No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOAQUIN S. RAMS – PETITIONER

vs.

COMMONWEALTH OF VIRGINIA – RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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	)	CR14003686-00
JOAQUIN SHADOW RAMS, SR.	)	Judge Randy I. Bellows

VERDICT

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	)	**CASE NUMBERS:**
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JOAQUIN SHADOW RAMS, SR.	)	**Judge Randy I. Bellows**

VERDICT

I. Preliminary Comments

The Defendant, Joaquin Shadow Rams, Sr., is charged in two counts, Attempted False Pretenses and Capital Murder. The two counts were joined for trial in an order signed by the Court on September 23, 2016.

On January 6, 2017, the Defendant was arraigned, pled Not Guilty on both counts and waived trial by jury, with the concurrence of his counsel, the Attorney for the Commonwealth and the Court.

The matter proceeded to trial on March 13, 2017 and concluded on April 6, 2017. The Court took the case under advisement and will now render its verdict.

Under the law, the Court is only required to render a verdict of either Not Guilty or Guilty on each count. The Court is no more legally obligated to explain its verdict and its reasons for its rulings than would be a jury determining the matter. Nevertheless, the Court will explain its reasoning, its findings and its ultimate rulings. I do this because I believe the parties to this proceeding and the public have a right to understand how the Court has arrived at its decision.

Before I proceed to the contents of the verdict, there are two preliminary comments I wish to make:

First, I want to take this opportunity to commend counsel – Mr. Ebert, Mr. Willett, Mr. Leibig, Ms. Robin and Ms. Lenox – for their professionalism throughout this proceeding. This

has been a hard-fought case, both in trial and in the years of litigation before trial. Both sides have zealously advocated for their position. Yet both sides have treated each other with respect and shown each other every professional courtesy. Neither side has ever descended into personal attacks or personal criticism. That is not always the case, especially when the stakes are as high as they are in this case. In addition, I want to thank all counsel for the manner in which you have conducted yourself before this Court. You have acted in accordance with the highest traditions of the profession and it has been a privilege to have you appear before me.

Second, I wish to advise counsel that I have written out my verdict and intend to read what I have written. You are welcome to take notes if you wish, but as soon as I leave the bench, copies of my verdict will be unsealed and given to you. Upon adjournment today, the verdict will become a public document and available to anyone who wishes to review it.

II. The Charge of Attempted False Pretenses

I will first address the charge of Attempted False Pretenses.

a. The Indictment

The indictment reads as follows:

> THE GRAND JURY FOR THE 31ST JUDICIAL CIRCUIT, COMPRISING THE COUNTY OF PRINCE WILIAM AND THE CITIES OF MANASSAS AND MANASSAS PARK, CHARGES THAT ON OR BETWEEN SEPTEMBER 15, 2011 AND OCTOBER 20, 2012, IN THE AFORESAID JUDICIAL CIRCUIT, THE ACCUSED, JOAQUIN SHADOW RAMS, SR., (A.K.A.: JOHN ANTHONY RAMIREZ, JR; JOHN ANTHONY RAMIREZ; JUQUIN ANTHONY RAMS; JOAQUIN SHADOW RAMS; JOAQUIN S. RAMS) DID ATTEMPT TO OBTAIN, BY ANY FALSE PRETENSE OR TOKEN, FROM MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, MONEY, A GIFT CERTIFICATE OR OTHER PROPERTY THAT MAY BE THE SUBJECT OF LARCENY, THE VALUE OF SAID MONEY, GIFT CERTIFICATE OR OTHER PROPERTY BEING $200.00 OR MORE, IN VIOLATION OF VIRGINIA CODE SECTION 18.2-178 AND PUNISHABLE IN ACCORDANCE WITH VIRGINIA CODE SECTION 18.2-95, AND 18.2-26.

b. The Elements of the Crime

The elements of Attempted False Pretenses, as it applies to the instant case, are as follows:

1. That the Defendant made a false representation of a past event or existing fact; and
2. When the false representation was made the Defendant intended to defraud the Massachusetts Mutual Life Insurance Company; and
3. That because of the false representation, the Defendant attempted to obtain possession of money, specifically the proceeds from the pay-out of Massachusetts Mutual life insurance death benefits on the life of Prince Elias Rams; and
4. That the money the Defendant attempted to obtain was worth $200 or more.

The Commonwealth must prove each element beyond a reasonable doubt.

c. The Underlying Facts

The Defendant is the father of Prince Rams. In early September 2011, the Defendant made an online inquiry with Beamalife, which was a general insurance agency that sold insurance policies and worked with various insurance carriers. On or about September 12, 2011, John Donovan, a Beamalife sales agent working on commission, contacted the Defendant in response to the Defendant's online inquiry. Over the next several days, Mr. Donovan and the Defendant had both email and telephone communications regarding the purchase of life insurance policies.

