19-6444

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JERMAINE D. HARRIS — PETITIONER
(Your Name)

vs.

STEPHEN T. MOYER et al. — 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

Jermaine D. Harris
(Your Name)

N.B.C.I, 14100 McMullen Hwy, sw
(Address)

Cumberland, Md 21502
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1) Did the Court of Appeals err in denying a certificate of appealability on Petitioner's claim that his trial counsel was constitutionally ineffective for failing to refute the aiding and abettting theory of liability that Mr. Harris conviction is possibly based upon?

2) This claim raises a pressing issue of national importance: Whether "legally inconsistent" verdicts are in violation and run contrary to the United States Constitution. Also whether Mr. Harris trial counsel was constitutionally ineffective for failing to object to the legally inconsistent verdicts in violation of Maryland's State law, when Federal law permits which verdicts. When the issue is ineffective assistance, a constitutional claim alleging violation of the Sixth Amendment right to effective counsel?

3) Did the Court of Appeals err in denying a certificate of appealability on Petitioner's cumulative effect claim under Strickland v. Washington?

a. Whether trial was ineffective by failing to object to lay witness providing expert opinion testimony about the operation of cell phone techology and cell tower location.

b. Whether trial counsel was ineffective when counsel failed to request instruction to inform the jury witness invoked their Fifth Amendment Privilege.

c. Whether trial counsel was ineffective when counsel failed to object to the legally inconsistent verdicts rendered?

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:

WAYNE A. WEBB, Commissioner, Maryland Department of Corrections; FRANK B. BISHIP, Warden of the North Branch Correctional Institution; ATTORNEY GENERAL OF MARYLAND

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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 B 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 C 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 _____ 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 _____ court appears at Appendix _____ 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 May 7, 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 11, 2019, and a copy of the order denying rehearing appears at Appendix A.

[✓] 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth, Fourteenth Amendment and 28 U.S.C §§ 2253(c), 2254(d), and 2254(e)(1).

STATEMENT OF THE CASE

The Court of Appeals decline to issue an COA and concluded that Mr. Harris has not made the requisite showing. App. B at 2. On the Habaes Corpus Petition counsel raised post conviction counsel was ineffective for failing to raise in initial post conviction, that trial counsel was ineffective for failing to refute the aiding and abetting theory of liability, under the Martinez exception. The district court decline to address the issue and concluded that it has not been raised in State court proceedings and must be deemed unexhausted. App. C at 14.

The district court stated the post conviction court was correct that the inconsistent verdicts, were not legally inconsistent, they were factually inconsistent and that the court reasonable found that defense counsel was not ineffective for failing to object to the verdicts because a further instruction to the jury to reach "factually inconsistent verdicts would likely result in [Harris] being found guilty of both first degree assault and second degree murder." App. C at 19. The district court concluded that trial counsel failure to object to the

inconsistent verdicts was consistent with Federal law, that inconsistent jury verdicts are permissible under United State v. Powell, 469 U.S. 57 (1984) and Maryland allows factually inconsistent verdicts. App. C at 20. At the post conviction hearing trial counsel testified the reason, he did not object to the verdicts, because he did not think the vedicts were inconsistent. The three errors the district court ruled on its merits concluded that the cumulative effect of trial counsel deficiencies collectively did not rise to the level of prejudice under Strickland to prevail on the Petition. App. C at 24.

REASONS FOR GRANTING THE WRIT

This case involves whether the criminal justice system will tolerate a trial where the trial counsel did not function properly in the adversarial process. The deficient performance of Mr. Harris trial counsel not only undermines confidence in Mr. Harris trial, it undermines confidence in criminal justice system as a whole.

This is extraordinary circumstances for trial counsel's failure to refute the aiding and abetting theory of liability, that deprived Mr. Harris constitutional right in closing argument to defend against this expanded theory of culpability. Which Mr. Harris convictions are possibly based upon. (discussed more below). Trial counsel's failure to address the aiding and abetting theory of liability

undermines the meaning of the Sixth Amendment right to effective counsel. The Fourth Circuit decision to deny COA is contrary to numberous Federal Circuit's, its own Fourth Circuit and this Supreme Court precedents. (discussed more below).

