant prosecutor to adduce any police report, phone calls to the police on that night from White herself stating that she was a victim of a attack by a gun. Trial counsel never asked Ehrenworth to adduce any pictures of White that showed she was a victim of a attack with a gun. Trial counsel counsel never asked the prosecution was any of White's blood found on the scene. Or did the commonwealth have any physical evidence from a hospital that stated White was there on the night of the date in question and had been treated for gun attack injuries. The assistant prosecutor knowingly withheld evidence that there was no physical evidence about White being attacked with a gun. Moreover, its not normal for a trial counsel to defend the prosecution's witness as far as claiming Johnson's testimony more believable than White's with no physical evidence to support Johnson's testimony.
See Brady v. Maryland 373 U.S. 83 S.Ct. 1194 (U.S. Md. 1963) Suppression by prosecution of evidence favorable to an accused upon request or no request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A.Const.Amend. 14

This ruling is an extension of Mooney v.Holohan 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, where the court ruled on what on nondisclosure by a prosecutor violates due process:

'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through

the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.' The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosector but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffer when any accused is treated unfairly.

Trial counsel abandoned his dereliction of duty because he failed to provide any defense when it really matter. Because when White was asked was she attacked by a gun by Farthing and she answered NO that should have been enough evidence for trial counsel to IMPEACH Johnson and along with the fact that the assistant prosecutor adduced no physical evidence to support Johnson's false testimony because there was no evidence of that. Moreover, this is a miscarriage of justice because when Johnson testified during trial he stated that he didnt know anything about the incident concerning Warner's rented room bedroom being allegedly broke and entered until Warner told him.

The court has established a two-part test to determine the admissibility of Rule 404 (b) evidence. United States v. Beechum 582 F.2d 898, 911 (5th cir. 1978) (en banc)

The extrinsic-offense evidence must (1) be relevant to an issue other than the defendant's character, and (2) must possess probative value which is not outweighed by undue prejudice. United States v. Bentley-Smith 2 F.3d 1368, 1377 n. 11 (5th cir. 1993)

Similarity of the extrinsic offense to the offense charged is the standard by which relevancy is measured under Rule 404 (b). The Commonwealth's malicious prosecutor used illegitimate methods to obtain a tainted conviction and in the process violated the Due Process Clause of the Fourteeth Amendment by knowingly using false evidence and false testimony that was completely unrelated to Farthing's charged offenses.

In Lewis v. Commonwealth 225 Va. 497 (Va. 1983) (the Supreme Court of Virginia held that evidence which has no tendency to prove guilt but only serves to prejudice an accused, should be excluded on the ground of lack of relevancy. For evidence to be admissible it must relate and be confined to matters in issue and tend to prove an offense or be pertinent thereto. Evidence of collateral facts or those incapable of affording any reasonable presumption or inference on matters in issue, because too remote or irrelevant cannot be accepted in evidence.) See also King v. Commonwealth 217 Va. 912 (Va. 1977) (the Supreme Court held that general, evidence that accused has committed an unrelated crime is inadmissible against him) It was basically Johnson's false testimony against White the alleged victim of a offense that Farthing was not charged with. Johnson stated he lived on the second floor and Warner lived on the third floor. Johnson was not a witness to the incident on the night of the date in question.

VI. Was trial counsel ineffective during trial for failing to IMPEACH the commonwealth' s witness in chief false testimony for committing numerous acts of perjury. Due process violation of the Fourteenth Amendment

Farthing asserts that he was denied a fair trial because the assistant prosecuting attorney knowingly used perjured testimony to obtain a tainted conviction. The knowingly used perjured testimony consists of Warner's preliminary hearing testimony in the matter of conflicting accounts of what Warner describes of him having a miraculous ability to see a gunman standing behind a closed rented room bedroom door. During trial Warner's testimony was completely different on how he insists on how he allegely has the ability to see standing behind a rented room bedroom door. The significance of this argument in reference to having the ability to identify the alleged gunman is that in order for trial counsel to effectively cross examine Warner during trial trial counsel needed the preliminary hearing transcript of proceedings to do so. Trial counsel failed to obtain the preliminary hearing transcript of proceedings prior to trial so this affected his ability to reveal to the judge any discrepancy between Warner's different accounts which would affect hiss ablity to see the gunman but his testimony conflicts with his actions and visibility. I emphasized that due to Warner's inability to remember what happened on the night of the date in question should have indicated to trial counsel that Warner was not being truthful. Warner suffered no injuries. Trial counsel admitted on the letter he wrote to the assistant attorney general that he did not have the preliminary hearing transcript of proceedings to see the numerous acts of perjury that Warner committed but he responded in the letter that what Farthing argued was not enough to prove

perjury. Without the preliminary hearing transcript of proceedings trial counsel could not effectively cross examine Warner during trial so he could use any prior inconsistent statement against him that would affect his credibility in order to IMPEACH Warner testimony. "