The Defendant initially told Mr. Donovan that he was seeking a life insurance policy for himself, in other words, a policy in which the insured individual was the Defendant. However, during the ensuing communications, the subject of purchasing life insurance for his children came up. Mr. Donovan testified that it was his belief that he is the one who raised that subject with the Defendant, and the Court accepts this as an established fact.

Mr. Donovan filled out a Mass Mutual Application over the telephone with the Defendant. This application was for the purpose of the Defendant purchasing a whole life insurance policy in which the insured individual was his son, Prince. The application was to be used by the insurance company to determine whether to issue the policy and, if issued, the application became a part of the policy itself. As the policy itself states: "A copy of the initial application is attached to and made a part of this policy" and "We rely on all statements made by or for the insured in the application(s)."[1]

Mr. Donovan testified that it was his practice to read the application to the applicant "line by line", fill it in based on the information provided by the applicant, and then send it to the applicant for him to review for mistakes, sign and return. He testified that this is what he did with the Defendant's application for Prince's Mass Mutual whole life insurance policy.

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[1] Exh. 18, at 425-426.

The signature block on the Mass Mutual application for Prince's policy is immediately preceded by the following language:

> IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, MISLEADING OR INCOMPLETE INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING THE COMPANY. PENALTIES INCLUDE IMPRISONMENT, FINES AND DENIAL OF INSURANCE BENEFITS.
>
> To the best of my knowledge and belief, all statements made in this Part 1 are complete, true and correctly recorded. I hereby adopt all statements made in the application and agree to be bound by them.[2]

The Defendant signed the application twice, first on behalf of Prince, listing himself as "Father," and second on behalf of himself, as the owner of the policy. The signatures date is "9/15/11" and the city and state where the application was signed is listed as "Bristow, VA",[3] which is in Prince William County.[4]

At issue are five representations that appear in the application. They are as follows:

- The application lists Prince's "Residential Address" as 9725 Kinloss Mews, Bristow, Va. 20136."[5] This was a false representation because, at the time the Defendant provided this information to Mr. Donovan, Prince lived with his mother in Maryland.
- In the section that states "List life insurance currently applied for, contemplated, or now in force on the Insured(s) with other companies...." the application fails to list the $30,000 Globe Life Insurance Policy that the Defendant had applied for on September 11, 2011 on the life of Prince Rams.[6] This was a false omission since the application required disclosure of other policies the Defendant was seeking on Prince's life.
- The application lists the Mother of Prince as having died at age 27 in an "Accident."[7] This was a false representation because Prince's mother is Hera McLeod and she is certainly not dead. Mr. Donovan indicates that the Defendant told Mr. Donovan that Prince and Shadow had two different mothers and that it was Shadow's mother who was dead, not Prince's mother. Mr. Donovan stated that it was his error that Shadow's mother's information appeared on Prince's life insurance form. Nevertheless, the

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[2] Exh. 18, at 410.
[3] Exh. 18, at 410.
[4] Exh. 18, at 341.
[5] Exh. 18, at 402.
[6] Exh. 18, at 371.
[7] Exh. 18, at 408.

Defendant was provided the form prior to signing it specifically for the purpose of reviewing it for mistakes and he did not correct this inaccurate information.

- The application lists the Defendant's "Household income" as $200,000.[8] This was a false representation because, in the year 2011, the Defendant's income was far less than $200,000. Total deposits over $100 to the bank account the Defendant was using in 2011 was $48,583.49.[9] The Defendant told Mr. Donovan that he had a high paying government job. That representation was also false.
- The application lists the Defendant's "Net Worth" as $2,000,000.[10] This was a false representation. At the time of the application, the Defendant had so few resources that he could not pay the $3,000 per month mortgage on the Bristow house and had to move in with the Jestices so he could rent out the Bristow house.

d. Materiality

The Court finds that each of these representations were material misrepresentations or, in the case of the Defendant's failure to list the Globe policy, material omissions. John Milbier, who is an investigative consultant and an employee of Mass Mutual, testified as follows:

- Had Mass Mutual known that the application contained representations that were untrue, it would not have issued the Prince Rams life insurance policy.
- It is the policy and guideline of Mass Mutual not to issue a life insurance policy on a child without both parents signing off on it. Mr. Milbier stated that Mass Mutual wanted "buy-in" from both parents for a policy on a child's life. Mr. Milbier stated that Mass Mutual did not want to issue a policy if there was discontent or discord between the parties with respect to the issuance of the policy. Therefore, if it had known that Prince's mother was alive, it would not have issued the policy without her consent.
- Mr. Milbier testified that had the Defendant listed a different address for Prince than his own address, it would imply a joint relationship. He testified that if the child's address were listed as being different from the Defendant's address, Mass Mutual would have raised a question as to why there is a different address and where is the mother in this situation.
- With regard to the Defendant's false statement of income, Mr. Milbier testified that the importance of this information is that the policy needs a financial underpinning. The owner of the policy needs to be able to afford the premium.

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[8] Exh. 18, at 407.
[9] Exh. VV.
[10] Exh. 18, at 407.

