No. 19-7167

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

HARSHADKUMAR NANJIBHAI JADAV — PETITIONER
(Your Name)

vs.

COMMONWEALTH OF VIRGINIA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF VIRGINIA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

HARSHADKUMAR NANJIBHAI JADAV
(Your Name)
BUCKINGHAM CORRECTIONAL CENTER
P.O. BOX 430
(Address)

DILLWYN, VA 23936
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

I.

Contrary to precedent set in Yeager v. Commonwealth, 16 Va. App. 761, 433 S.E.2d 248 (1993) and rule 3A:16 of the Rules of Supreme Court of Virginia, did the Court of Appeals of Virginia unreasonably affirm the Petitioner's conviction on the charge of First-Degree Murder after the trial court denied the objection from the Petitioner to the Jury Instruction Number Eleven as the instruction impermissibly 'singled out for emphasis' the factors to be considered in establishing element of premeditation and deliberation ?

II.

Did the Court of Appeals of Virginia unreasonably affirm the Petitioner's conviction on the charge of First-Degree Murder even though the evidence was insufficient to show that he was the individual who committed the crime or that he acted with premeditation ?

Contrary to United States v. Strayhorn, 572 U.S. 1145(2014), is there sufficient evidence to infer that the Petitioner was in possession of the alleged murder weapon and other items found near the weapon during the commission of the crime ?

Is there sufficient evidence to infer that it was the Petitioner who was in possession of the cell phone while it was moving, contrary to prosecution's own DNA evidence ?

Is there sufficient evidence to infer the identity of the car or the driver ?

Is just a matching name sufficient to prove the authorship of internet search records ?

LIST OF PARTIES

[x] 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:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

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

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals 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 United States district 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.

[X] For cases from **state courts:**

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] 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 _____.

[ ] 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 _____ (date) in Application No. ___A_____.

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was Oct. 07, 2019
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

The Fourteenth Amendment to the Constitution.

STATEMENT OF THE CASE

Comes now your Petitioner, Harshadkumar Nanjibhai Jadav, pro se, and respectfully represents that he is aggrieved of a certain judgement and sentence imposed by the Honorable Patricia Kelly, Judge of the Circuit Court of Hanover County, Virginia on January 25, 2018. The proceedings below of which the Petitioner complains consist of a jury trial on June 12, 2017 through June 15, 2017, wherein the Petitioner was convicted of one felony, to wit: First Degree Murder pursuant to Virginia Code § 18.2-32. After finding the Petitioner guilty, the jury heard further evidence and argument of counsel, and it recommended a punishment of imprisonment for life. On January 25, 2018, the trial court heard the Petitioner's Motion to Set Aside the Verdict, which was denied. Then, a sentencing hearing was held, in which the trial court sentenced the Petitioner in accordance with the jury's recommendation. On February 12, 2018, the Petitioner filed a Notice of Appeal in the Hanover County Circuit Court, Virginia. On July 9, 2018, the Petitioner filed a Petition for Appeal, which was denied by a One-Judge Order on December 28, 2018. The Petioner then filed Petition for Appeal in the Supreme Court of Virginia on May 3, 2019, but the Supreme Court of Virginia denied a Discretionary Review on October 7, 2019.

The transcripts in this case are referred to as follows:

May 30, 2017 - Motions Hearing - 1Tr.

June 12, 2017 - Jury Trial Day 1 - 2Tr.

June 13, 2017 - Jury Trial Day 2 - 3Tr.

June 14, 2017 - Jury Trial Day 3 - 4Tr.

June 15, 2017 - Jury Trial Day 4 - 5Tr.

January 25, 2018 - Motion to Set Aside the Verdict and Sentencing Hearing - 6Tr.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW:

On May 30, 2017, the trial court heard argument on the Petitioner's Motion to Suppress, which was denied.(1Tr. 16). On June 12, 2017, the Petitioner pled "not guilty" to one count of First-Degree Murder and was tried by jury from June 12, 2017 through June 15, 2017. At the end of the Commonwealth's evidence, defense counsel argued a Motion to Strike based on insufficient evidence as to First-Degree Murder, which was denied. (4Tr. 221). After closing argument, the jury found the Petitioner guilty of First-Degree Murder. (5Tr. 100). After hearing further evidence and argument of counsel, the jury recommended the above-stated sentence. (5Tr. 127). On January 25, 2018, the trial court heard argument on the Petitioner's Motion to Set Aside the Verdict, which was denied. (6Tr. 34). Thereafter, a sentencing hearing was held in which the trial court imposed the jury's recommended sentence. (6Tr. 39). On February 12, 2018, the Petitioner filed a Notice of Appeal in the Hanover County Circuit Court. On July 9, 2018, the Petitioner filed a Petition for Appeal, which was denied by a One-Judge Order on December 28, 2018. The Petitioner filed a Demand for Consideration by Three-Judge Panel on January 11, 2019 which was denied by an Order on April 3, 2019. The Petitioner then filed a Petition for Appeal in the Supreme Court of Virginia on May 3, 2019, which denied a Discretionary Review by an Order on October 7, 2019.