Regarding the legally inconsistent verdicts, the district court stated that "the failure to object was consistent with federal law. Under federal law, inconsistent verdicts are permissible." From this observation, the district court concluded that "where federal law permits inconsistent verdicts... post-conviction court's conclusion that failure to object to the arguably inconsistent verdicts was not ineffective assistance of counsel was an reasonable application of federal law." App. C at 20. The district court is wrong in its analysis.

First, although it is true that Petitioner's legally inconsistent verdicts were objectionable under state law only, see United States v. Powell, 469 U.S. 57, 64-65 (1984), whether counsel's failure to object resulted in deficient performance is, of course, a question of federal constitutional law, see Strickland, 466 U.S. at 687. Put differently, "the issue of ineffective assistance-even when based on the failure of counsel to raise a state law claim-is one of constitutional dimension." Alvord v. Wainwright,

725 F.2d 1282, 1291 (11th Cir. 1984); see also Fagan v. Washington, 942 F.2d 1155, 1158 (7th Cir. 1991)(Posner, J.)("[T]he constitutional right to counsel, and its derivative right that counsel be at least minimally effective, is unrelated to the source-whether state or federal-of the defendant's defenses."); cf. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)(concluding that federal habeas relief is not available for errors violating California law, but is available for errors that violate "federal constitutional rights"). Here, Petitioner's claim is predicated on an alleged violation of his Sixth Amendment right to effective counsel. Therefore, it is cognizable under Section 2254(d).

It is also time for this Court to overrule Powell that permits inconsistent verdicts. Because Powell is outdated and did not make a distinction between "factually inconsistent" and "legally inconsistent" verdicts. Legally inconsistent verdicts contradicts the holding in In re Winship, 397 U.S. 358 (1970), and the United States Constitution.

The district court conceded to Mr. Harris cumulative effect claim that some errors were in fact deficiencies by counsel. But the district court concluded "they do not collectively rise to the level of establishing prejudice under Strickland sufficient for Harris to prevail on the

Petition." App. C at 24. It can be reasonably said that reasonable jurists and in this Supreme Court always debate whether an error is prejudicial to a defendant or not.

This Court's precedent is clear: a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. Thus, "a prisoner seeking a COA need only demonstrate "a substantial showing" that the district court erred in denying relief. Miller-EL, 537 U.S. at 327 (quoting Slack v. McDaniel, 529 U.S. at 473, 484 (2000) and 28 U.S.C. § 2253(c)(2). This "threshold inquiry" is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." Id. at 327, 336. A COA is not contingent upon proof "that some jurists would grant the Petition for Habeas corpus. Indeed, a claim can be debatable even though every jurists of reason might agree, after the COA has been granted and the has received full consideration, that Petitioner will not prevail." Id. at 338.

The Fourth Ciruit decision to deny COA is wrong under the standard review. Petitioner's constitutional issues deserved encourgement to proceed further. A trial counsel's adverse testing is the foundation to a fair trial and there was a lack of it in Mr. Harris trial. This Court review is

warranted not only: a) to overrule Powell to resolve the issue of legally inconsistent verdicts; b) Whether Mr. Harris was denied effective assistance of counsel for failing to object to legally inconsistent verdicts in violation of State law, when Federal law permits which verdicts. But also to maintain public confidence that courts will not permit an conviction tainted by counsel's conduct that so undermined the proper functioning of the adversarial processs.

For all these reasons, and those discussed more fully herein, certiorari should be granted.

I. TRIAL COUNSEL FAILED TO REFUTE THE AIDING AND ABETTING THEORY OF LIABILITY.

During the entirely of Mr. Harris trial, the State argued He shot and killed Jesse Gay and trial counsel defense was someone else committed this crime not Mr. Harris. During jury instructions the State submitted for the aiding and abetting instruction to be given. (T.10/30/08 at 214). The trial court instructed the jury on this theory. (T.10/30/08 at 238-40). In closing the State's argument like during trial, Mr. Harris was the principal and never made an argument that He was an aiding and abettor to the crime. (T.10/30/08 at 246-97). Trial counsel made no argument refuting the aiding and abetting instruction, focused only on refuting the State's argument that Mr. Harris was the principal. (T.10/30/08 at 269-88).