The false representations, viewed individually or collectively, constitute intent to defraud Mass Mutual.

Had Mass Mutual known that the Defendant was lying on the application, it would have rejected the policy. Indeed, Mr. Milbier – who has worked at Mass Mutual since 1985 – testified that he is not aware of any other case in which Mass Mutual issued a policy in which it had previously determined that the applicant lied about the death of the other parent. Moreover, had Mass Mutual known that the Defendant had no significant net worth, made only a fraction of the income he claimed, and was so broke he had to move in with friends, Mass Mutual would not have issued the policy because it needs to make sure the individual can afford the policy. And had Mass Mutual known that Prince's mother was alive and raising Prince in her home in Maryland, Mass Mutual would not have issued the policy without her approval and consent. Whether it is a strict rule or a guideline, Mr. Milbier stated unequivocally that the policy would not have been accepted and issued by Mass Mutual.

In closing argument, defense counsel argued that knowledge that Mass Mutual would not issue a policy to one parent without the other parent's consent was the insurance equivalent of inside baseball. In other words, the defense's claim is essentially that this is an esoteric matter known only to insurance company insiders and the Defendant could not have known that it would have been important and significant to Mass Mutual that Prince's mother was alive and well, indeed was raising Prince in Maryland, and certainly was not a participant in the insurance application.

The Court disagrees. In September of 2011, the Defendant and Ms. McLeod did not have a harmonious co-parenting relationship. That is clear from Ms. McLeod's trial testimony. Listing Prince's mother as dead, and lying about where Prince lived, closed off to Mass Mutual a line of inquiry that the Defendant had to have known would culminate in the policy being rejected. In other words, even assuming that the Defendant did not know about Mass Mutual's guideline not to issue policies on a child's life without both parents consent, the Defendant had to have known that truthful answers on the application would have been a red flag and prevented the policy from being issued.

The false representations created an inaccurate impression of the Defendant that led Mass Mutual to make its assessment that it should and would issue the policy on Prince's life. That impression was of a single parent raising an infant child, whose mother died in an accident, who had substantial income and substantial net worth, and who was not simultaneously attempting to buy additional life insurance on this child's life.

e. Verdict on the Charge of Attempted False Pretenses

The first element is whether the Defendant made a false representation of a past event or existing fact. As stated above, the Defendant made multiple false representations in his Mass Mutual life insurance application on Prince's life. Therefore, the Court finds this element proved beyond a reasonable doubt.

The second element is whether the Defendant intended to defraud Mass Mutual when he made these false representations. As stated above, the Court finds this element proved beyond a reasonable doubt.

The third element is whether, because of these false representations, the Defendant attempted to obtain possession of money, specifically, the proceeds of the life insurance policy on Prince's life. The Court finds this element also proven beyond a reasonable doubt. The false representations caused Mass Mutual to issue this policy and it was certainly done with the intent to obtain money in the event of Prince's death.

To be clear, it is not an element of this offense that the Defendant intended to murder Prince when he bought the policy. Nor is it an element of this offense that the Defendant actually did murder Prince.

Defense counsel made the point that the Defendant never submitted a claim on the policy following Prince's death. The Court finds this to be of no significance. First, the Defendant is not charged with False Pretenses but Attempted False Pretenses. Second, as defense counsel noted in her argument, the death of Prince Rams was immediately viewed by law enforcement as a possible crime, which made the Defendant a prime suspect. Given that he was being investigated for killing his child, it is of no significance that he did not file a claim on the policy either before he was arrested in January 2013 or thereafter.

The fourth element is that the money the Defendant attempted to obtain was worth $200 or more. Given the face value of the death benefits for this policy -- $444,083 – the Commonwealth has proved this element beyond a reasonable doubt.

Having found that each of the elements has been proven beyond a reasonable doubt, the Court finds the Defendant, Joaquin Shadow Rams, Sr., GUILTY of Attempted False Pretenses.

III. The Charge of Capital Murder of Prince Elias McLeod Rams

I will now turn to the charge of Capital Murder of Prince Elias McLeod Rams.

a. The Indictment

The indictment reads as follows:

> THE GRAND JURY for the 31st Judicial Circuit, comprising the County of Prince William and the Cities of Manassas and Manassas Park, charges that on or about October 20, 2012, in the aforesaid Judicial Circuit, the accused, JOAQUIN SHADOW RAMS, SR., (A.K.A.: JOHN ANTHONY RAMIREZ, JR.; JOHN ANTHONY RAMIREZ; JUQUIN ANTHONY RAMS; JOAQUIN SHADOW RAMS; JOAQUIN S. RAMS) did, while being a person twenty-one years of age or older, willfully, deliberately and with premeditation, kill Prince Elias McLeod Rams, a person under the age of fourteen years, in violation of Virginia Code Section 18.2-31(12).

b. The Elements of the Crime

The elements of capital murder in this case are as follows:

1. That the defendant killed Prince Elias McLeod Rams; and
2. That the killing was willful, deliberate and premeditated; and
3. That the killing was of a person under the age of fourteen by a person age twenty-one or older.