A. Facts Established at Trial:

Sumitra Shrestha, the victim(Reena Shrestha)'s mother, testified that the victim married to and lived with the Defendant in Hanover County, Virginia. (2Tr. 218). On September 4, 2016, she saw the victim at dinner. (2Tr. 219). After dinner, she went to the victim's house. (2Tr. 219-220). The victim was wearing black pants and a blue shirt. (2Tr. 221, 235). The Petitioner was wearing a blue shirt with orange or red stripes. (2Tr. 224). She had seen the Petitioner wear that shirt before.(2Tr. 238). She did not recall what color pants the Petitioner was wearing or if his shirt was torn. (2Tr. 234, 239). She left the victim's home at 9:30 pm. (2Tr. 231). The Petitioner texted her husband at 5:30 am the next morning to advise that the victim was not at home. (2Tr. 232-233). She went to the victim's house with her husband to look for the victim. (2Tr. 232). Her husband, Chandra Shrestha, spoke with the Petitioner on the phone on the way to the victim's house. (2Tr. 242). She did not see the victim take any medication that day. (2Tr. 248).

Roger Hultgren lived in the same neighborhood as the victim and the Petitioner. (2Tr. 250). On September 4, 2016, while asleep, he heard a brief scream. (2Tr. 251). He could not tell the direction or distance from which the scream emanated. (2Tr. 253). He went out on his back patio for a few seconds, but did not see anything. (2Tr. 251, 254). He also did not see any cars driving on the road. (2Tr. 253). There are no lights in his backyard. (2Tr. 251). It was a woman who screamed. (2Tr. 251). He does not know the Petitioner or the victim.

Dr. Willie Stroble lives in the same neighborhood as the victim and the Petitioner. (2Tr. 257). At 11:00 pm on September 4, 2016, he

he heard a female scream. (2Tr. 258). The scream came from behind his home. (2Tr. 259). He looked out of his second floor window, but he did not see anything. (2Tr. 259, 262). There were no light in his backyard. (2Tr. 259). He did not see any cars driving on the road. (2Tr. 263). He does not know the victim or the Petitioner. (2Tr. 259).

Sergeant Matthew Gardner responded to the Honey Meadows neighbourhood at 5:45 am on September 5, 2016. (2Tr. 265). He saw the Petitioner next to a Toyota Prius talking on a cell phone. (2Tr. 265, 267). He saw the victim lying in a yard near him. (2Tr. 265) He searched the Petitioner and the Prius, and did not find any weapons. (2Tr. 273). The Petitioner said the victim went for a run the ni ght before, and when she did not come home, he drove around to look for her and this is how he found her. (2Tr. 274, 278). The Petitioner appeared calm and was not crying. (2Tr. 274, 275). There was no blood on the Petitioner. (2Tr. 276).

Deputy Ryan Dumond responded to the Honey Meadows neighborhood at 5:39 am on September 5, 2016. (2Tr. 282). He held the Petitioner in investigative detention for two hours. (2Tr. 282, 303). The Petitioner was not able to wash his hands. (2Tr. 283). The Petitioner said the victim had acted strangely the night before. (2Tr. 306). The Petitioner went to sleep and the victim went for a run. (2Tr. 296). When the Petitioner woke up, the victim was not there. (2Tr. 296). The Petitioner called the victim's parents and learned that she was not at their house. (2Tr. 296). The Petitioner drove around looking for her. (2Tr. 296). The Petitioner tried to move the victim, but was unable to do so. (2Tr. 297). When Deputy Dumond told the Petitioner that his wife had died, the Petitioner asked if he was serious, but did not

cry. (2Tr. 300). The Petitioner joked as he talked with Deputy Dumond. (2Tr. 303). The Petitioner asked the Deputy if they could talk about something other than the victim. (2Tr. 309).

Charles Udriet laid the foundation for recordings of two 911 phone calls that were received in association with this case. (2Tr. 313, 315). Wellford Buchannan lives at 10200 Waxcomb Place. (2Tr. 316). He has a security camera that points towards his driveway. (2Tr. 316). He provided to the police a copy of the security footage from 9:00 pm on September 4, 2016 to 6:00 am on September 5, 2016. (2Tr. 319, 3Tr. 14).

Investigator Steven Diloreto took photographs of the Petitioner at the scene. (3Tr. 38, 41-44). The Petitioner did not wash or wipe his hands. (3Tr. 38). He executed a search warrant on the Toyota Prius, and he found multiple red stains in the vehicle. He collected a swab of a red stain from a curb. (3Tr. 57). The victim's body was between the house and the curb. (3Tr. 58). The red stain on the curb was close to the Toyota Prius. (3Tr. 59). He did not see a large amount of blood on the Petitioner. (3Tr. 60). He collected a backpack and a water bottle from near the victim's body. (3Tr. 61-62). He saw perform a luminol test in the Toyota Prius, and there was a faint reaction near the stearin wheel. (3Tr. 64).

On September 7, 2016, Melinda Mitchell found a hammer and some clothes in the backyard of her property. (3Tr. 69). She brought them inside. (3Tr. 75). She did not see blood on either item. (3Tr. 86). She washed a shirt and a pair of pants, but she threw the remaining items in a trash can. (3Tr. 76). She put the hammer in her husband's tool box. (3Tr. 75). She did not get any blood on the hammer, and she did not see her husband use the hammer.

(3Tr. 79). She turned these items over to the police on September 12, 2016. (3Tr. 80). There are no lights in her backyard. (3Tr. 81). The clotheswere three or four feet away from the hammer. (3Tr. 84). The clothes were spread out. (3Tr. 84). She did not notice any blood on the clothing. (3Tr. 86). The investigator took a buccal swab from her cheek. (3Tr. 86).