In Ramonez v. Berghuis 490 F.3d 482 (C.A.6 (Mich.) 2007) (it was held that constitutionally effective counsel must develop trial strategy based on what investigation reveals witnesses will actually testify to not based on what counsel guesses they might say in the absence of a full investigation) Challenging Warner's credibility was a plausible line of defense that trial counsel failed to pursue. In Ohara v. Brigano 499 F. 3d 492, 502 (6th cir. 2007) (undisclosed written statement by victim could have been used to IMPEACH victim's testimony at trial.) The preliminary hearing transcript of proceedings could have been used against Warner's statement he gave to the police on the night of the date in question.

In Nealy v. Cabana 764 F.2d 1173 (the court of appeals held that missing testimony might have affected the truthfulness of states witness and its evaluation of the relative credibility of the conflicting witnesses, petitioner adequately established that he was prejuciced by his counsel's failure to investigate.)

The Commonwealth contends that having an investigator view the place the incident occured wouldn't have affected the outcome of Farthing's trial. The commonwealth also contends that trial counsel did try to impeach Warner's testimony although trial counsel admitted in the letter he wrote to the assistant attorney general Mr. Schandevel stating that he has not seen the preliminary hearing transcript of proceedings but credited his cross examination of Warner without any mention during the trial that Warner committed perjury and his testimony should be IMPEACHED.

The matter of law is that code 18.2-435 for perjury was violated by Warner the commonwealth witness in chief on numerous occasions during the preliminary hearing and the trial. How could Warner see a gunman if he stood behind his bedroom rented room door the entire time the incident occured allegely because Farthing denies being involved in the incedent. Farthing asserts that the damage done to Warner's door may have been self inflicted. People in this world commit crimes and put the blame on somebody else. For instance, when Warner was cross examined by trial counsel in the preliminary hearing Warner stated his first encounter with the accused on the night of the date in question was at the door of his rented room bedroom. Warner stated he walked to his door after he heard someone knock on his bedroom door then it imploded on him when it was allegely kicked, Warner stated the door was only open a split second. Warner slammed his door shut then he heard a shot pow then Warner fell up against his wall. How can Warner have seen a gunman if he stood behind his rented room bedroom door that was only open a split second then he slammed the door shut then fell up against his wall.

During trial Warner was asked when did he encounter the accused on the night of the date in question. Warner testimony changed Warner stated he was talking to White when she was in the kitchen cooking and he claims he witnessed the accused open the boarding house door with a key. Warner then stated he was talking to White on the second floor and witnessed the accused allegelly walk up the stairs. How can Warner be in two places at one time? Where was trial counsel's assistance during this phase of the trial? From here it can be seen that Warner forgot the lie he told in the police report and the preliminary hearing so he had to tell another lie. This is a miscarriage of justice.

In Higgins v. Renico 470 F.3d 624 where the accused for convicted for a murder he didnt commit. The actual shooter was taking down to the police station where he got his hand tested for gunshot residue. The accused was wrongly convicted of murder. The test results took a while to get back to the arresting officer in reference to the gun shot residue that was found on the shooter's hand. The shooter blamed the accused for the murder. The accused as a consequence suffered a wrongful conviction due to ineffective assistance of counsel. (In Higgins v. Renico it was held that defense attorney's failure to cross examine key prosecution witnesses at trial constituted deficient performance and defendant was prejudiced by defense attorney's failure to cross examine key prosecution witness) (C.A.6 (Mich.) 2006) When Warner stated in the preliminary hearing that he slammed his rented room bedroom door shut then fell against his wall after he heard the shot was a indication that what Warner stated of how he allegely had the ability to see the gunman conflicting with his actions as the incident occured. As the cross examination went on during the trial Warner was asked what happened to his rented room bedroom door within the boarding house on the night of the date in question. Warner stated his door was kicked in on him as he was about to open it. It was only open a split second before he slammed it shut then this time Warner stated he leaned to the side and started yelling that he didnt do anything. This would affect Warner's ability to see into his hallway, gunman, clothes the gunman was wearing, the bathroom, a gun pointed in his face, and what color the gun was. The way Warner describes the incident conflicts with his actions in contrast to his testimony which explains Warner's numerous acts of perjury. Warner was not being truthful about what happened on the night of the date in question.