The term "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." See Virginia Model Jury Instructions, No.33.260.

The Commonwealth must prove each element beyond a reasonable doubt. With respect to the third element – which concerns the age of the Defendant and the age of his alleged victim – the Commonwealth must prove and has proved beyond a reasonable doubt that Prince Elias McLeod Rams, who I shall call "Prince" throughout this opinion, was under fourteen at the time of his death and that the Defendant was age twenty-one or older at that same time.[11] The contested issue in this case is whether the Defendant killed Prince and, if so, whether it was willful, deliberate and premeditated.

c. Undisputed Facts

There are certain facts in this case that are not in dispute and the Court adopts these facts as proven beyond a reasonable doubt. They are as follows:

[11] Exh. 18, at 1.

Prince was born on July 1, 2011. Prince died on October 21, 2012 at Fairfax Hospital after being declared brain dead.[12]

Prince's mother is Hera McLeod. Prince's father is the Defendant, Joaquin Shadow Rams, Sr. Prince also had a brother, Joaquin Shadow Rams, Jr., whom I shall call Shadow throughout this opinion because that is the name he indicated he goes by. Shadow's father is the Defendant. Shadow's mother is Shawn Mason, who is deceased.

The Defendant and Ms. McLeod were not married but they did live together in the Defendant's Bristow residence until several weeks after the birth of Prince. When Ms. McLeod left the residence, she moved with Prince to Montgomery County, Maryland.

On March 29, 2012, the Circuit Court for Montgomery County entered a Child Custody Order granting Ms. McLeod sole legal and physical custody of Prince, with the Defendant being granted supervised visitation on Wednesday evenings for three hours.[13] That order was subsequently modified by an "Access Order" issued by the Circuit Court for Montgomery County on July 14, 2012. The modification once again gave Ms. McLeod sole legal and physical custody of Prince, but granted the Defendant unsupervised visitation every other Saturday for seven hours from 10am to 5pm and alternate Wednesdays for two hours. Diane Tillery was appointed as the supervisor of the visitation exchanges.[14]

On the morning of October 20, 2012, Ms. Tillery picked up Prince from Ms. McLeod at a Montgomery County police station and transported him to a different Montgomery County police station to meet the Defendant and transfer Prince to his custody. That was accomplished and the Defendant and Prince, with Shadow in the car, drove back to the home of Roger and Sue Jestice, where the Defendant and Shadow were then living.

The Jestice residence is at 9073 Landgreen Street, in Manassas, which is in Prince William County. Present in the residence that day were Prince, the Defendant, Shadow and Roger and Sue Jestice.

At 2:20 pm, a 911 call was placed from the residence.[15] The call concerned the condition of Prince. City of Manassas Fire and Rescue personnel were dispatched and arrived on scene at 2:26 pm. Emergency personnel were at the patient's side at 2:27 pm[16] and determined that he was asystolic, meaning he was in cardiac arrest. Despite cardiopulmonary resuscitation, emergency personnel were unable to restore Prince's heartbeat or respiration. Emergency

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[12] Exh. 18, at 52, 66.
[13] Exh. 18, at 818-820.
[14] Exh. 18, at 2-3.
[15] Exh. 18, Flashdrive.
[16] Exh. 18, at 628-629.

personnel departed by ambulance with Prince at 2:36 pm and arrived at Prince William Hospital at 2:39 pm.[17]

At 3 pm, hospital personnel were able to resuscitate Prince.[18] CT scans of the head and spine were normal.[19] Given his critical condition, Prince was transferred by helicopter to Inova Fairfax Hospital.[20] Dr. Steven Keller performed a first brain death examination at 7 am on October 21, 2012.[21] Dr. Kathleen Donnelly conducted a confirmatory brain death examination at 7 pm on October 21, 2012.[22] Both physicians confirmed that their examinations were consistent with brain death.[23] Prince was declared dead at 8:38 pm.[24]

An autopsy was performed the following day by Dr. Constance DiAngelo, who was then an Assistant Chief Medical Examiner for the Commonwealth of Virginia. Dr. Diageo's final report was issued on January 16, 2013. While the parties are in sharp conflict with respect to the Cause and Manner of Death, it is not disputed that Dr. DiAngelo found the "Cause of Death" to be "Drowning" and the "Manner of Death" to be "Undetermined." Subsequently, Dr. William Gormley, Chief Medical Examiner for the Commonwealth of Virginia, reversed the Cause of Death finding and changed it to "Undetermined."[25]

The Defendant was arrested in January 2013.

d. The Non-Medical Issues

At the heart of the Commonwealth's case is the contention that the Defendant murdered Prince for money. That contention requires examination of two questions: Was the Defendant in desperate financial straits in October 2012? Did the Defendant stand to benefit financially from Prince's death?

i. Was the Defendant in Desperate Financial Straits in October 2012?