Sergeant Drew Darby supervised a search along Route 301 on September 12, 2016, which culminated at to Ms. Mitchell's house. (3Tr. 94). He took from Ms. Mitchell all the items she found in her backyard. (3Tr. 98-100). He noticed brown, reddish stains on the hammer. (3Tr. 101-102). He obtained a buccal swab from Ms. Mitchell. (3Tr. 102). The buccal swab, underwear, and hammer were sent to the forensic lab. (3Tr. 104). He explained measurements taken from Ms. Mitchell's residence. (3Tr. 105-108, 109). He did not look for blood in Ms. Mitchell's garage. (3Tr. 108).

Dr. Michael Hayes performed an autopsy on the victim. (3Tr. 118). He noted multiple blunt force trauma injuries to the head, shoulders, and extremities as well as a puncture wound to the head. (3Tr. 120). He noted both lacerations and contusions. (3Tr. 120). He explained the victim's injuries. (3Tr. 121-133). The injuries to the victim were consistent with multiple blows from a hammer. (3Tr. 134). The cause of the victim's death was blunt force trauma to the head. (3Tr. 136). One of the victim's injurie was not consistent with the blow from a hammer. (3Tr. 140). He was not able to determine the exact time of death. (3Tr. 142). There would have been a significant amount of blood loss at the time the injuries were inflicted. (3Tr. 148). Blood could have left the victim's body and travelled onto the attacker's body. (3Tr. 150).

Kimberly Townsend testified that the victim worked at Regions Bank and had three life insurance plans. (3Tr. 170). The Petitioner was the beneficiary of all three plans. (3Tr. 170). Regents Bank was notified of the victim's death by email on September 6, 2016. (3Tr. 170). Regent Bank's record do not show that the Petitioner had knowledge of any of the three policies or that he was the beneficiary of those policies. (3Tr. 171). Investigator Kevin LaPlaga described the scene and the injuries to the victim. (3Tr. 181-182, 190). The Petitioner told him that he tried to move the victim but that he was unable to do so. (3Tr 191). He did not see any dirt or blood on the Petitioner other than a few red specks on his finger. (3Tr. 191-193). He did not see the Petitioner show any emotion or cry. (3Tr. 193). He observed red stains on the black backpack that was recovered near the victim. (3Tr. 194). No swab of this backpack was taken, and it was not sent to the lab for testing. (3Tr. 213). He executed a search warrant on the Petitioner's house. (3Tr. 197). He found an opened bag of tools in a hall closet. (3Tr. 197). There was no indication that a hammer should have been found in the bag. (3Tr. 222). He saw blood splatter on the victim's arm. (3Tr. 215). The blood splatter would have landed on the victim's attacker. (3Tr. 216). A luminol test was not done in the house. (3Tr. 221). Swab of a red stain in the Petitioner's house were not analysed by the forensic lab. (3Tr. 218). The shirt and pants recovered from Ms. Mitchell's residence were not tested by the forensic lab. (3Tr. 228). The victim's clothing was not analysed by the forensic lab. (3Tr. 231). Red stains from a Highlander vehicle were not submitted to the forensic lab. (3Tr. 237). The clothing the Petitioner was wearing at the scene were not sent to

the forensic lab. (3Tr. 237). A luminol test was performed in the Toyota Prius and partially confirmed the Petitioner's story of touching the victim and getting into the Prius. (3Tr. 239). Lisa Schiermeier-Wood is a forensic scientist who tested the items collected in this case. She received a DNA sample from Ms. Mitchell, the victim, and the Petitioner. (3Tr. 265-265). She found blood on both the handle and the head of the hammer, and she determined it was a single DNA profile. (3Tr. 272). The victim could not be eliminated as a contributor to this DNA profile. (3Tr. 273). The Petitioner and Ms. Mitchell could be eliminated as a contributor to this DNA profile. (3Tr. 273). She found blood on the Petitioner's phone , and she determined that it was a mixed DNA profile. (3Tr. 278). The Petitioner could be eliminated as a major contributor to the mixed DNA profile. (3Tr. 279). The victim could not be eliminated as a major contributor to the mixed DNA profile. (3Tr. 278). She could not perform a comparison as to the minor contributor to this mixed DNA profile. (3Tr. 279). She tested a pair of underwear, and she found a mixed DNA profile. (3Tr. 281). The Petitioner and the victim could not be eliminated as a contributor to this mixed DNA profile. (3Tr. 283). Her notes reflected that the hammer recovered by investigator LaPlaga was originally wrapped in the underwear. (3Tr. 295). She tested tiny stains on the Petitioner's belt buckle, but did not find any blood. (3Tr. 299).

The Petitioner messaged Gina Gattuso on August 1, 2016 on the website eHarmony.com. (3Tr. 309). The Petitioner went on multiple dates with Ms. Gattuso. (3Tr. 312). On August 25th, 2016, he told Ms. Gattuso that he had previously been in a long-term relation

but that it did not work out. (3Tr. 314). He told Ms. Gattuso that he had never been married and that he did not have any children. (3Tr. 314). They discussed having intercourse after the third date. (3Tr. 320).

The Petitioner messaged Felicia Smith on July 26, 2016 on the website eHarmony.com. (3Tr. 323). They talked about a serious relationship and finding a life partner. (3Tr. 323). The Petitioner and Ms. Smith went on multiple dates, and they were intimate on multiple occassions. (3Tr. 324). Ms. Smith visited the Petitioner's house on three occasions. (3Tr. 324). She testified about the frequency and content of her communications with the Petitioner. (3Tr. 29-331).