During deliberation the jury sent a note asking "do they have to pull the trigger to be convicted of first degree?". (T.10/30/08 at 305-08). The trial court held:

"The aiding and abetting would answer their question as to whether you have to pull the trigger to be convicted of first degree murder. I'm assuming when they say first degree, they mean first degree murder, but they could mean first degree assault. Either way, it specifically addresses that first degree murder, second degree murder, and first degree assault, the accessory law applies." (T.10/30/08 at 307-08).

The trial court in response to the jury question sent the jury the aiding and abetting instruction. (T.10/30/08 at 307-310). Trial counsel should have objected and/or

requested to re-open closing when the trial court failed to give an opportunity for additional argument, because the instruction undermined his closing argument and to defend against the theory of aiding and abetting.

Federal courts have considered the propriety of a supplemental instruction on a different theory of culpability in response to a jury question and have concluded that reversal is warranted when the defendant was prejudiced because the instruction undermined the closing argument already given by the defense. In United States v. Gaskins, 849 F.2d 454, 458 (9th Cir. 1988), the court considered whether a district court's supplemental instruction to the jury on aiding and abetting was prejudicial. Gaskin was charged with possessing and manufacturing methamphetamine and the prosecution tried Gaskin as a principal. Gaskin claimed that the drugs and drug manufacturing laboratory that was located in his home belonged to his brother-in-law. The district court, in response to a jury question posed during its second day of deliberations instructed the jury on aiding and abetting. Gaskin objected to the instruction and requested leave to reopen closing argument to argue facts regarding the aiding and abetting charge, but the court denied his request. The United States Court of Appeals for the Ninth Circuit reversed and concluded that, "instructing the jury that it

could convict Gaskin as an aider or abettor without allowing additional argument to address this theory required reversal." Id. at 460. The court reasoned Gaskin suffered prejudiced because his counsel was not given an opportunity to address whether Gaskin could have been convicted as an aider or abettor. Id.; see also United States v. Hannah, 97 F.3d 1267 (9th Cir. 1996) (defendant was not prejudiced by supplemental instruction on aiding and abetting in response to a question from the jury when the court properly permitted supplemental closing arguments on that theory).

A defendent must have an adequate opportunity to argue his innocence under [trial] court's instruction in order to be assured a fair trial. See Cruz v. State, 407 Md. 202, 214 (2009)(quoting U.S. v. Horton, 921 F.2d 540, 544 (4th Cir. 1990). In Horton, the United Stated Court of Appeals for the Fourth Circuit stated "Adequate additional argument can cure any prejudice experienced as a result of supplemental instructions". Id. at 547. The right to effective assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial to participate fully and fairly in the adversary factfinding process. There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. The breakdown in the

adversarial process in this trial from trial counsel's failure to argue Mr. Harris innocence under the additional theory of liablity denied him Sixth Amendment right to effective assistance.

In Herring v. New York, this Supreme Court recognized a Sixth Amendment assistance of counsel "right to be heard in summation of the evidence from the point of view most favorable to him". 422 U.S. 853, 864-65, 95 S.Ct. 2550, 2556-57, 45 L.Ed.2d 593 (1975).

II. TRIAL COUNSEL FAILED TO OBJECT TO THE LEGALLY INCONSISTENT VERDICTS.

In this case Mr. Harris was found guilty of first degree murder, second degree murder and found not guilty of both forms of first dergee assault. Serious physical injury version is a lesser included offense to murder.

