

ORIGINAL

No. 19-5761

FILED

AUG 09 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JAVON LAREN MARTIN — PETITIONER
(Your Name)

vs.

HAROLD W. CLARK — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAVON LAREN MARTIN
(Your Name)

KEEN MOUNTAIN CORR. CMT. P.O. BOX 860
(Address)

OAKWOOD, VIRGINIA 24631
(City, State, Zip Code)

(Phone Number)

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LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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

☒ For cases from **federal courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☒ 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,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the VIRGINIA SUPREME COURT court appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JUNE 25, 2019.

☐ 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: JUNE 25, 2019, 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. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was AUG 18, 2015.
A copy of that decision appears at Appendix C.

☒ A timely petition for rehearing was thereafter denied on the following date: NOV 3, 2017, and a copy of the order denying rehearing appears at Appendix C.

☐ 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

VIOLATION OF EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A DEFENDANT HAS THE "RIGHT TO BE TRIED BY A JURY WHOSE MEMBERS ARE SELECTED PURSUANT TO NON DISCRIMINATORY CRITERIA" BATSON V. KENTUCKY 476 U.S. 79, 85-86 (1986).

IN EVALUATING AN ATTORNEY RACE-NEUTRAL EXPLANATION FOR STRIKING A JUROR, THE COURT MUST DETERMINE WHETHER, ASSUMING THE PROFFERED REASONS FOR THE PEREMPTORY CHALLENGES ARE TRUE, THE CHALLENGES VIOLATE THE EQUAL PROTECTION AS A MATTER OF LAW.

BARKSDALE V. COMMONWEALTH, 17 VA. APP. 456, 459-460 428 S.E. 2D 761, 763 (1993)

AS A GENERAL RULE "OPINION TESTIMONY OF LAY WITNESS IS INCOMPETENT. BOND V. COMMONWEALTH 226 VA 534 538, 311 S.E. 2D 769, 772 (1984)

A CRIMINAL CONVICTION MUST BE FOUNDED UPON PROOF BEYOND A REASONABLE DOUBT. DUE PROCESS REQUIRES NO LESS IN RE. WINSHIP 397 U.S. 358, 364 (1970)

QUESTION(S) PRESENTED

- 1) THE CIRCUIT COURT ERRED BY ALLOWING THE COMMONWEALTH TO USE A PREEMPTORY STRIKE OF A POTENTIAL JUROR WITHOUT PROVIDING A VALID RACE-NEUTRAL BASIS FOR THE STRIKE IN VIOLATION OF EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION
- 2) THE CIRCUIT COURT ERRED IN DENYING A MISTRIAL AFTER THE COMMONWEALTH MET WITH THE CO-DEFENDANT WHILE STILL A TESTIFYING WITNESS DURING THE TRIAL
- 3) THE CIRCUIT COURT ERRED IN DENYING THE DEFENSE'S OBJECTION TO DETECTIVE ORTLIZ'S TESTIMONY REGARDING HER CONCLUSIONS OF THE VIDEO AND ITS IMPORTANCE
- 4) THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FIRST-DEGREE MURDER AND ROBBERY IN THAT THE EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR MARTIN ACTUALLY COMMITTED THOSE CRIMES

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

ON FEBRUARY 13, 2013, A JURY IN THE CIRCUIT COURT FOR ARLINGTON COUNTY RENDERED GUILTY VERDICTS ON TWO CHARGES AGAINST MARTIN: FIRST-DEGREE MURDER IN VIOLATION OF VIRGINIA CODE SECTION 18.2-32 (CASE NO. CR12-16, AND ROBBERY IN VIOLATION OF SECTION 18.2-58 (CASE NO. CR12-15. PET. FOR WRIT OF HABEAS CORPUS 1-2 (ECF NO. 1 AT 1-2) ON SEPTEMBER 12, 2013, THE COURT SENTENCED MARTIN TO TWENTY (20) YEARS ON THE MURDER CHARGE AND SEVEN (7) ON THE ROBBERY CHARGE, IN ADDITION TO IMPOSING COST. ID AT 1,

MARTIN, BY COUNSEL, APPEALED TO THE COURT OF APPEALS OF VIRGINIA RAISING FOUR GROUNDS FOR RELIEF. ID AT 2. THE COURT OF APPEALS DENIED MARTIN'S CLAIMS IN A PER CURIAM OPINION. MARTIN V. COMMONWEALTH NO. 2183-13-4 (VA. CT. APP. OCT 14, 2014) ECF NO 13-1 A THREE JUDGE PANEL OF THE COURT AFFIRMED THE DENIAL TWO DAYS LATER MARTIN V. COMMONWEALTH NO. 2183-13-4 (VA. CT. APP. OCT 16 2014). (ECF NO. 13-2).

MARTIN THEN PETITIONED THE VIRGINIA SUPREME COURT FOR APPEAL RAISING THREE GROUNDS FOR RELIEF. PET FOR APPEAL MARTIN V. COMMONWEALTH, NO. 150122 (VA. JAN. 15, 2015) (ECF NO. 13-3) AFTER BRIEFING, THE VIRGINIA SUPREME COURT REFUSED THE PETITION ON AUG 18, 2015. (ECF NO 13-5)

ON AUG 18, 2016, MARTIN, BY COUNSEL, FILED A STATE PETITION FOR WRIT OF HABEAS CORPUS IN ARLINGTON COUNTY CIRCUIT COURT. PET., MARTIN V. WALRATH NO CL16-2130 (VA. CIR. CT. AUG 18, 2016) (ECF NO. 13-6) THAT PETITION RAISED THREE CLAIMS - RELATED TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, ID. THE COURT DENIED AND DISMISSED HIS PETITION. ORDER, MARTIN V. WALRATH NO CL16-2130 (VA. CIR. CT. MARCH 8, 2017) (ECF NO. 13-7) MARTIN THEN PETITIONED THE VIRGINIA SUPREME COURT FOR AN APPEAL OF THIS DENIAL. PET. FOR APPEAL, MARTIN V. WALRATH, NO 170763 (VA. JUNE 7 2017) (ECF NO 13-8). THE VIRGINIA SUPREME COURT FOUND NO REVERSIBLE ERROR AND REFUSED THE PETITION ON NOVEMBER 3, 2017. (ECF NO. 13-9)

MARTIN TIMELY FILED THIS FEDERAL HABEAS PETITION ON FEBRUARY 1, 2018. MARTIN RAISES GROUNDS FOR RELIEF, ALL RELATED TO INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL. RESPONDENT FILED A RULE 5 ANSWER AND MOTION TO DISMISS, AS WELL AS THE NOTICE TO PRO. SE PLAINTIFFS REQUIRED BY ROSEBORD V. GARRISON 528 F. 2d 309 (4TH. CIR. 1975) (THE RESPONDENTS MOTION TO DISMISS WAS GRANTED). MARTIN'S PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 USC. 3 2254 IS DENIED AND ALL HIS CLAIMS WERE DISMISSED.