Investigator Tyler Cary obtained records from the cell phones of the Petitioner, the victim, and the victim's father. (4Tr. 17). He explained what each of those records showed. (4Tr. 17-29). He determined that the Petitioner's phone travelled in the direction of Ms. Mitchell's home between the hours of 11:31 pm on September 4th and 12:01 am on September 5th. (4Tr. 57-65). He could not determine the location of the victim's phone from 11:37 pm on September 4th to 12:31 am on September 5th. (4Tr. 69). He reviewd surveillance footage from stores along a route the Phone may have travelled. (4Tr. 71). He saw a Toyota Prius, but he could not determine who was the driver. (4Tr. 71).

Investigator Shawn Dover spoke with the Petitioner at the scene. (4Tr. 81). The Petitioner said he was in bed between 10:30 pm on September 4th and 5:30 am on September 5th. (4Tr. 84). The Petitioner drove around on September 5th to look for his wife when he realized that she was not at her parent's house. (4Tr. 84). The Petitioner patted the victim's back, smacked

her head, and pulled her leg after he found her lying in the yard (4Tr. 85). The victim had blood on her head, arms, and shirt. (4Tr. 85). The Petitioner did not cry. (4Tr. 89). The Petitioner did not know who would want to hurt the victim. (4Tr. 91). He laid the found tion for the introduction of records from Google and eHarmony.com. (4Tr. 142-143). He did not find a hammer in the Petitioner's home. (4Tr. 145). He found a bottle of cleaning wipe n the Petitioner's kitchen, but he did not collect the bottle or any wipes. (4Tr. 147, 162). He collected the clothes the Petitioner was wearing when he was arrested on September 12, 2016. (4Tr. 147). The Petitioner was wearing a backpack when he was arrested that contained a computer, the Petitioner's passport and ID, the victim's passport and ID, life insurance documents from Region's Bank, and $10,000 in cash. (4Tr. 149, 153). There was no luminol test done in the Petitioner's house. (4Tr. 164). A bag of tools was found in the Petitioner's house, but there was no indication of which tools should be in the bag. (4Tr. 166). A PERK kit was ordered to see if there was any DNA on the victim's fingernails. (4Tr. 176).

Chandra Shrestha, the victim's father, testified taht the victim would not wear her wedding ring when she was in a fight with the Petitioner. (4Tr. 179). The victim would stay at her parents home often. (4Tr. 180). On September 4, 2016, he was with the victim at a family dinner. (4Tr. 182). While at the dinner, he called th Petitioner who said that he was in an argument with the victim. (4Tr. 183). After the family get together, he went with the victim to her house. (4Tr. 184). He saw the Petitioner take her phoner out of her purse. (4Tr. 185). The Petitioner sent him a

text message the following morning about the victim not being at home. (4Tr. 186). The Petitioner told him that the victim wanted to go for a walk the night before, but that the Petitioner did not want to go. (4Tr. 187). The Petitioner said that he took the victim's car keys out of her purse the night before. (4Tr. 187). The Petitioner told him that the victim said her father would come pick her up. (4Tr. 187). The victim never called him to pick her up. (4Tr. 187).

The next morning on September 5th, the Petitioner said he was going to look for the victim in a car. (4Tr. 188). He was on the phone with the Petitioner up until the Petitioner found the victim. (4Tr. 188). The victim never went out at nighttime in the dark by herself. (4Tr. 189). The victim usually drove a Prius and the Petitioner usually drove a Highlander. (4Tr. 191). He asked the Petitioner to track the victim's phone. (4Tr. 201). He spoke with the Petitioner about the victim going out at night to places that might put her in danger on September 4th visit. (4Tr. 202). The victim sought medical attention to address concerns about her going out at odd times at night and exposing herself to danger. (4Tr. 207).

Gaurav Shrestha, the victim's brother, spoke with the Petitioner after the victim's death, and he noticed that the Petitioner appeared unemotional and detached. (4Tr. 211). The Petitioner did not attend the victim's celebration of life ceremony or the spreading of her ashes, but he attended and paid for her funeral. (4Tr. 211-214). He never questioned the Petitioner about whether the Petitioner killed the victim. (4Tr. 213).

B. Facts Relating to the Dispute over Jury Instructions:

After the Commonwealth rested its case but before closing arguments to the jury, there was a discussion about jury instructions. (4Tr. 223). Defense counsel objected to a non-model jury instruction about premeditation. (4Tr. 223). Specifically, this non-model jury instruction, which was introduced over defense counsel objection as Jury Instruction Number Eleven, stated, "[i]n deciding whether premeditation and deliberation exists, you may consider the brutality of the attack, whether more than one blow was struck, the disparity in size and strength between the defendant and the victim, the concealment of the victim's body, the defendant's lack of remorse, and the defendant's efforts to avoid detection."

Defense counsel objected to this instruction as it improperly emphasized the element of premeditation. (4Tr. 224). Commonwealth cited the case of Epperly v. Commonwealth, 222 Va. 214, 294 S.E. 2d 882(1982), and argued that the instruction was an accurate statement of law. (4Tr. 228-229). The trial court overruled the defense counsel's objection. (4Tr. 229).

The Court of Appeals of Virginia also denied the claim.