The short answer to this question is yes. From 2009 to 2012, the trajectory of the Defendant's finances was on a downward spiral.

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[17] Exh. 18 at 629.
[18] Exh. 18, at 13, 20.
[19] Exh. 18, at 37-38.
[20] Exh. 18, at 683-688.
[21] Exh. 18, at 52, 63.
[22] Exh. 18, at 66.
[23] Exh. 18, at 64-66.
[24] Exh. 18, at 66.
[25] Exh. 18, at

In 2009, the Defendant obtained substantial proceeds as the beneficiary of a life insurance policy on his mother's life. On February 4, 2009, Metropolitan Life opened an account for the benefit of the Defendant and credited the account with $162,439.44.[26] Between February 2009 and January 2011, the Defendant used the account to pay a variety of expenses, including most significantly the mortgage on his Bristow home.[27] The mortgage amount varied in cost during this time period, ranging from $2,774.43 per month to $3,070.70 per month.[28] In addition, on December 3, 2009, he persuaded a close friend, Ruben Martinez, to open a bank account, ostensibly in Mr. Martinez' name, but for the Defendant's exclusive use. The Defendant told Mr. Martinez he could not have a bank account in his own name because he was going through bankruptcy.

The Court would note here that there is no question – and no dispute – that the Martinez bank account was actually the Defendant's bank account. Indeed, it is the defense that called Ruben Martinez to establish the Defendant's true ownership of the Martinez bank account. Independent of this testimony, the Defendant listed himself as the "authorized account holder" on Bank of America checking account number 435020270074 – which is the Martinez bank account – when he set up automatic recurring drafts off the account to pay the premium on the Mass Mutual insurance policies he had purchased on the lives of Prince and Shadow Rams.[29]

In 2010, there was still considerable money in the Metropolitan Life account, at least initially. The year began with a balance of $56,590.18.[30] The Defendant also began receiving substantial funds into the secret Martinez bank account from an individual named Maher Davtian. According to Roger Jestice, Mr. Davtian was a business partner of the Defendant in a video gaming website. In the year 2010, there were four large deposits attributed to Mr. Davtian in the total amount of $200,000.[31] However, the Defendant was also spending money almost as fast as he obtained it. From December 22, 2009 to December 22, 2010, the expenditures out of the secret Martinez bank account was $166,302.37.

By the end of the year, the Defendant was telling Hera McLeod, whom he had met on Match.com in February 2010, that he was having financial problems and needed her help.

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[26] Exh. 18, at 264.
[27] Exh. 18, at 264-291.
[28] Exh. 18, at 291.
[29] Exh. 22.
[30] Exh. 18, at 266.
[31] Exh. VV.

The year 2011 opened with a balance in the Metropolitan Life account of just $4,624.29, which was enough to cover just one more mortgage payment.[32] At that point, Hera McLeod took over paying the mortgage, along with other household expenses. By August 2011, the Metropolitan Life account had just $98.20 in it and was closed on August 19, 2011.[33]

The secret Martinez bank account was not doing much better. The year began with a balance in the account of $31,838.11.[34] There were a few additional deposits attributable to Mr. Davtian, along with other deposits, but by the end of the year the balance in the account was just $2,061.67. More importantly, in the middle of the year, shortly after the birth of Prince, the Defendant lost his alternative source of financial support, Hera McLeod. She testified that she moved out several weeks after the July 1, 2011 birth of their child.

Having lost Hera McLeod as his source of financial support, he could no longer continue to live in the Bristow house and also pay the mortgage. He was in "financial distress," according to Sue Jestice, and he and Shadow moved into the Jestice house so that the Defendant could rent the Bristow house. The rental began in August 2011, according to Ms. Jestice, but the renter eventually moved out. According to realtor Mary Palmer, the Defendant put the house back on the rental market in July 2012, but there was no new renter.

By July 2012, the Defendant was no longer paying the mortgage. His last mortgage payment was on June 25, 2012, but by then he already had a past due amount of more than $6,000.[35] According to Bank of America Vice President Laniska Jenkins, the bank began foreclosure proceedings in August 2012. Specifically, bank records indicate the matter was referred for foreclosure on August 22, 2012.[36]

The inability to pay the mortgage was not the Defendant's only financial difficulty in 2012 and, according to Sue Jestice, the Defendant was contemplating bankruptcy and had actually spoken with an attorney. He owed the Wakefield School, Shadow's private school, $11,320.33[37], a sum that the school eventually wrote off, according to its Chief Financial Officer, Robin Nida. He also had completely exhausted a $50,000 home equity loan with Bank of America.[38] The total amount of deposits coming into the secret Martinez bank account between January 2012 and October 20, 2012 was $22,350[39] but during that same time period

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[32] Exh. 18, at 269.
[33] Exh. 18, at 270.
[34] Exh. UU.
[35] Exh. 18, at 301-308.
[36] Exh. 18, at 309-340.
[37] Exh. 18, at 369.
[38] Exh. 18, at 341-367.
[39] Exh. UU, VV.

the Defendant's expenditures out of the account was $24,310.18.[40] The balance in the account on October 17, 2012, four days before Prince was pronounced dead at Fairfax Hospital, was $389.18.