Prior to Mr. Harris trial in 2008, the Court of Appeals of Maryland in Price v. State, 405 Md. at 19, 949 A.2d at 624, parted ways with the United States Supreme Court's jurisprudence allowing inconsistent jury verdicts. See United States v. Powell, 469 U.S. 57 (1984). The Court of Appeals concluded that legally inconsistent verdicts undermine to court's confidence in the outcome of the trial. Price v. State, 405 md. at 28, 949 A.2d at 630 ("The possibility of a wrongful conviction... outweighs the rationale for allowing inconsistent verdicts to

stand.")(citation omitted).

In Tate v. State, 182 Md. App. 114 (2008), the Maryland Court of Special Appeals made a distinction between factually and legally inconsistent verdicts, explaining that,

> [a] legal inconsistency... occurs when the crime for which a defendant is acquitted is, in its entirety, a lesser included offense within the greater inclusive offense for which a defendant is convicted... [t]he commission of the greater crime cannot, as a matter of law, take place without the commission of the lesser crime... [t]he lesser crime is a required element of the greater... [t]he acquittal of the lesser crime precludes the finding of that required element of the greater crime for which the defendant was convicted. Id at 131.

The Maryland Court of Appeals subsequently confirmed and made explicitly clear in McNeal v. State, 426 Md. at 458 n.1, 44 A.2d at 984 n.1 (2012), "Legally inconsistent verdicts are those where a defendant is acquitted of a 'lesser included' crime embraced within a conviction for a greater offense." It is well-established that assault is a lesser included offense of murder. See Dishman v. State, 118 Md. App. 360 (1997) (finding that "assault and battery are indeed, lesser included offenses of murder"); Spencer v. State 97, Md. App. 734, 743 (1993) (stating that assault is a lesser-included offense of murder under the required evidence test); Middleton v. State, 238 Md. App. 295, 192 (2018) ("Confining our analysis to a single type of mens rea, the specific intent to cause serious physical injury to another... [is a] variety of second-degree murder based

first degree assault... that is a lesser-included offense of

on the specific intent to inflict grievous bodily harm").

The not guilty verdict on the first degree assault (serious physical injury), which includes the risk of death is an essential element of murder. The acquittal of the first degree assault count removed an essential element that the trial court instructed the jury on necessary to convict Mr. Harris on the first and second degree murder counts. (T.10/30/08 at 240-42). Legally inconsistent verdicts is one in which "the jury acts contrary to a trial judges proper instructions regarding the law." Price Md. at 35. Legally inconsistent verdicts defy more than logic-they run contrary to many principles of law. As mandated by this Supreme Court interpretation of the Constitution, each element of a crime must be proven by the [State] beyond a reasonable doubt in order to convict the accussed. The phrase "beyond a reasonable doubt" is constitutionally mandated and essential to a fair trial. This is the very reasons the Price holding prohibits legally inconsistent verdicts in Maryland and why Maryland parted ways with Powell. The due process requires that the [State] prove each element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

The district court and State court's conclusion that the verdicts are factually inconsistent is wrong and their conclusion that trial counsel's decision not to object

reflected a strategic choice runs contrary to his unrebutted testimony-that he did not object to the vedicts because he did not think they were inconsistent. Consequently, the testimony of Petitioner's trial counsel expressly contradicts the lower court's postulate that his failure to object reflected a trial strategy. Because he was unware that the verdicts were inconsistent, not alone legally inconsistent, Petitioner's trial counsel was "not in a position to make an informed strategic chioce" about whether to object to the jury's verdicts. Gray, 529 F.3d at 231 (internal brackets omitted).