REASONS FOR GRANTING THE PETITION

PRIOR TO TRIAL, THE COMMONWEALTH USED ONE OF ITS PEREMPTORY CHALLENGES TO STRIKE SHARRON DAY, ONE OF ONLY TWO AFRICAN-AMERICAN JURORS, WITHOUT PROVIDING A VALID, RACE NEUTRAL BASIS FOR THE STRIKE IN VIOLATION OF BATSON V. KENTUCKY, 476 U.S. 79 (1986). MR MARTIN MADE A PRIMA FACIE CHALLENGE THAT THE COMMONWEALTH'S PEREMPTORY STRIKE WAS MADE ON RACIAL GROUNDS AND THE COMMONWEALTH'S RESPONSE WAS INSUFFICIENT TO REBUT THE PRIMA FACIE CHALLENGE. THE CIRCUIT COURT ERRED BY ALLOWING THE COMMONWEALTH'S VAGUE GENERALITIES TO BE THE BASIS FOR THE COMMONWEALTH'S STRIKE. THE PURPORTED BASIS FOR STRIKING MS DAY IS THAT SHE WOULD BE LIBERAL-MINDED AND MORE SYMPATHETIC TO THE DEFENCE BECAUSE SHE WORKED IN THE MENTAL HEALTH FIELD. THIS REASONING SIMPLY HAS NO FOUNDATION. IN FACT, MENTAL IS NOT AN ISSUE IN THIS CASE. THE COMMONWEALTH NEVER ASKED A QUESTION RELATING TO MENTAL HEALTH DURING ITS GENERAL VOIR DIRE OF THE WITNESS. IN FACT, THE COMMONWEALTH ONLY ASKED MS DAY IF SHE INTERACTED WITH THE FAMILIES INVOLVED IN HER WORK, WHICH SHE REPLIED THAT SHE DID NOT. MS DAY'S OCCUPATION AS AN OPERATIONS MANAGER, IN A LEGAL OFFICE THAT ADVOCATES FOR FAMILIES OF INDIVIDUALS WITH MENTAL HEALTH ISSUES, AND DOES NOT INTERACT WITH THE FAMILIES, IS NOT A VALID BASIS FOR A STRIKE IN THIS CASE.

THE PROSECUTOR MUST OFFER RACE-NEUTRAL EXPLANATIONS WITH SOME NEXUS TO THE CASE AT HAND. IN ADDITION, THE TRIAL JUDGE SIMPLY CANNOT ACCEPT AT FACE VALUE THE REASONS PROFFERED BY THE COMMONWEALTH. THE TRIAL JUDGE MUST ALSO INDEPENDENTLY EVALUATE THE REASON JUST AS HE OR SHE WOULD ANY DISPUTED FACT. THIS DID NOT OCCUR IN MR MARTIN'S CASE. THE TRIAL JUDGE BELIEVED THE COMMONWEALTH'S EXPLANATION CONSTITUTES AN UNREASONABLE APPLICATION OF BATSON, REQUIRING REVERSAL.

THE CIRCUIT COURT ALSO ERRED WHEN IT FAILED TO GRANT A MISTRIAL AFTER THE COMMONWEALTH'S ATTORNEY SPOKE WITH THE CO-DEFENDANT PRIOR TO HIM TAKING THE STAND ON DIRECT EXAMINATION AND ALSO IN BETWEEN CROSS-EXAMINATION AND REDIRECT ONCE THE TRIAL BEGAN AND A NUMBER OF WITNESSES TESTIFIED. THE COMMONWEALTH'S ATTORNEY SPOKE WITH THE CO-DEFENDANT PRIOR TO TAKING THE STAND. THERE IS NO REASON TO SPEAK WITH A CO-DEFENDANT IMMEDIATELY BEFORE HE TAKES

THE STAND AND AFTER THE TRIAL HAS BEGUN. MOREOVER IT IS MORE INAPPROPRIATE FOR A COMMONWEALTH'S ATTORNEY TO SPEAK WITH THE CO-DEFENDANT WHILE STILL TESTIFYING DURING A BREAK BETWEEN CROSS-EXAMINATION AND REDIRECT TO TALK ABOUT HIS EXAMINATION.

THE RULE ON WITNESSES PROVIDES MANY PROTECTIONS TO ENSURE TO A DEFENDANT A FAIR AND IMPARTIAL TRIAL. USUALLY, THIS APPLIES TO APPLIES TO WITNESSES SPEAKING ABOUT THEIR TESTIMONY WITH OTHERS ESPECIALLY OTHER WITNESSES. DURING TRIAL, THE LIMITED EXCEPTION IS FOR A VICTIM OF A CRIME. HOWEVER, THE ISSUE OF AN ATTORNEY SPEAKING WITH A WITNESS WHILE STILL UNDER OATH AND DURING HIS TESTIMONY, VIOLATES THE PRINCIPLE OF THE RULE ON WITNESSES AND SHOULD BE GROUNDS FOR A MISTRIAL.

THE COURT ALSO ABUSED ITS DISCRETION BY ALLOWING THE COMMONWEALTH WITNESS, DETECTIVE ORTIZ, TESTIFY ABOUT HER OPINION AS TO WHAT A VIDEO PURPORTED TO DISPLAY. AFTER NUMEROUS OBJECTIONS TO THE DETECTIVE'S TESTIMONY, THE COURT CONTINUED TO ALLOW THE COMMONWEALTH'S WITNESS TO TESTIFY AS TO HER OPINION CAUSING UNFAIR PREJUDICE TO MR. MARTIN. IN ESSENCE THE DETECTIVE PROVIDED THE COMMONWEALTH WITH A "BADGE OF APPROVAL" FOR THEIR THEORY OF THE CASE. THE OPINION EVIDENCE IS INAPPROPRIATE FOR LAY WITNESS. FACT-FINDING IS STRICTLY THE PROVINCE OF THE JURY OR A JUDGE SITTING WITHOUT JURY.