So, to answer the question posed at the beginning of this section, by October 2012 the Defendant was indeed in desperate financial straits.

Which brings the Court to realtor Mary Palmer and an exchange of text messages that took place between the Defendant and Ms. Palmer. Ms. Palmer testified that she had put the Bristow house on the rental market in July 2012 but the house was still empty in October.

On October 7, 2012, the Defendant and Ms. Palmer exchanged the following text messages[41]:

Defendant: *Good morning Mary*
just wanted to give you heads up
I'm going to start moving my stuff back to the house
so you can take it off the market
thanks

Mary: *Ok. Will do and that's nice.*
Its shown a couple times but no interest.

Defendant: *Ok. Thanks*
I appreciate it
getting new appliances and getting the house repainted
so I'm excited things are finally looking up :)

Defendant: *I'm thinking of doing the deck or pool*
not sure yet

Mary: *That is great!*
it's a wonderful house and you should be in it.
I'm glad.
You need to sign release to take off market and need to give you key.
when can

Mary: *I meet you or I can leave at my office.*

Defendant: *I can meet you tomorrow morning if that's okay at the house*

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[40] Exh. UU.
[41] Exh. 25.

Defendant: *The painting people gonna come out*

Defendant: *I can meet you at 8*
is that okay

That completes the text messages that were offered and accepted into evidence. The Court would note that it has reviewed the secret Martinez bank account records and there is nothing in them to suggest a basis for the Defendant's text: "I'm excited things are finally looking up," followed by a smiley face. Total deposits between the date of that text and January 10, 2013 amounted to just $3,837.93.[42] That works out to about $1,300 in income per month, which certainly provides no explanation for such excitement and financial optimism.

After all, on October 7, 2012, the Defendant is texting about: (1) moving back in to a house that was already in foreclosure, where he had a total payments due as of August 1, 2012 of $12,245.43,[43] meaning that as of October 7, 2012 he would have incurred an additional two months -- approximately $6,000 – in unpaid mortgage debt; (2) he was going to meet with painters about repainting the house; (3) he was "getting new appliances"; and (4) he was "thinking" about "doing the pool or deck." These are each expensive propositions, especially for an individual whose bank account on October 7, 2012 has a total balance of just $837.40, and who has exhausted his $50,000 home equity line of credit.

By itself, this certainly does not prove that the Defendant murdered Prince. But it is incriminating. And there are two additional points of significance with respect to the text messages:

On September 21, 2012, at 3:03 a.m., Montgomery County Fire and Rescue were dispatched to Hera McLeod's home because Prince was having a seizure.[44] He was taken to Medstar Montgomery Medical Center, where it was determined that he had a 103.3 degree fever. He was evaluated and released.[45] Later the same day, Ms. McLeod took Prince to his pediatrician, who assessed him as having "Bronchiolitis, RSV [Respiratory Syncytial Virus]; seizures, febrile."[46]

As a result of Prince's illness and seizure, Ms. McLeod cancelled the Defendant's scheduled unsupervised visitation with Prince. Ms. McLeod testified that she was under an obligation to communicate medical problems regarding Prince to the Defendant. This is

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[42] Exh. UU.
[43] Exh. 18, at 308.
[44] Exh. 18, at 590.
[45] Exh. 18, at 574-589.
[46] Exh. 18, at 493A.

consistent with provisions of the Child Custody Orders of March 29, 2012[47] and July 14, 2012,[48] which required that Ms. McLeod "advise defendant of significant and major matters involving the minor child...,"[49] which was accomplished through intermediaries. Ms. McLeod testified that when she would cancel a visit she would communicate the reason to Diane Tillery, the intermediary, who would communicate the reason for the cancellation to the Defendant, and that this would have been done for the scheduled September 22, 2012 visit.

Thus, at some point on September 21, 2012, the Defendant would have known that Prince had suffered another febrile seizure – in addition to the one that the Defendant witnessed on September 8, 2012.

It is therefore both significant and even more incriminating – in the context of the Defendant's claim to emergency and medical personnel that Prince was seizing on October 20, 2012 – that the earliest text reference by the Defendant about moving back to his house is not actually October 7, 2012 but, rather, September 22, 2012. On that date, the Defendant wrote Mary Palmer: "Hi Mary just so you know I'm thinking of moving back home."

The Defendant's financial situation on September 22, 2012 was just as bleak as it would be two weeks later on October 7, 2012. There had been no deposits to his secret Martinez bank account since August 3, 2012 and he was down to a balance of 2,633.29.[50] If the October 7, 2012 text messages are incriminating because there was no legitimate basis for financial optimism, the fact that the Defendant actually put Mary Palmer on notice that he was contemplating returning to his home two weeks earlier – just after learning of Prince's second febrile seizure episode in two weeks – is even more incriminating, because the timing of the text messages suggests a connection between Prince's febrile seizures and the Defendant's financial optimism.