Additionally, the district court and State court's trial strategy argument ignores the fact that-even in the worst case scenario-had the jury redeliberated and thereafter convicted Petitioner of an first degree assault count, that count simply would have "merged" into the murder count. See Sifrit v. State, 383 Md. 116, 138-39 (2004); Jenkins v. State, 146 Md. App. 83, 134 (2002), rev'd on other grounds, 375 Md. 284 (2003). In other words, because the jury had already found him guilty of murder, Petitioner faced no additional consequences resulting from a conviction for first degree assault. Thus, there was no downside to trial counsel raising a timely objection to the legally inconsistent verdicts. By contrast, there was "tremendous upside" to a timely objection. Had that

occurred, the jury would have redeliberated and may have resulted in a mistrial or a new verdict acquitting Petitioner of murder. By failing to object-based on ignorance, not strategy-Petitioner's trial counsel unreasonably deprived Mr. Harris of the opportunity to have the jury deliberate further. The appellate courts in Maryland have held that counsel's failure to act based on an ignorance of the law constitutes a deficient performance. See Adams v. State, 171 Md. App. 668, 714-715 (2006); Redman v. State, 363 Md. 298, 310 (2001).

III. CUMULATIVE EFFECT.

Under Strickland jurisprudence, a defenadant may be denied constitutionally effective assistance of counsel based on the totality of circumstances of his case and the issues therein. See e.g., United States v. Russell, 221 F.3d 615 (4th Cir. 2000).

The district court held:

> Finally, regardless of whether Harris's claim that the cumulative effect of errors by counsel warrant's granting of the Petition was procedurally defaulted, the Court rejects that claim. To the extent that some of the alleged errors were in fact deficiencies by counsel, they do not collectively rise to the the level of establishing prejudice under Strickland sufficient for Harris to prevail on the Petition. See App. C at 24.

a. Trial counsel was ineffective by failing to object to lay witness providing expert opinion testimony about the operation of cell phone techology and cell tower location.

Their is clearly established law that trial counsel

should have known and should have object to Det. Cook's testimony regarding cell tower location and in fact constituted expert testimony. In Ragland v. State, 385 md. 706 (2005), Md. Rules 5-701, 5-702 and its Federal counter parts Fed. R. Evid. 701 and 702 govern expert testimony. The Court of Appeals of Maryland in Ragland distinguishes expert opinion testimony from lay opinion testimony, observing:

> [e]xpert opinion testimony is testimony that is based on specialized knowledge, skill, experience, training, or education. Expert opinions need not be confined to matters actually perceived by the witness. Lay opinion testimony is testimony that is rationally based on the perception of the witness. Id at 717.

Det. Cook testimony was based upon knowledge, skill, experience, training, or education, he had been able to "hone in" on the relevant call detail records and eliminate the irrelevant data and calls. The raw call detail records were comprised of "string of data" unfamiliar to a layperson that is not decipherable based on personal experience. The State did not qualify Det. Cook as an expert at trial under Md. Rules 5-702 similar to Fed. R. Evid. 702 and the State did not fulfill its discovery obligations under Md. Rules 4-263(b)(4). The State did not give expert notice that it would seek to designate Det. Cook to interpet the phone records regarding cell tower location. Det. Cook explained to the jury the process of cell phone tracking. (T.10/29/08 at 395-397). Also discuss

the records that were coded in the two columns identifing "an incoming or outgoing" phone call to get the tower location. (T.10/29/08 at 416-17). With this information, Det. Cook place Mr. Harris in the vicinity of the murder when it allegedly happen.

The State in opening argument told the jury they will hear about phone records and towers. (T.10/28/08 at 230, 236, 239). On the State's direct and redirect examination with Det. Cook the term "tower" was used (80) times and another (10) times in closing. In closing, the State continued to rely on Det. Cook testimony that Mr. gay the victim and Mr. Harris phone used the same tower and concentrated on the importance of these towers to prove Mr. Harris allegedly was there and committed the crime. (T.10/30/08 at 258-61). Trial counsel was constitutionally ineffective for allowing the State to use this improper evidence without an objection to a lay witness giving expert opinion that allegedly places Mr. Harris in the vicinity of the crime.

The district court concluded that "it is not clear under federal law that Sgt. Cook's testimony necessarily constituted expert testimony... such testimony appears to be consistent with what was deemed to be lay testimony in Graham, and in any event was not so clearly in the realm of expert testimony under federal law that failure to object

to it would constitute deficient performance by counsel." App. C at 18.

b. Trial counsel was ineffective when counsel failed to request instruction to inform the jury witnesses invoked their Fifth Amendment Privilege.