Court of Appeals of Virginia One-Judge Order dated December 28, 2018 APPENDIX A

C. Facts Relating to the Claim of Insufficiency of Evidence:

At the Petitioner's sentencing hearing, defense counsel argued a Motion to Set Aside the verdict asserting that there was not sufficient evidence to convict the Petitioner. Trial court denied the similar claim of insufficiency of evidence as well. Court of Appeals of Virginia denied appeal concluding that there was sufficient evidence to convict the Petitioner.

Petitioner's Motion to Set Aside the Verdict: 6Tr. 15-35.

Court of Appeals of Virginia One-Judge Order dated December 28, 2018. APPENDIX A.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals of Virginia unreasonably denied the Petitioner's claim regarding Jury Instruction Number Eleven as it impermissibly singled out for emphasis the factors to be considered in establishing premeditation and deliberation.

Standard of Review:

The granting or denying of a Jury Instruction rests in the sound discretion of the trial court. Edwards v. Commonwealth, 65 Va. App. 655, 662, 779 S.E 2d 858, 861 (2015). On Appeal, an appellate court considers the trial court's ruling regarding the granting or denying of a jury instruction with an abuse of discretion standard of review Gaines v. Commonwealth, 39 Va. App. 562, 567, 574, S.E.2d 775 778 (2003). (en banc). The abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgement that the court does not reverse merely because it would have come to a different result in the first instance Lawlor v. Commonwealth, 285 Va 187 212, 738 S.E.2d 847, 861 (2013). "A reviewing court's responsibility in reviewing jury instructions is 'to see that the law has been stated clearly and that the instructions cover all issues which the evidence fairly raises.'" Rhodes v. Commonwealth, 41 Va. App 195, 200, 583 S.E.2d 773, 775 (2003)(quoting Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719(1988)).

Argument:

"When a trial judge instructs the jury in the law, he or she may not 'single out for emphasis a part of the evidence tending to establish a particular fact' ... The danger of such emphasis

is that it gives undue prominence by the trial judge to the highlighted evidence and may mislead the jury." Yeager v. Commonwealth, 16 Va. App 761, 766, 433 S E 2d 248, 251(1993) (quoting Terry v. Commonwealth, 5 Va. App 167, 170 360 S.E.2d 880, 882 (1987)).

The notion "that the language of a specific opinion dictates the content of a jury instruction ... is at odds with [the] often repeated caution that language in an opinion is meant to provide a rationale for a decision and may not translate immutably into jury instructions." Keefer v. Commonwealth, 56 Va. App 520(2010) see also Va. Elec & Power Co. v. Dungee, 258 Va 235, 520 S.E 2d 340 (1990); Blondel v. Hays, 241 Va. 467, 403 S.E.2d 340 (1991); Seaton v. Commonwealth, 42 Va. App. 739, 595 S.E.2d 16 (2004). An Appellate court's opinion is "intended as a guide for the trial courts to determine whether the evidence is legally sufficient to support an instruction on [an offense]. It is not intended to be included in jury instructions and should not be so used because it might be considered a comment on the evidence by the court, which is of course, not permissible." Oak Knolls Realty Co v. Thomas, 212 Va. 396, 397, 184 S.E.2d 809 (1971).

At the conclusion of the trial, the defense counsel objected to the giving of a non-model jury instruction about premeditation and deliberation that stated, "In deciding whether premeditation and deliberation exist you mayconsider the brutality of the attack, whether more than one blow was struck, the disparity in size and strength between the defendant and the victim, the concealment of the victim's body. the defendant's lack of remorse and the defendant's efforts to avoid detection." (4Tr. 4).

In support of his objection at trial, defense counsel argued "I think the instruction unnecessarily highlights different ways for the jury to get to the premeditation... I think it's inappropriate to say to the jury and by the way, if you're having some difficulty with premeditation, here's some other ways you can get there". (4Tr. 227-228)

In response, the Commonwealth cited Epperly v Commonwealth, 222 Va. 214, 294 S.E.2d 882 (1982), and argued that it was a proper statement of the law The trial court overruled defense counsel's objection and it submitted the non-model jury instruction to the jury as Jury Instruction Number Eleven.

The Petitioner raised the issue on Appeal, but the Court of Appeals of Virginia denied the claim . The Supreme Court of Virginia denied discretionary review.

The Petitioner contends the Appeals Court was unreasonable in denying the claim as the instruction improperly singled out for emphasis the factors to be considered in determining premeditation. The Petitioner argues that the various factors listed in the Epperly opinion are only intended to be used as a guide for the trial court to determine whether evidence produced at a trial is legally sufficient to establish premeditation and deliberation in first-degree murder . The Petitioner asserts that the Commonwealth may have sought this non-model instruction because the factors listed in the Epperly opinion happened to dovetail with the facts they intended to use in the Petitioner's case to prove premeditation.

However, by submitting this instruction to the jury, the trial court essentially allowed specific parts of the evidence

shown by the Commonwealth throughout the trial to then again be singled out in an effort to prove a particular fact, to wit: premeditation and deliberation. As argued in the Motion to Set Aside the Verdict, "the Commonwealth just lifting this out of this case because it dovetails with the evidence in their case, it causes the jury to think that this is highlighted, that they really need to pay special attention to these factors." (6Tr 23).