In Nixon v. Newsome 888 F.2d 112 (C.A. 11 (GA.) 1989) (The Court of Appeals, Anderson , Circuit Judge, held that trial counsel was ineffective in failing to impeach state's witness with prior inconsitent testimony) Ineffective assistance of counsel " For Sixth Amendment purposes," as the constitution entitles a defendant to generally proficient performance not perfect representation, but where an attorney fails to raise an important obvious defense without any imaginable strategic or tactical reason for the omission, his performance falls below the standard of proficient representation that the constitution demands. Strickland v. Washington; See also United States v. Cook 102 F.3d 249 252 (7th cir. 1996) ("eyewitnesses may give unreliable testimony, because of shortcomings of memory, the difficulty of categorizing facial features of other ethnic groups, and the tricks the mind plays on people desperate to pin the blame on someone.") In Nixon v. Newsome 888 F.2d 112,115 (11th cir. 1989) (Finding deficient performance where counsel failed to confront the prosecutor's star witness with inconsistent statements, thus "sacrificing an opportunity to weaken the inculpatory testimony)

The Virginia Supreme Court and United States District Court in the Eastern District of Virginia seeks to hold Farthing to a standard that even Strickland does not impose. Under Strickland a petitioner is not required to disprove or impeach every detail of the state's trial evidence. See e.g. Strickland 466 U.S. at 693, 104 S.Ct. 2052 (nor must a petitioner "show that counsel's deficient conduct more likely than not altered the outcome in the case")

REASONS FOR GRANTING THE WRIT

The Prisoner's all across the United States suffer from the results of ineffective assistance of counsel. As a consequence, many miscarriage of justice occur. Because of these unfortunate situations, quite often the accused suffers at the hands of injustice. Prisoner's lack the ability and knowledge in regards to understanding and interpreting the law. The prisoner seeks the assistance of counsel to provide adequate representation as he stands trial against all accusations. Without the effective assistance of counsel standing along side of the accused prisoners' rather take a plea for fear of going to trial and lose. According to the Due Process Clause of the Fourteenth Amendment even an accused U.S. citizen is guaranteed some justice and a constitutional right to a fair trial. Farthing asserts that he has been deprived due process of law, life and liberty. I hope the United States Supreme Court grant Farthing relief from a wrongful conviction due to a ineffective counsel because his position requires him to stand for justice. Throughout the proceedings Farthing has presented arguments supported with case laws that had outcomes that was favorable to those who were convicted of offenses that the Court's evidence failed to prove every essential element of guilt beyond a reasonble doubt. Farthing asserts that he may be a victim of the system that suppose to uphold justice and rectify the affair of injustice. Farthing contends that according to clearly established federal law that his convictions for attempted statutory burglary with intent to commit assault and battery should be reversed and dismissed and vacated because Warner's rented room locked bedroom is not a dwelling house. And Farthing's convictions for attempted statutory burglary with intent to commit assault and battery with one count of use of a firearm and attempted malicious wounding with a subsequent count of use of a firearm because assault and battery is a lesser included offense of malicious wounding should be reversed [illegible].

CONCLUSION

In Cargle v. Mullin 373 F.3d 1196 (C.A.10 (Okla.) 2003) (The court of appeals, Ebel, Circuit Judge, held that: (1) defense counsel's performance at guilt phase of defendant's murder trial was constitutionallyneffective; (2) habeas relief was warranted on the basis of cumulative errors which occurred during guilt phase; and habeas relief was warranted on the basis of cumulative errors which occurred during penalty.

Farthing asserts that he should be entitled to habeas relief on the basis of cumulative errors which occurred during the commonwealth's case in chief, guilt phase and during the penalty phase and sentencing phase.

The petition for a writ of certiorari should be granted.

Respectfull submitted,

Date: 5/5/18

JAMES M. MILLER
NOTARY PUBLIC
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MY COMMISSION EXPIRES 6-30-20
COMMONWEALTH OF VIRGINIA

5/5/18
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