IN ADDITION, THE COMMONWEALTH WAS UNABLE TO CARRY ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT MR. MARTIN WAS GUILTY OF THE CRIMES CHARGED. THE COMMONWEALTH'S ENTIRE CASE RELIED LARGELY ON THE TESTIMONY OF THE CO-DEFENDANT, ROGER CLARK III. THROUGHOUT HIS TESTIMONY, IT BECAME EASILY APPARENT THAT CLARK WAS A WITNESS WHO AT BEST CONTRADICTED HIMSELF, AND AT WORST LIED ON THE STAND. ON HIS FIRST DAY OF CROSS EXAMINATION, CLARK STATED THAT HE DID NOT RECALL TELLING THE DETECTIVES SEVERAL KEY PIECES OF INFORMATION, INCLUDING THE FACT THAT HE WAS POSITIVE THAT MR. MARTIN DID NOT STAB THE VICTIM. HOWEVER ON DAY TWO OF HIS CROSS-EXAMINATION, THE LIGHT SWITCH SUDDENLY CAME ON AND CLARK ASSURED THAT NOW HE DID REMEMBER SAYING THOSE KEY FACT TO THE DETECTIVES. HE CONTRADICTED HIMSELF IN COURT ON SEVERAL INTEGRAL POINTS, THUS RENDERING HIM INCREDIBLE AS A WITNESS.

CLARK'S INACCURACIES REGARDING THE NIGHT IN QUESTION HIGHLIGHTS HOW WEAK THE COMMONWEALTH'S CASE WAS AGAINST MR. MARTIN. THERE WERE NO EYEWITNESSES WHO TESTIFIED TO ACTUALLY SEEING MR. MARTIN WITH CLARK ON THE NIGHT IN QUESTION. THE EVIDENCE OFFERED AT TRIAL SIMPLY

DID NOT MEET THE APPROPRIATE STANDARD TO HAVE CONVICTED MR MARTIN. CLARK, THE COMMONWEALTHS STAR WITNESS, WAS A INDIVIDUAL WITH A PATTERN OF DEFEAT AND WHO ARGUABLY HAD MUCH TO GAIN IN TERMS OF HIS OWN SENTENCING BY MAKING SURE MR MARTIN WAS FOUND GUILTY.

ALL OF THESE ERRORS REQUIRE THAT MR MARTINS CONVICTIONS BE VACATED AND THE CASE REMANDED FOR A NEW TRIAL, WITH APPROPRIATE SAFE GUARDES.

I. THE CIRCUIT COURT ERRED BY ALLOWING THE COMMONWEALTH TO USE A PEREMPTORY STRIKE WITHOUT PROVIDING A VALID RACE-NEUTRAL BASIS FOR THE STRIKE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

A DEFENDANT HAS THE "RIGHT TO BE TRIED BY A JURY WHOSE MEMBERS ARE SELECTED PURSUANT TO NONDISCRIMINATORY CRITERIA" BATSON V. KENTUCKY 476 U.S. 79, 85-86 (1986). IN BATSON, THE SUPREME COURT OF THE UNITED STATES HELD THAT THE PEREMPTORY EXCLUSION OF JURORS "ON ACCOUNT OF THEIR RACE" VIOLATES THE EQUAL PROTECTION CLAUSE

THE SUPREME COURT'S HOLDING IN BATSON ESTABLISHED A THREE-STEP TEST FOR ANALYZING CLAIMS THAT A PROSECUTOR'S PEREMPTORY CHALLENGES VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION. IN THE SPIRIT OF BATSON, THE VIRGINIA THE VIRGINIA SUPREME COURT HAS OUTLINED THE FOLLOWING PROCEDURE FOR DETERMINING WHETHER A PROSECUTOR EXERCISED A PEREMPTORY STRIKE TO REMOVE A PROSPECTIVE JUROR SOLELY ON ACCOUNT OF THE JURORS RACE:

"A DEFENDANT MUST FIRST ESTABLISH A PRIMA FACIE SHOWING THAT THE PEREMPTORY STRIKE WAS MADE ON THE BASIS OF RACE. AT THAT POINT, THE BURDEN SHIFTS TO THE PROSECUTION TO PRODUCE EXPLANATIONS FOR STRIKING THE JUROR WHICH ARE RACE-NEUTRAL. EVEN IF RACE-NEUTRAL, THE REASONS MAY BE CHALLENGED BY THE DEFENDANT AS PRETEXTUAL. FINALLY, THE TRIAL COURT MUST DECIDE WHETHER THE DEFENDANT HAS CARRIED HIS BURDEN OF PROVING PURPOSEFUL DISCRIMINATION BY THE PROSECUTOR IN SELECTING THE JURY PANEL."

CODDIE V. COMMONWEALTH, 23 VA. APP. 193, 198, 475 SE 2D 821 823 (1996) (CITING BUCK V. COMMONWEALTH 247 VA 449, 450-451, 443 S.E. 2D 414, 415 (1994))

IN EVALUATING AN ATTORNEY'S RACE-NEUTRAL EXPLANATION FOR STRIKING A JUROR, THE COURT MUST DETERMINE WHETHER, ASSUMING THE PROFFERED REASONS FOR THE PERemptory CHALLENGES ARE TRUE, THE CHALLENGES VIOLATE THE EQUAL PROTECTION CLAUSE AS A MATTER OF LAW. *Id.* AT 841 (QUOTING *BARKSDALE V. COMMONWEALTH*, 17 VA APP 456, 459-460, 438 S.E.2D 761, 763 (1993) IF NOT, THE DECISIVE QUESTION BEFORE THE TRIAL JUDGE IN A BATSON ANALYSIS BECOMES WHETHER COUNSEL'S RACE-NEUTRAL EXPLANATION FOR PERemptory CHALLENGE SHOULD BE BELIEVED. ONCE THAT HAS BEEN SETTLED, THERE SEEMS NOTHING LEFT TO REVIEW. IN DISCHARGING THIS RESPONSIBILITY, TRIAL JUDGES ENJOY THE UNIQUE OPPORTUNITY OF PERSONAL OBSERVATION AND FAMILIARITY WITH THE GENERAL CIRCUMSTANCES OF THE CASE, AS A CONSEQUENCE THE COURT ON APPEAL WILL UPHOLD THE TRIAL COURT'S DECISION IF IT IS SUPPORTED BY CREDIBLE EVIDENCE.

HOWEVER, "UNLIKE A TRIAL COURT'S DETERMINATION THAT THE EXPLANATION IS PRETEXTUAL, A DETERMINATION TURNING LIKELY ON THE PROONENTS CREDIBILITY E.G. *HERNANDEZ* 500 U.S. AT 365, A TRIAL COURT'S FINDING OF FACIAL NEUTRALITY IS NOT GIVEN DEFERENCE ON APPEAL." *RILEY V. COMMONWEALTH*, 21 VA APP 330, 335, 464 S.E.2D 508, 510 (1995). INDEED, A "RUBBER STAMP APPROVAL OF ALL NONRACIAL EXPLANATIONS WILL NOT SATISFY THE COMMAND OF *BATSON*." *JACKSON V. COMMONWEALTH*, 8 VA APP 176, 185, 380 S.E.2D 116 (1989) (CITING *BATSON V. KENTUCKY* 476 U.S. AT 97-98.) *BATSON* OBLIGES THE TRIAL JUDGE TO EVALUATE THE CREDIBILITY OF THE STATED REASONS "BASED UPON THE TOTALITY OF THE CASE, AS REFLECTED IN THE RECORD." THE RECORD MUST CONTAIN FINDINGS BY THE JUDGE, NOT JUST A CONCLUSION, IN ORDER TO FACILITATE BOTH THE INITIAL INQUIRY AND APPEALATE REVIEW.