The language of the instruction was taken verbatim from the Epperly opinion. The Petitioner maintains that just because the Epperly opinion listed these factors as evidence of premeditation and deliberation observed in various murder cases does not mean that the exact wording from the Epperly case opinion can simply be plugged into an instruction on premeditation and deliberation.

Here is an excerpt from the Epperly opinion that was copied into the instruction in question.

> "The question whether premeditation and deliberation exist so as to elevate a homicide to first degree murder, is in the province of the jury. Hodges v. Commonwealth, 213 Va. 316, 191 S.E.2d 794 (1972). In deciding it, the jury may properly consider the brutality of the attack. and whether more than one blow was struck, Jackson v. Virginia. 443 US 307, 325 (1979); the disparity in size and strenghts between the defendant and the victim, State v. LaChance, 524 S.W.2d 933 (Tenn. 1975); the concealment of the victim's body, State v. Austin, 52 Ohio App.2d 59, 368 N.E.2d 59 (1976); and the defendant's lack of remorse and efforts to avoid detection, Smith v. Commonwealth, supra."

In denying the claim, the appeals court appears to make three unreasonable arguments.

A. Evidence is sufficient:

Following is a portion of the One-Judge reply to the claim that talks about the reason to deny the claim:

> "...the reviewing court will affirm a conviction of premeditated murder, even though based upon wholly circumstantial evidence, whenever [it] can say that the reasonable import of such evidence, considered as a whole, is sufficient to show beyond a reasonable doubt that the accused was the criminal agent and that he acted with a premeditated intent to kill."

This argument is unreasonable because it is telling the lower courts how to find sufficiency of evidence under review. The Petitioner is raising a completely different issue of validity of the instruction number eleven here, not sufficiency of evidence. It appears that the court has not understood fully the issue at hand. The question raised by the Petitioner is whether the instruction improperly singled out for emphasis the factors the jury could consider in deciding premediation. But, sufficiency was not the core concern here. The Court of Appeals of Virginia has looked at the claim with a different standard than the one raised by the Petitioner.

B. What is Premeditation:

The trial court also instructed the jury under Instruction Number 10 that "Willful, deliberate, and premeditated means a specific intent to kill, adopted at some time before the killing, but which need not exist for any particular length of time."

The Appeals Court reasons: Viewed in context and based on Epperly and Rhodes, Instruction Number Eleven properly stated the law concerning the issues faily raised by the evidence with regard to premeditation... Accordingly, the trial court did not err by granting the instruction.

As we can see from reading the instruction number ten that it is all about "what" is premeditation. Nowhere does it explain "how" to find premeditation. It is Jury instruction number eleven that describes "how" to reach to premeditation. The question raised by the Petitioner is whether the court erred by giving the impermissible instruction that 'singled out for emphasis' the evidence the jury could consider to reach to the premeditation.

The infirmity in the Jury Instruction Number Eleven is not lessened by giving of instruction number ten at all The two instructions serve different purposes and guide the jury as to "how to find" premeditation versus "what is premeditation". As described the cort's ruling was unreasonable in denying the claim based on this argument.

C .Not a Mandatory Presumption:

> Another reason given by the reviewing court is as follows: "Although appellant argues that Instruction Number 11 improperly 'singled out for emphasis' the factors the jury could consider in deciding premeditation, the instruction correctly stated that certain factors **may** be considered in determining whether the killing was premeditated."

The emphasis on word 'may' was italicised in the original reply, but law library typewriter does not have italiced capacity, so it is bold and underlined to show emphasis here.

The emphasis in the court's reply seems to show that the court is rejecting the argument as if the jury had "Permissible Inference" and not "Mandatory Presumption". This not the issue raised by the Petitioner here. The issue raised by the Petitioner is whether the court impermissibly singled for emphasis the factors the jury could consider to reach premeditation.

As mentioned in Footnote 3 from Keefer v. Commonwealth, 56 Va. App. 520 (2010), "We reject the Commonwealth's argument that the instruction did not constitute an impermissible comment becaus it stated the jury 'may' infer an intent to defraud, rather than that the jury 'must' infer such an intent. cf. Velasquez v. Commonwealth, 276 Va. 326, 330, 661 S.E.2d 454, 456 (2008). (holding that a jury instruction stating the jury "may infer" erroneously commented on the evidence.)

Apparently, the reason given by the appellate court in the instant case is contrary to the precedent set by Keefer, supra and Velasquez, supra.

IN SUM, as shown in arguments A, B, and C, the decision of the lower court is in direct contradiction to the previous ruling set in Yeager, supra and Rules of Supreme Court of Virginia 3A:16 both.With the limited resources of law library, pro se petitioner could not find any previous ruling from Supreme Court of US on this particular matter. Perhaps, by taking up this case, the Court can set a new standard for the lower courts to follow for the future reference. The Petitioner has followed all the steps and raised this issue in the lower courts, but unfortunately been denied at all steps along the way. The Petitioner pleads this court to please take this matter and based on its merit and national importance, grant a new trial.

2. The Court of Appeals of Virginia unreasonably denied the Petitioner's claim regarding Insufficiency of Evidence on the charge of First-Degree Murder as the evidence was not sufficient to show he was the person who killed the victim or that he acted with premeditation.

Standard of Review:

The standard of review for a claim of insufficient evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyong a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.E.2d 560 (1979). A court reviewing the sufficiency of evidence "must consider circumstantial as well as direct evidence and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir., 1982). It has further been held that "circumstantial evidence may support a verdict of guilty, even though it does not exclude every reasonable hypothesis consistent with innocence. " United States v. George, 568 F.2d, 1064, 1069 (4th. Cir., 1978).