The second point of significance is this: Why, if the Defendant on October 7, 2012 is telling Mary Palmer, his realtor, that he has decided to move back into the Bristow house, does he not share this same great news with Sue Jestice? Ms. Jestice testified that she was unaware that the Defendant had taken the house off the rental market and was planning to move back in. The Jestices had taken the Defendant and Shadow into their home. They were providing him free rent. Ms. Jestice testified that the Defendant was more than a friend, that "he's like a family member." If the Defendant was moving out – and it is clear from the text message of October 7, 2012 that this was not just a thought, a dream, a plan, or an aspiration, but a reality – is there any credible reason for him not to share this great news with Ms. Jestice?

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[47] Exh. 18, at 818-821.
[48] Exh. 18, at 2-4.
[49] Exh. 18, at 819.
[50] Exh. UU.

Well, there is one credible reason not to share this news and it lies in the different roles that Ms. Palmer and Ms. Jestice played in the Defendant's life. Ms. Palmer was his realtor. He had no choice but to tell her to take the house off the market once he decided to move back in. And he was certainly under no obligation to explain to his realtor what had happened – or what he expected to happen – that would so dramatically improve his financial condition. Ms. Jestice, however, presented a very different situation. The Defendant was living in her house, along with his son, Shadow, with Prince visiting every other weekend. She knew he was in "financial distress." She had no information that his finances had improved and in fact understood them to be the "same." If the Defendant had revealed to her his intent to move back into the Bristow house, it would inevitably and unavoidably have raised questions about how and why his finances had taken such a great leap forward. He could certainly avoid such questions from Mary Palmer (had she asked them) but Sue Jestice – the person who considered the Defendant to be a member of her family and who would ultimately, along with her husband, use $35,000 of their own money to pay for the Defendant's initial attorney – was not some one who could so easily be dismissed or avoided. In other words, the fact that he said nothing to Sue Jestice about moving back in to the Bristow house is additional incriminating evidence.

The final comment to make about the Defendant's finances is that they showed no improvement in the months after Prince died, a further indication that he had no legitimate basis for telling Mary Palmer that "things were looking up" on October 7, 2012. In fact, in both November and December, the defendant incurred a $35 overdraft fee for not having sufficient money in his account to cover a particular debit in each of those months. And what were the particular debits that caused the overdrafts? In each of those months it was the $250.01 automatic recurring monthly payment for the Mass Mutual life insurance policies that the Defendant had taken out on the life of Prince Rams and Shadow Rams.

The last draft for Prince and Shadow's Mass Mutual life insurance policy took place on January 10, 2013, in the regular amount of $250.01. Following that debit, the balance in the account was "$0."[51]

ii. <u>Did the Defendant Stand to Benefit Financially from Prince's Death?</u>

Some two months after Prince was born, the Defendant began buying insurance on Prince's life.

On September 11, 2011, he applied to purchase a $30,000 policy on Prince's life through a company called Globe Life.[52] On September 15, 2011, he applied to purchase a $444,083

[51] Exh. UU.
[52] Exh. 18, at 371-380.

policy through a company called Mass Mutual.[53] On November 10, 2011, he applied to purchase a $50,000 policy through a company called Gerber Life.[54] Each of the policies were actually issued. The Globe policy carried a monthly premium of $9.49;[55] the Mass Mutual policy carried a monthly premium of $150;[56] and the Gerber policy carried a premium of $28.05.[57] Each of the policy premiums were paid by automatic recurring drafts from the secret Martinez bank account.[58] The total monthly premiums for the three Prince life insurance policies was $187.54.

Collectively, the amount of money that would be paid to the beneficiary or beneficiaries of these policies, was $524,083. The sole beneficiary of the Globe policy on Prince's life was the Defendant.[59] The Mass Mutual policies originally had two primary beneficiaries: the Defendant and Shadow.[60] However, on November 1, 2011, the Defendant changed the beneficiaries so that he became the sole primary beneficiary and Shadow was the secondary beneficiary, meaning that in the event of Prince's death, the Defendant would receive the entirety of the proceeds of the policy.[61]

Viewed in isolation, the purchase of life insurance is certainly not incriminating. Nor, viewed in isolation, is it incriminating to purchase a life insurance policy for a child, even for a young child. In this case, however, there are a number of factors that make these purchases incriminating:

First, there is the issue of timing with regard to the purchase of the policies. The Defendant applied for these policies just three weeks after his mother's life insurance proceeds ran out. Those proceeds had paid his mortgage and now it was gone. Then Hera McLeod had paid his mortgage and now she was gone. The secret Martinez bank account, so flush in 2010 that the Defendant could spend approximately $166,000 and still have money left over, was now receiving in 2011 less than one fourth of the deposits it had received in 2010. The Defendant was in such "financial distress," according to Sue Jestice, that he had just moved in with the Jestices so that he could rent out his house to pay the mortgage. This was the context in which the Defendant purchased more than one half million dollars in life insurance on his infant son, and made himself the sole primary beneficiary.