IN THIS CASE, THE COMMONWEALTH STRUCK ONE OF ONLY TWO BLACK JURORS DUE IN PART TO HER OCCUPATION AS AN "OPERATIONS MANAGER" IN THE MENTAL HEALTH FIELD. THE COMMONWEALTH REASON THAT BECAUSE PROSPECTIVE JUROR WAS EMPLOYED BY AN OFFICE WITH THREE ATTORNEYS WHO WORKED TO HELP FAMILIES WITH MEMBERS WHO HAVE MENTAL ILLNESS, SHE WAS SORELY "LIBERAL-MINDED," ACCORDING TO THE COMMON-WEALTH'S LOGIC, THIS WAS SUFFICIENT GROUNDS TO BELIEVE SHE WOULD THEREFORE BE SYMPATHETIC TO THE DEFENCE. THE COMMONWEALTH DID NOT OFFER MUCH ELSE IN REGARDS TO THIS EXPLANATION OTHER THAN IT WAS TYPICALLY HER PRACTICE TO EXCLUDE JURORS WITH SUCH A BACKGROUND. UNFORTUNATELY THE TRIAL JUDGE DID NOT REDUCE THE COMMONWEALTH TO ACTUALLY LEAD SUBSTRATE TO ITS FACIALLY RACE-NEUTRAL EXPLANATION.

TO SATISFY BATSON THE COMMONWEALTH'S ATTORNEY "MUST ARTICULATE A NEUTRAL EXPLANATION RELATED TO THE PARTICULAR CASE TO BE TRIED." TAITANO V. COMMONWEALTH, 4 VA APP. 342, 347, 358 SE 2D 590, 592 (1987) (EMPHASIS ADDED). AS THE COURT IN JACKSON PROCLAIMED, "IT IS NOT ENOUGH FOR THE COMMONWEALTH, IN REBUTTING THE DEFENDANTS CASE, TO ADOPT ROPE 'NEUTRAL EXPLANATIONS' WHICH ARE ONLY FACIALLY LEGITIMATE" 8 VA. APP. AT 186, 380 SE 2D AT 6. THE COMMONWEALTH'S ATTORNEY "NEED NOT RISE TO THE LEVEL JUSTIFYING CHALLENGE FOR CAUSE [BUT] THEY MUST BE CLEAR, REASONABLY SPECIFIC, AND RELATED TO THAT PARTICULAR CASE TO BE TRIED. SEE BATSON V. KENTUCKY, 476 U.S. AT 98 N.2D.

AS COUNSEL FOR MR MARTIN STATED AT TRIAL THIS CASE DID NOT CONTAIN ANY MENTAL HEALTH ELEMENT. THERE WAS NO INDICATION FROM EITHER PARTY THAT MR. MARTIN'S MENTAL HEALTH WOULD BE AN ISSUE OF MENTAL ILLNESS DURING VOIRE DIRE. NEVERTHELESS, THE COMMONWEALTH PROFFERED A GENERALIZATION ABOUT MS DAY'S PERCEIVED IDEOLOGY BASE SOLELY ON HER PLACE OF EMPLOYMENT. IN FACT SHE IS NOT EVEN AN ATTORNEY IN THE OFFICE. THEORETICALLY, MS DAY'S WORK DUTIES COULD CONSIST SOLELY OF ADMINISTRATIVE TASK. SHE EVEN STATED THAT ON THE RECORD SHE DID NOT EVEN INTERACT WITH THE FAMILIES. YET, THE COMMONWEALTH DOES NOTHING FURTHER TO ELABORATE ON WHAT BASIS SHE HAD REASON TO BELIEVE MS DAY'S OCCUPATION AUTOMATICALLY SIGNALLED AN UNWAVERING PRO DEFENCE BELIEF-SYSTEM.

THE TRIAL JUDGE LIKEWISE DID NOT GO FAR ENOUGH TO MAKE THE COMMONWEALTH SATISFY HER BURDEN. THE CIRCUIT COURT ERRED BY NOT MAKING THE COMMONWEALTH ARTICULATE IN WHAT RESPECT MS DAYS OCCUPATION IN THE MENTAL HEALTH FIELD WAS EVEN RELEVANT TO THE CASE AT HAND. THE SUPREME COURT HAS "EMPHASIZED THE REQUIREMENT THAT A COURT MUST CARRY OUT EACH STEP INDEPENDENTLY" RILEY V. COMMONWEALTH 21 VA APP AT 335, 464 S.E. 2D AT 510. THE TRIAL JUDGE FAILED TO SUFFICIENTLY ADDRESS STEP TWO OF THE BATSON ANALYSIS BY NOT REQUIRING THE COMMONWEALTH TO ELABORATE A RELEVANT RACE-NEUTRAL BASIS FOR STRIKING THE POTENTIAL JUROR. WITHOUT MORE, IT BECOMES CLEAR THAT MS DAY WAS STRICKEN SOLELY BASED ON HER RACE.

THE ONLY QUESTIONS THAT THE COMMONWEALTH ASKED MS DAY ON WHAT SHE ACTUALLY DID IN HER OFFICE AND WHETHER SHE EVER HAD ANY INTERACTION WITH THE FAMILIES. MS DAY ANSWERED THAT SHE HAD NO INTERACTION WITH THE FAMILIES AND THAT SHE WAS ONLY AN OFFICE MANAGER. IN LIGHT OF THESE FACTS, IT BECOMES EVER HARDER TO UNDERSTAND HOW THE CIRCUIT COURT GAVE CREDENCE

TO THE COMMONWEALTH'S ALLEGED RACIALLY-NEUTRAL EXPLANATION WHEN THE POTENTIAL JUROR DID NOT EVEN ENJOY THE BENEFIT OF MEETING OR ESTABLISHING ANY TYPE OF WORKING RELATIONSHIP WITH THE ACTUAL FAMILIES.