Argument:

Based on the evidence adduced at trial, following are some of the pertinent questions raised by the Petitioner.

A. Presence at the scent of the crime:

One of the long standing principles of criminal law is that an accused cannot be convicted of the crime unless the government meets the burden of proving every essential element of an offense beyong a reasonable doubt. while the government need not exclude

every possible theory or surmise of innocence presented by the defense, it must reasonably exclude all theories of innocence which flow from the evidence itself. The Petitioner claims that the appellate court jumped to conclusion that the Petitioner was present at the scene of the crime when it happened. Although, this conclusion is not supported by the evidence presented at trial.

Dr. Willie Stroble and Roger Hultgren, the two eye witnesses who claimed they heard a scream at around 11 pm on September 4, 2016, both denied seeing the Petitioner or the victim at the scene of the crime. They did not see any vehicle, any murder weapon, or any dead body either.

The prosecution claims it was the Petitioner who puts himself at the scene of the crime in his statement given to the investigators. But, as per the Petitioner's statement, he was back home by 10:30 pm on Septemebr 4, 2016. While the Prosecution claims that the crime took place at 11 pm outside the above mentioned witness' house in the same neighbourhood. There is no reference in the entire trial record that shows that the Petitioner was even present at the crime scene at 11 pm.

This jump to conclusion by the Appellate court can only be supported by speculation, suffice to invalidate the conviction. The Prosecution hides behind a claim that it was dark outside when the witnesses looked outside their homes after hearing the scream. But that is not a basis to assume that the crime happened at 11 pm or that the Petitioner was present at the scene.

Autopsy report is inconclusive about the time of death of the victim. The witnesses did not see the body after they heard

presented evidence of Petitioner's SMS to the victim at 12:47 am on September 5, 2016 sent by using cell number with area code 201 (let's call it 'cell2'). Another evidence presented by prosecutor was an SMS sent by the Petitioner to his father-in-law around 5am on the same day. The father-in-law called the Petitioner back on cell2 right after the SMS. Prosecution also presented multiple documents showing cell number 201(cell2) as the petitioner's contact number. No evidence to show that the Petitioner owns or possessed cell1 while it was moving. To the contrary, DNA evidence shows victim's DNA and an unknown person's DNA on the phone. But the Petitioner's DNA was not on the cell1 at all. Still, theory presented by prosecution somehow assumes that it was the Petitioner who was in possession of the cell1 while it was moving, just based on the 911 call made by the Petitioner the next day using cell1.

C. Identity of the Car or the Driver:

Investigator Cary testified during trial that a Prius car was seen on video moving about the same time with cell1 movement. The Petitioner and victim owned a Prius as well. Prosecution used these facts to infer that the taillights seen on video belongs to the car owned by the Petitioner. This assumption was contrary to another testimony by Sumitra Shrestha that it was the victim who normally drove the Prius. The Petitioner usually drove a second car, Highlander.

The video did not show make, model, color, VIN number or any other identification of the car that can be used to reasonably

conclude that it was the same car as owned by the Petitioner or who is the driver. The Appellate court could not have affirmed this conclusion without conjecture.

D. Possession of the Alleged Murder Weapon:

Witness Ms. Mitchell claimed that she had found a hammer and some clothes in her frontyard a few days after the crime. She had washed the shirt and pants, threw the underwear in the trash, and put the hammer in her husband's toolbox. She submitted these items to thepolice after a few more days on September 12, 2016.

The autopsy results shows the cause of the death of the victim was blunt force trauma, consistent with a hammer. DNA analysis showed that the hammer had victim's DNA on it, but it did not have anything from the Petitioner. No DNA or fingerprints were matched with the petitioner regarding the hammer. The shirt and pants were never tested by the forensic lab. Underwear had 3 distinct DNA profiles that matched with the Victim, The Petitioner and an unknown person. The items found by the witness in her frontyard and she claimed they were spread out a few feet apart. As per her testimony, this house is on the side of a busy highway and covered by trees.

No evidence was presented to suggest whether the underwear was possessed by the Petitioner at the time the crime took place. Same goes for the alleged murder weapon - hammer. It was never in possession of the Petitioner as per the evidence. It was not owned by the petitioner either. In sum, there was no evidence presented at trial to even suggest that the Petitioner was ever in contact with this hammer. The court of appeals has impermissibly inferred that since the hammer is found a few feet away from

the underwear, it must have been placed there at the same time the underwear and other clothes were placed, and it must have been placed there by the Petitioner. This seems to be a too far fetched conclusion even in a fiction story. But the court of appeals has affirmed the conviction primarily based on this speculation.

This conclusion is in stark contrast to the earlier court position that ridicules such an inference. "...to allow this conviction to stand would be to hold that anyone who touches anything which is found later at the scene of the crime may be convicted, provided he was within a mile and a half of the scene when the crime may have been committed." Borum v. United States, 380 F.2d 595(DC Cir., 1967).

The instant case shows similar scenario. The cell phone prosecution used, to place the Petitioner near Ms. Mitchell's yard, had more than a mile radius accuracy from the cell tower. The cell phone could have been anywhere in the area, and items found could have been placed there before or after September 4, 2016. Also, the item with the Petitioner's DNA is an underwear, which is an easily movable object. In the case of United States v. Strayhorn, 572 U.S. 1145(2014), evidence was found to be insufficient because the fingerprint evidence on the duct tape used in the robbery, and tape was an easily movable object.