The district court concluded that "the lack of a request for an instruction, if error, was not so serious as to deprive the defendant of a fair trial whose result is reliable." App. C at 23. During trial, trial counsel attempted to call Michael Lawson and Rodney Terry ("Baltimore boys"), who had been charged with robbery and shooting of a man named Australia Mackey ("Mackey") that occured in Delaware approximately 24 hours before Mr. Gay the victim in this instant case was killed. Mr. Gay was the suspected participant that did the shooting in that robbery.

On cross-examiantion both State's witnesses Nathaniel Kellam and Matthew Spence testfied they went to visit Mackey in the hospital the day before Mr. gay was killed. Both believed Mr. Gay was responsible for robbing and shooting Mackey. (T.10/29/08 at 61-62); (T.10/29/08 at 285-87). Mr. Kellam further testified that people dealing drugs that get robbed don't call the police, police gets involved when someone goes too far and shoots someone and ends up in the hospital. (T.10/29/08 at 285-87). Trial counsel wanted to establish the connection between Mackey shooting and

this case. That Mr. gay was killed for the shooting of Mackey. (10/30/08 at 34-35). Counsel for Lawson and Terry advised the trial court they would invoked their Fifth Amendment right against self-incrimination and refuse to testify for the Delaware charges including "the events that lead to this [instant case] trial." (T.10/30/08 at 6-7).

After being called out of the presence of the jury both Lawson and Terry invoked their privilege. (10/30/08 at 19-23). The trial court ruled that neither Lawson or Terry may be called by defense counsel in front of the jury to invoke their Fifth Amendment privilege. The trial court concluded that it would suggest to the jury they were invoking their privilege merely to protect them from criminal liability in this [case] would be improper. (T.10/30/08 at 32-33). Trial counsel failed to request a jury instruction under Gray v. State, 368 Md. 529 (2002), to inform the jury that these witnesses had invoked their Fifth Amendment and were unavailable to the defense. In Gray, the Court of Appeal of Maryland recognized that,

> [w]here the trial court fails to permit a "Gatton-type" of witness to invoke the Fifth Amendment in the presence of the jury, the trial court, upon appropriate request, should give a full instruction to the jury, that the witness, under the circumstances described above, has invoked his right against self-incrimination, and, therefore, is unavailable to the defendant.

Trial counsel defense theory at trial was someone else committed this murder not Mr. Harris. During the State's

examination with Mr. Kellam, when asked, who did he state in one of his early statements shot Mr. Gay, his response was **"one of the Baltimore boys."** (T.10/29/08 at 254-55).

Trial counsel defense theory and part of Mr. Kellam testimony that one of the Baltimore boys shot Mr. Gay. The jury instruction would have offered a reasonable set of facts showing that another individual murdered Mr. Gay. As counsel stated during trial [the Baltimore boys] did have a motive to kill Mr. Gay because of his actions during the robbery of Mr. Mackey that got the police involved. (T.10/30/08 at 34-35). Trial counsel's failure to request instruction deprived Mr. Harris of the ability to bolster a potentially viable defense. Trial counsel fell below an requestively reasonable standard of performance and therefore constituted ineffective assistance.

c. Trial counsel was ineffective when counsel failed to object to the legally inconsistent verdicts rendered.

For the very reasons explained in argument II, trial counsel was ineffective for failing to object to the legally inconsistent verdicts.

d. CONCLUSION

The Fourth Circuit should have granted an COA for the cumulative effect claim. In Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)("the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the

adversarial balance between defense and prosecution that the trial was rendered unfair and the verdicts rendered suspect"). In totality of these errors, the breakdown in the adversarial process caused by the deficiencies in counsel's assistance and whether these errors rise to the level of establishing prejudice under Strickland. Reasonable jurists could conclude the issue presented is adequate to deserve encouragement to process further.

CONCLUSION

For all of the foregoing reasons, Mr. Harris case is extraordinary. At a minimumm reasonable jurists could so conclude, which means the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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10/7/19
Date