THE COMMONWEALTH MAKES NO OTHER EFFORT TO FURTHER QUESTION HIS DAY IN ORDER TO ASCERTAIN WHETHER HER OCCUPATION AS AN OFFICE MANAGER WOULD CLOUD HER IMPARTIALITY AND LEND HER JUDGEMENT SKEWED IN FAVOR OF THE DEFENSE. IN ADDITION, THE TRIAL JUDGE ERRED BY NOT REQUIRING THE COMMONWEALTH TO PROVIDE A MORE RELEVANT EXPLANATION IN LIGHT OF THE INITIAL VAGUE REASONING. THE TRIAL JUDGE CANNOT JUST ACCEPT AT FACE VALUE THE REASONS OFFERED, BUT MUST INDEPENDENTLY EVALUATE THOSE REASONS AS HE OR SHE WOULD ANY DISPUTED FACT. SEE JACKSON V. COMMONWEALTH 8 VA APP. AT 185, 380 S.E.2D AT 6

FACIALLY NON-RACIAL REASONS DO NOT OVERCOME THE PRIMA FACIE SHOWING OF A DISCRIMINATORY INTENT WHEN APPLIED TO MEMBERS OF ONE RACE AND NOT TO ANOTHER. BUCK V. COMMONWEALTH, 16 VA APP. 551, 555, 432 S.E.2D 180, 183 (1993) (BARROW, J., DISSENTING) (CITING BROADY V. COMMONWEALTH, 16 VA. APP. 281, 285, 429, SE.2D 468, (1993) HERE, THE COMMONWEALTH MAINTAINED IT STRIKE MS DAY BECAUSE SHE WORKED IN THE MENTAL HEALTH FIELD AND THUS WOULD LIKELY BE SYMPATHETIC TO THE DEFENDANT.

THE COMMONWEALTH DID NOT PROVE THAT IT WAS NOT TARGETING MS DAY BECAUSE OF HER RACE. THIS CASE HAD RACIAL UNDERTONES WITH A WHITE VICTIM AND A BLACK DEFENDANT. THUS, THE INAPPROPRIATE STRIKE OF ONE OF ONLY TWO BLACK JURORS WAS PREJUDICIAL AND THE COMMONWEALTH HAS NOT OVERCOME THE PRESUMPTION THAT THE STRIKE WAS RACIALLY MOTIVATED.

II. THE CIRCUIT COURT ERRED IN DENYING A MISTRIAL AFTER THE COMMONWEALTH MET WITH THE CO-DEFENDANT WHILE STILL TESTIFYING AS A WITNESS DURING THE TRIAL.

THE CIRCUIT COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A MISTRIAL AFTER IT WAS REVEALED THE COMMONWEALTH'S ATTORNEY HAD SPOKEN TO ROGER CLARK, III WHILE STILL TESTIFYING AS A WITNESS DURING THE TRIAL.

THE DECISION TO GRANT A RECESS AND ALLOW A CONFERENCE BETWEEN A LAWYER AND A TESTIFYING WITNESS "FALLS WITHIN THE

BROAD DISCRETION OF A TRIAL COURT AND WILL NOT BE REVERSED ABSENT AN ABUSE OF DISCRETION" WILL V. COMMONWEALTH, 31 VA APP. 571, 577, 525 S.E. 2D 37, 40 (2000) ALTHOUGH NO CASE HAS ADDRESSED THIS PARTICULAR ISSUE PER SE, THE COURT OF APPEALS OF VIRGINIA HAS HELD THAT "THE DECISION PERMITTING A NON-TESTIMONY CONFERENCE BETWEEN AN ATTORNEY AND A TESTIFYING WITNESS LIES WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

IN WILL, HOWEVER, THE TESTIFYING WITNESS WAS NINE YEAR-OLD JUVENILE WHO HAD BEEN A VICTIM OF SEXUAL ABUSE BY HER FATHER, THE DEFENDANT. ID AT 573, 525, S.E. 2D AT 38. IN THIS CASE, THE TESTIFYING WITNESS WAS A TWENTY-TWO YEAR-OLD MALE WHO HAD ALREADY PLED GUILTY TO THE MURDER OF THE VICTIM. IN WILL THE COMMONWEALTH REQUESTED THE RECESS DURING HER DIRECT EXAMINATION TO CONFER WITH THE WITNESS BECAUSE SHE WAS HAVING DIFFICULTY KEEPING HER COMPOSURE IN LIGHT OF THE SENSITIVE NATURE OF THE FACTS. WILL, 31 VA APP AT 574, 525, S.E. 2D AT 38. HERE, THE COMMONWEALTH REQUESTED THE RECESS IN THE MIDDLE OF THE CO-DEFENDANT'S CROSS-EXAMINATION, AND ACTUALLY GOT THE OPPORTUNITY TO SPEAK WITH HIM RIGHT BEFORE HIS REDIRECT EXAMINATION. NOTHING IN THE RECORD MENTIONS CLARK NEEDING A RECESS TO REGAIN HIS COMPOSURE DUE TO THE SENSITIVITY OF THE MATTER AT HAND.

ADDED OVER, THE COMMONWEALTH ADMITTED WANTING TO TALK WITH CLARK TO "PREPARE [HIM] FOR [HIS] EXAMINATION" AND TO [GO] OVER THE REDIRECT. AT THAT TIME, CLARK WAS IN THE MIDDLE OF HIS TESTIMONY AND THE "RULE ON WITNESSES" HAD BEEN ORDERED BY THE JUDGE.

THE TRIAL JUDGE ERRED BY OVERRULING MR MARTIN'S MOTION FOR A MISTRIAL. IN FACT, THE TRIAL JUDGE APPEARED TO HAVE ALREADY MADE UP HER MIND EVEN BEFORE EXAMINING CLARK TO DETERMINE IF ANYTHING OUTSIDE THE SCOPE HAD BEEN DISCUSSED DURING THE RECESS. (" I'M GOING TO DENY THE MOTION FOR A MISTRIAL UNLESS HE HE REVEALS SOMETHING ELSE AT THIS POINT) THE APPEARANCE THAT THE TRIAL JUDGE HAD ALREADY MADE A DETERMINATION BEFORE EXAMINING THE SUBSTANCE OF THE CONVERSATION BETWEEN CLARK AND THE COMMONWEALTH PREJUDICED MR MARTIN'S CASE.

ADDITIONALLY, WHILE THE RECORD IN WILL ESTABLISHED THAT THE WITNESS'S TESTIMONY AFTER THE RECESS WAS CONSISTENT WITH HER INITIAL TESTIMONY, 32 VA APP AT 582, 525, S.E. 2D AT 42, THIS WAS NOT THE CASE WITH RESPECT TO CLARK'S TESTIMONY.

SUDDENLY, IN LESS THAN TWENTY FOUR HOURS, CLARK REMEMBERED ALL OF THE IMPORTANT DETAILS THAT HE CLAIMED HE COULD NOT THE DAY BEFORE. UNLIKE IN THE WILL CASE, IN THIS SITUATION THERE WERE CLEARLY SUBSTANTIVE CHANGE BETWEEN THE WITNESS'S TESTIMONY BEFORE AND AFTER THE RECESS. IN ADDITION, COUNSEL FOR MR MARTIN WAS NOT PROVIDED WITH THE OPPORTUNITY TO CROSSEXAMINE CLARK, LIKE THE DEFENSE COUNSEL IN WILL. AS A RESULT, MR MARTIN WAS NOT GIVEN A FAIR CHANCE TO DETERMINE FOR ITSELF, WITH ITS OWN LINE OF QUESTIONS, WHETHER ANYTHING IMPROPER HAD BEEN DISCUSSED DURING THE RECESS.