There are numerous breaks in the evidence chain and court of appeals could not have affirmed the conviction without so many speculations. And, as quoted through the court opinions in Borum and Strayhorn, supra, evidence is insufficient.

E. Theory of Blood Travel:

The hypothesis which must be reasonably excluded are those which flow from the evidence itself, and not from the imagination of defendant's counsel.

The expert witness, Investigator LaPlaga, testified at trial that the blood would have travelled to the attacker's clothes at the time of the attack. Prosecution claims that the Petitioner was wearing the clothes later found by Ms. Mitchell a few days later. Ms. Mitchell testified that there was no blood on those clothes she found in her yard. And these seems to be another hole in the prosecution's theory based on their own evidence. The prosecution did not present any evidence to exclude any reasonable hypothesis regarding blood theory. Moreover, there was no large pool of blood on the Petitioner, his home, car or cloths he was wearing when police investigated him after the 911 call. Also, the timeframe leaves no time for the Petitioner to clean the clothes before discarding, if he was the perpitrator. But, the prosecution fails to exclude this hypothesis of blood travel even though it flows from their own evidence.

F. Failed to Prove Premeditation:

Even if we were to assume that the Petitioner was the one who murdered the victim, there was not sufficient evidence to prove that he acted with premeditation. While the Petitioner acknowledges that the prosecution can prove premeditation by circumstantial evidence, to do so, it must exclude all reasonable hypothesis of innocence. The Petitioner contends that the [illegible] evidence at trial was not sufficient to exclude the hypothesis that the incident was caused by passion rather than premeditation or self defense.

At trial,the victim's father testified that the Petitioner and the victim were arguing on the day in question. Also, the defense counsel argued to the trial court about jury instruction, "brutality is often the result of heat of passion."

The prosecution tried to prove the premeditation by internet search records showing queries like "homicide". But, it failed to provide any evidence to support an inference that the Petitioner was the author of the search records or that the account belonged to him.

Another possibility that the Petitioner acted in self defense was also left open. All the evidence presented by the prosecution --cell phone, car, weapon, clothes, internet account access, etc. are equally accessible to the victim as much as they are to the Petitioner. On top of that, the insurance policy that prosecution suggested as the motive, was signed on by the victim and not the Petitioner. The Regions Bank representative and witness testified during trial that there was no evidence to suggest that the Petitioner knew about the insurance policy before the death of the victim. This hypothesis of self defense was equally plausible given all the evidence adduced at the trial. The Petitioner claims that the prosecution failed to exclude this hypothesis, and thus failed to convincingly support premeditation.

In Sum, as described in points A through F, there are some overwhelming voids in the evidence chain. The prosecution's theory could not be materialized without speculation. The Petitioner claims the evidence adduced at trial failed to meet the standard set in Jackson v. Virginia, supra.

SUMMARY

I.

As described in claim one, the jury instruction in question was not only contrary to the Rule 3A:16 of Rules of Supreme Court of Virginia, but also contrary to precedent set in Yeager, supra and Keefer, supra. One of the consideration for review for the Honorable Court to use its discretionary power is to settle disputes between lower courts. Instant case presents an issue of importance that matches this criteria.

Another consideration governing review on certiorari is when a state court has decided an important question of law that has not been, but should be, settled by the Honorable Court. With the limited resources of the prison law library, this pro se petition presents a similar situation. The Petitioner pleads the Honorable Court to take this opportunity to set guidelines on the question presented here for the lower courts to follow.

The issue raised by the Petitioner os of the right of an accused to a fair trial guaranteed by the Fourteenth Amendment. Therefore, based on its merits and above mentioned reasons, the Honorable Court should issue writ of certiorari.

II.

Instant case involves evidentiary rulings based on cell phones, DNA, blood travel, internet search records, video surveillance, luminol test and more high-tech areas. This kind of technology based rulings are increasing by the day because average citizens are using this tech gadgets in their everyday

life. And investigators are using advanced forensic tests to counter. But the prosecutors and defense attorneys are still battling to apply the right standards to argue for the courts to rule on. The evidentiary rulings and inferences allowed based on these evidence by the jury and appellate courts is still evolving in many areas.

The Petitioner has raised important questions based on the ambiguities that still exist in interpreting tech evidence. The Petitioner pleads the Honorable Court to take this case to set appropriate guidelines for the lower courts to use and avoid wrongful convictions.

The Petitioner has also shown in the argument above, that the ruling of the lower court is in contradiction with the previous rulings of the case Borum, supra and Strayhorn, supra. The Honorable Court should take this case to clear out this kind of contradiction and set a clear standard.

One of the touchstones of the justice system is that no person should be convicted without the sufficient evidence to prove him or her guilty beyond a reasonable doubt. But, due to lack of understanding of the technical knowledge and insufficient advancement of the law is behind the ever increasing wrongful convictions. And the nature of appellate courts is such that this wrongfully convicted people are forced to prove their innocence to get out of incarceration. Instant case is a prime example of such a dreadful reality. For reasons mentioned above, The Honorable Court should issue writ of Certiorari.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner respectfully requests the Honorable Court to grant a writ of certiorari.

Date: DEC. 19, 2019

Respectfully submitted,

HARSHADKUMAR NANJIBHAI JADAV

PRO SE,