III THE CIRCUIT COURT ERRED IN DENYING THE DEFENSE'S OBJECTION TO DETECTIVE ORTIZ'S TESTIMONY REGARDING HER CONCLUSIONS OF THE VIDEO AND ITS IMPORTANCE.

AS A GENERAL RULE " OPINION TESTIMONY OF LAY WITNESSES IS INCOMPETENT " BOND V. COMMONWEALTH, 226 VA 534, 538, 311 SE.2D 769, 772 (1984) MOREOVER, " WHEN THE EVIDENCE, EXCLUSIVE OF EXPERT TESTIMONY, IS SUFFICIENT TO ENABLE A JURY OF LAYMEN TO REACH AN INTELLIGENT CONCLUSION, AN OPINION OFFERED BY AN EXPERT IS INADMISSIBLE " WHERE THE "FACTS AND CIRCUMSTANCES SHOWN IN EVIDENCE ARE SUCH THAT MEN OF ORDINARY INTELLIGENCE ARE CAPABLE OF COMPREHENDING THEM, FORMING AN INTELLIGENT OPINION ABOUT THEM, AND DRAWING THEIR OWN CONCLUSIONS THEREFROM, THE OPINION OF AN EXPERT BASED UPON SUCH FACTS AND CIRCUMSTANCES IS INADMISSIBLE ". (CITING COPPOLA V. COMMONWEALTH, 226 VA 243, 252, 257, SEAD 797, 803-04 (1979)).

ON THE SECOND DAY OF TRIAL THE COMMONWEALTH CALLED DETECTIVE ROSA ORTIZ TO TESTIFY, IN PART, AS TO THE CONTENTS OF THE VIDEOTAPE FROM THE RED TOP CAB BUILDING AND THE INTERSECTION OF NORTH 13TH STREET AND IRVING STREET FROM THE VIDEO, WHICH WAS COMMONWEALTH'S EXHIBIT 1. SHE THEN DREW THE JURY'S ATTENTION TO A PARTICULAR VEHICLE, A LIGHT COLORED CAR " AND IDENTIFIED IT AS A "CAR OF INTEREST" BECAUSE MR DIENER'S BODY APPEARED IN THE ROAD " A FEW MINUTES LATER " ORTIZ THEN ATTEMPTED TO TESTIFY THAT THE VEHICLE IS THE SAME VEHICLE AS IT PROGRESSED FROM THE VIEW OF ONE CAMERA TO THE VIEW OF ANOTHER. DEFENCE COUNSEL THEN OBJECTED

THAT THE VIDEO SPEAKS FOR ITSELF AND THE TRIAL COURT SUSTAINED THE OBJECTION. AT A SIDEBAR DEFENCE COUNSEL ALSO OBJECTED THAT ORTIZ WAS TESTIFYING AS TO WHAT WAS, IN HER OPINION, IMPORTANT ABOUT DIFFERENT SEGMENTS OF THE VIDEO AND THAT THE RELATIVE IMPORTANCE OF THE VIDEO WAS FOR THE JURY TO DETERMINE.

ORTIZ THEN TESTIFIED AS TO THE VIEW FROM TWO DIFFERENT CAMERAS AND THE APPEARANCE OF A VEHICLE WITHIN THE VIEW OF EACH. SHE THEN ATTEMPTED TO CHARACTERIZE MOVEMENT IN THE VIDEO AS A PERSON WALKING THROUGH AN INTERSECTION. SHE DID THIS AFTER ADMITTING THAT IT WAS NOT EASY TO SEE. DEFENSE COUNSEL AGAIN OBJECTED TO ORTIZ'S CHARACTERIZATION OF WHAT SHE SAW IN THE VIDEO, THAT IT WAS FOR THE JURY TO DETERMINE. THE COURT THEN SEEMINGLY REVERSED ITS POSITION AND ALLOWED ORTIZ TO TESTIFY AS TO WHAT IT APPEARED TO HER TO BE, "IN ESSENCE, ALLOWING HER TO RENDER AN OPINION AS TO WHAT WAS BEING VIEWED ON THE VIDEOTAPE. ORTIZ WENT ON TO DESCRIBE FURTHER DIFFERENT CAMERA ANGLES AND ATTEMPTED TO IDENTIFY CARS IN EACH CAMERA'S VIEW. ORTIZ THEN IDENTIFIED A PARTICULAR CAR AS "THE VEHICLE THAT WE'VE BEEN LOOKING AT" ON A DIFFERENT CAMERA AND STATED THAT IT WENT THROUGH ANOTHER INTERSECTION AND WAS CAPTURED ON A DIFFERENT CAMERA. COUNSEL AGAIN OBJECTED THAT NO BASIS EXISTED TO ALLOW ORTIZ TO RENDER SUCH TESTIMONY. THE COURT CONCLUDED THAT SHE WAS BASING IT ON "HER OBSERVATIONS ON BOTH CAMERAS" WHETHER A PARTICULAR AUTOMOBILE WAS SEEN MORE THAN ONCE BY A PARTICULAR CAMERA, THE MOVEMENT OF PEOPLE ALONG THE STREET AND ACROSS INTERSECTION AND WAS ALLOWED TO RENDER AN OPINION TO THE JURY AS TO WHERE THEY "SHOULD BE LOOKING" COUNSEL OBJECTED YET AGAIN THAT THE WITNESS WAS BEING ALLOWED TO CHARACTERIZE WHAT WAS ON THE VIDEO BUT THAT THE VIDEO SPEAKS FOR ITSELF. THE COURT RESPONDED THAT ORTIZ WAS CHARACTERIZING "AS A PERSON" ADMITTING, THOUGH, THAT EVEN THE COURT COULD NOT "SEE IT VERY WELL". DEFENSE COUNSEL OBJECTED THAT THE COMMONWEALTH WAS IMPROPERLY USING ORTIZ'S POSITION AS A DETECTIVE TO GIVE HER TESTIMONY MORE CREDIBILITY THAN WOULD BE GIVEN ANOTHER WITNESS. THE COURT OVERRULED THE OBJECTION SAYING THAT COUNSEL COULD CROSS EXAMINE HER ON THE TESTIMONY THE WITNESS WAS ALLOWED TO CONTINUE RENDERING AN OPINION AS TO WHAT WAS ON THE VIDEO FOR SIX MORE PAGES OF TRANSCRIPT. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING DETECTIVE ORTIZ TO RENDER AN EXPERT OPINION VALUING AS MORE IMPORTANT CERTAIN EVIDENCE OVER OTHER EVIDENCE OVER OTHER EVIDENCE, A ROLE STRICTLY RESERVED FOR THE JURY.

IV EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE MURDER AND ROBBERY IN THAT THE EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MARTIN COMMITTED THE CRIMES.

THE COMMONWEALTH WAS UNABLE TO SATISFY ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT MR. MARTIN WAS GUILTY OF THE CHARGES. WHERE THE SUFFICIENCY OF THE EVIDENCE IS CHALLENGED AFTER CONVICTION, THE COURT "MUST CONSIDER IT IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH AND GIVE IT ALL REASONABLE INFERENCES FAIRLY DEDUCTIBLE THEREFROM." HIGGINBOTHAM V. COMMONWEALTH, 1A 216 VA 216 VA 349, 352, 218 S.E.2D 534, 537, (1975). THE COURT WILL AFFIRM THE JUDGEMENT OF THE TRIAL COURT "UNLESS IT APPEARS FROM THE EVIDENCE THAT THE JUDGEMENT IS PLAINLY WRONG OR WITHOUT EVIDENCE TO SUPPORT IT

EVEN WHEN CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, THE EVIDENCE OFFERED AT TRIAL IN THIS CASE CLEARLY DID NOT SUPPORT FINDING MR. MARTIN GUILTY OF THE CRIMES ALLEGED. THE COMMONWEALTH'S EVIDENCE MAY BE VIEWED IN TWO SECTIONS (1) THAT PORTION THAT RELIED ON ROGER CLARK, III'S TESTIMONY AND (2) THE REMAINDER OF THEIR CASE, WHICH RELIED ENTIRELY ON CIRCUMSTANTIAL EVIDENCE. HIGGINBOTHAM, SUPRA, SUCCINCTLY THAT:

[IF] THE PROOF RELIED UPON BY THE COMMONWEALTH IS WHOLLY CIRCUMSTANTIAL... THEN TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT ALL NECESSARY CIRCUMSTANCES PROVED MUST BE CONSISTENT WITH GUILT AND INCONSISTENT WITH THAT OF GUILT. TO ACCOMPLISH THAT, THE CHAIN OF NECESSARY CIRCUMSTANCES MUST BE UNBROKEN AND THE EVIDENCE AS A WHOLE MUST SATISFY THE GUARDED JUDGEMENT THAT BOTH THE CORPUS DELICTI AND THE CRIMINAL AGENCY OF THE ACCUSED HAVE BEEN PROVED TO THE EXCLUSION OF ANY OTHER RATIONAL HYPOTHESIS AND TO MORAL CERTAINTY. VA. 216 AT 352-53, 218 SE 2D AT 537 QUOTING LA PRADE V. COMMONWEALTH, 191 VA, 410, 418, 61 S.E.2D 313, 316 (1950) THE COMMONWEALTH'S CIRCUMSTANTIAL CASE RELIED ON POOR QUALITY VIDEOTAPE THAT RECORDED SEEMINGLY WITHOUT RHYME OR REASON.

WHILE ERIC WILLIAMS, THE IT PROFESSIONAL FOR RED TOP CAB, DID HIS BEST TO REHABILITATE THE VIDEO SYSTEM, HE CONCEDED THAT SOMETHING THAT MIGHT SET OFF THE VIDEO CAMERA'S MOTION SENSOR WOULDN'T DO SO EVERY TIME. HE ALSO ADMITTED TO "LARGE GAPS" THAT EXISTED "BETWEEN ACTUAL RECORDED FOOTAGE EVEN THOUGH THINGS MIGHT HAVE MIGHT HAVE HAPPENED. PEOPLE MIGHT HAVE WALKED BY." NEVERTHELESS DESPITE THE WEAKNESS IN THIS EVIDENCE, THE COMMONWEALTH VIA DETECTIVE ORTIZ ATTEMPTED TO TRACE PROGRESS OF A "LIGHT COLORED CAR" IN THE VIDEO ACROSS THE SCREEN AND INTO THE VIEW OF ANOTHER CAMERA AND THEN INTO THE VIEW OF YET A THIRD. THE PROBLEM, OF COURSE, IS THAT WITHOUT A SOUND FOUNDATION I.E., AN IDENTIFICATION OF THE VEHICLE VIA A LICENSE PLATE OR SOME OTHER IDENTIFYING MARKS, OR WITHOUT AT LEAST A QUALITY RECORDING OF THE EPISODE, THE ARGUMENT FAILS. THE COMMONWEALTH OFFERED NO SUCH EVIDENCE. THE VIDEOTAPE EVIDENCE ATTEMPTING TO TRACE THE PROGRESS OF THE "LIGHT COLORED CAR" WAS SO WEAK, DUE TO THE POOR QUALITY OF THE VIDEO SYSTEM AND THE RESULTING "GAPS" IN THE RECORDING, THAT THE TRIAL COURT HAD OCCASION TO COMMENT ON IT.

WHAT THE COMMONWEALTH DID OFFER WAS THE TESTIMONY OF JERNIKA INGRAM, A FRIEND OF THE DEFENDANT WHO TESTIFIED THAT SHE OWNED A SILVER HONDA ACCORD. YET MS INGRAM WAS NEVER CALLED UPON TO IDENTIFY THE AUTOMOBILE IN THE VIDEO. IN FACT, NO ONE WAS CALLED TO IDENTIFY THE TYPE OF VEHICLE IN THE VIDEO. INGRAM TESTIFIED THAT JAVON MARTIN, ON OCCASION USED HER CAR, BUT SHE HAD NO RECOLLECTION OF WHETHER HE USED HER CAR ON THE NIGHT MR DIENER WAS KILLED. ALTHOUGH SHE STATED THAT ON ONE OCCASION HE BROUGHT THE CAR BACK AT APPROXIMATELY 6:00 AM, SHE DID NOT NOTICE ANYTHING UNUSUAL ABOUT THE CAR AND DID NOT NOTICE ANYTHING UNUSUAL ABOUT JAVON.

THE COMMONWEALTH ALSO CALLED SPECIAL AGENT JENNIFER BANKS WITH THE FEDERAL BUREAU OF INVESTIGATION (FBI). AGENT BANKS INTRODUCED THE HISTORICAL CELL TOWER ANALYSIS OF MR MARTIN'S CELL PHONE, AS WELL AS THE CELL PHONE BELONGING TO ROGER CLARK III. THE CELL TOWER EVIDENCE PROVIDED MR MARTIN WAS IN WASHINGTON D.C. FROM APPROXIMATELY 9:00 PM TO 1:06 AM THE NIGHT PRIOR

THERE WAS NO FURTHER ACTIVITY WITH MR MARTIN'S CELL PHONE UNTILL 9:00 AM THE NEXT MORNING - APPROXIMATELY SEVEN (7) HOURS AFTER THE MURDER. THE EVIDENCE NEVER PROVIDED THAT MR. MARTIN WAS IN VIRGINIA AT THE TIME OF THE MURDER AND PROVIDED ALTERNATE THEORIES OF HIS WHEREABOUTS THAT NIGHT, LOCATIONS INCONSISTENT WITH TRAVELING SOUTH INTO VIRGINIA FROM D.C., THAT WERE NOT PRECLUDED BY THE COMMONWEALTH'S WITNESS.

THUS THE COMMONWEALTH'S CASE MUST DEPEND VERY HEAVILY ON ROGER CLARK III'S TESTIMONY TO SHORE UP THE FOREGOING WEAKNESSES. THE COMMONWEALTH RELIED EXCLUSIVELY ON THE TESTIMONY OF ROGER CLARK, III, TO PUT MR MARTIN AT THE SCENE OF THE CRIME AND PLACE THE MURDER WEAPON IN HIS HANDS. ONLY CLARK, THE CO-DEFENDANT, TESTIFIED THAT MR MARTIN WAS WITH HIM THAT NIGHT AND ACTUALLY COMMITTED THE MURDER.

MR CLARK'S TESTIMONY, HOWEVER, WAS REplete WITH INCONSISTENCIES AND ATTEMPTS AT EVASION. CLARK ACTUALLY TESTIFIED THAT HE "[COULD] NOT RECALL" WHETHER HIS SENTENCE DEPENDED ON TESTIFYING AGAINST JAVON MARTIN. CLARK "COULD NOT RECALL" WHEN ASKED ABOUT THE CIRCUMSTANCES OF HIS QUESTIONING BY POLICE, AND WHEN ASKED BY THEM ABOUT JAVON INVOLVEMENT. TELLING THEM "I'LL PUT IT ON MY MOTHER THAT HE DID NOT STAB HIM" CLARK "COULD NOT RECALL", TELLING POLICE THAT HE DIDN'T HAVE ANYTHING TO DO WITH DIENER'S KILLING, THAT HE DIDN'T EVEN THINK HE WOULD BE CAPABLE OF IT, AND THAT HE HAD NOT PARTICIPATED IN THE KILLING, THAT HE HAD ONLY BEEN A WITNESS.

THEN, SUDDENLY, THE NEXT DAY, HE REMEMBERED MAKING ALL THE STATEMENTS - ALL OF THEM. IN ADDITION, HE ADMITTED HAVING MADE THE STATEMENT "WHAT DO I HAVE TO DO TO GET OUT OF THIS SITUATION RIGHT NOW?"

THE FOREGOING, COMBINED WITH THE VARIOUS, CONFLICTING VERSIONS OF WHAT HAPPENED ON THE NIGHT OF MR. DIENER'S DEATH - ALL OF WHICH WERE DESIGNED TO ASSIGN BLAME TO SOMEONE, ANYONE, OTHER THAN ROGER CLARK, III - RENDER HIS TESTIMONY INCREDIBLE. CLARK TESTIFIED THAT JAVON MARTIN PLACED THE KNIFE USED TO KILL DIENER IN THE BACK SEAT OF THE VEHICLE, AFTER TELLING DETECTIVES NUMEROUS TIMES THAT MARTIN PLACED IT IN THE SIDE POCKET OF THE CAR DOOR. DETAILED POLICE EXAMINATION OF JERNIKA INGRAM'S VEHICLE HOWEVER, REVEALED NO TRACES OF BLOOD.

THE DEFENDANT SUBMITS THAT IN THIS CASE, HOWEVER, THE COMMONWEALTH CANNOT RISE ABOVE ITS OWN EVIDENCE. PARTICULARLY THE DEFENDANT RELIES ON MR CLARK HAVING STATED DURING HIS FIRST DAY OF TESTIMONY THAT HE DID NOT RECALL HAVING TOLD DETECTIVES SEVERAL THINGS CENTRAL TO THE ISSUES ON TRIAL, INCLUDING TELLING THEM "I PUT IT ON MY OWN MOTHER THAT HE DID NOT STAB HIM" AND THEN, THE NEXT DAY MAGICALLY RECALLING THAT HE DID, IN FACT, TELL THE DETECTIVES THOSE THINGS. THIS, THE DEFENSE SUBMITS, RENDERS HIM INCREDIBLE AS A WITNESS.

THIS IS NOT A CASE WHERE THE DEFENDANT CLAIMS THAT THE WITNESS'S TESTIMONY SHOULD BE FOUND INHERENTLY INCREDIBLE BECAUSE OF PRIOR, OUT-OF-COURT, INCONSISTENT STATEMENTS. SEE, WOODWARD V. COMMONWEALTH 27 VA. APP. 405, 408, 499 S.E. 2D 557 (1998) RATHER, IN THIS CASE MR MARTIN RELIES UPON THE WITNESS'S ACTUAL TESTIMONY AT TRIAL WHILE HE INITIALLY TESTIFIED THAT HE COULD NOT RECALL MAKING SEVERAL STATEMENTS TO DETECTIVES, THE WITNESS LATER COMPLETELY RETRACTED THIS TESTIMONY AND UNEQUIVOCALLY STATED THAT HE DID IN FACT MAKE THOSE STATEMENTS TO THE DETECTIVES. A CRIMINAL CONVICTION MUST BE FOUNDED UPON PROOF BEYOND A REASONABLE DOUBT. DUE PROCESS REQUIRES NO LESS IN RE. WINSHIP 397 U.S. 358, 364 (1970) GIVEN THE WEAKNESS OF THE COMMONWEALTH'S CIRCUMSTANTIAL EVIDENCE AGAINST THE DEFENDANT, AND GIVEN THE INHERENTLY INCREDIBLE TESTIMONY OF MR MARTIN'S GUILT BEYOND A REASONABLE DOUBT.

MR MARTIN SUBMITS THAT A CONVICTION WHICH REST UPON A WITNESS WHO AT BEST CONTRADICTS HIMSELF, AND AT WORST LIES ON THE STAND, CAN NEVER RISE TO THIS LEVEL THEREFORE, MR MARTIN RESPECTFULLY REQUEST THAT THIS COURT REVERSE HIS CONVICTIONS AS CONTRARY TO THE LAW AND THE EVIDENCE IN THIS CASE.

FOR THE FOREGOING REASONS, MR. MARTIN URGES
THIS COURT TO REVERSE THE CONVICTIONS OF WHICH HE
HAS APPEALED AND TO TAKE SUCH OTHER AND FURTHER
ACTIONS AS IT DEEMS REASONABLE AND APPROPRIATE.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: _____