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[53] Exh. 18, at 403-426.
[54] Exh. 18, at 382-383.
[55] Exh. UU.
[56] Exh. 23.
[57] Exh. UU.
[58] Exh. UU.
[59] Exh. 18, at 372.
[60] Exh. 18, at 406.
[61] Exh. 18, at 455-458.

Second, the Defendant purchased not just one but three policies on Prince's life. The Globe and Mass Mutual policies were purchased at around the same time, mid-September 2011. But the Gerber policy was not purchased until November 2011. That is significant because, on November 10, 2011, when the Defendant submitted his application for the Gerber policy, he already had in his hands $474,083 in life insurance on Prince. What could possibly have led the Defendant to conclude he needed to go out and buy even more insurance on Prince's life? Buying the additional $50,000 Gerber policy did, however, insure that in the event of Prince's death, the beneficiary of these three policies – the Defendant – would receive $524,083, not $474,083.

The defense suggests that the Defendant's purpose in buying these three policies was to plan for Prince's future, and that – at worst – the Defendant was simply a naïve and unsophisticated consumer with regard to the best way to save for a child's future. The Court finds no merit in this argument. When it came to money matters, the Defendant was anything but naïve and unsophisticated. He persuaded his friend, Ruben Martinez, to set up a straw man bank account in order to hide his income from a contemplated bankruptcy. He ran a video gaming website that brought him hundreds of thousands of dollars in income but arranged to have the money transferred to him indirectly through the secret Martinez bank account. He applied for, obtained, and then exhausted a $50,000 equity line of credit on his house. He persuaded his girlfriend to pay his bills even as he was secretly continuing to receive money through the Martinez account. Then he persuaded the Jestices to give him and his son a place to live rent-free so that he could rent out his own house to pay for his mortgage.

In any event, how sophisticated did an individual need to be to read in the Globe material that the $30,000 whole life policy he purchased from Globe would have a cash value for Prince in twenty years of just $984?[62]

Such a paltry cash value sum also illustrates the hollowness of the assertion that these purchases were all about savings, and not about payouts upon death. No matter how paltry the cash value might be, however, the fact that the policies accumulated <u>any</u> cash value did serve a critical purpose for someone contemplating murder: it gave the purchaser a cover story to justify the purchase of large amounts of life insurance, specifically, the ability to claim that the purpose of the purchase was to provide for the child's future, which is precisely what the Defense claims in this case.

Nor is it at all significant that, on the Mass Mutual application, the Defendant checked a box indicating that the "primary purpose of [the] insurance" was "Income for Dependents" and

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[62] Exh. 18, at 380.

"Savings."[63] It is not as if Mass Mutual gave the Defendant a third option to check a box reflecting homicidal intent.

Third, if the Defendant's purpose in purchasing these three policies on Prince's life was to provide for Prince's future, and simply reflected responsible parenting, why did he never tell the mother of his child, Hera McLeod, that he had made this financial sacrifice for their son? Why did she only learn of the policies' existence two weeks after Prince died?

Fourth, if the purpose of the insurance was to use it as a savings device, why would the Defendant have gone to the trouble to change the beneficiaries on the Mass Mutual policy on November 1, 2011 to make himself sole primary beneficiary[64]? And why would he apply nine days later to Gerber for an additional $50,000 policy for which he would also be sole primary beneficiary?

Now the defense claims that making himself the sole beneficiary on the Mass Mutual policies was simply a cost savings device to avoid guardianship costs when a minor is the beneficiary of life insurance. Putting aside the question as to how this supposedly unsophisticated and naïve individual would have known the cost of guardianship, the argument on its face is without merit. The simple reality is this: By eliminating Shadow as a primary beneficiary on Prince's life insurance policy, the Defendant insured he would not have to split the proceeds of a payout with his son.

Fifth, the Defendant was so determined to obtain life insurance on Prince's life, that he willingly and intentionally made false statements to get them. With regard to the Globe policy, the Defendant listed "Parents" as the individuals applying for the policy, when it was only the Defendant who had applied. With regard to the Mass Mutual policy, as documented earlier in this opinion, the Defendant lied when he reported that Prince lived at his Bristow home, he lied when he claimed his annual income was $200,000, he lied when he claimed his net worth was $2,000,000, and he lied when he claimed that Prince's mother was dead at age 27.

Before moving on to the sixth point, it is important to address the issue of how the application came to state that Prince's mother was dead, when in truth she was obviously alive. Mr. Donovan testified that it was his mistake, not the Defendant's mistake, and the Court accepts this as true. But that only explains how the mistake made its way into the application, not how it stayed there. The Defendant was sent the completed application. It was sent to him specifically for him to review for mistakes, according to Mr. Donovan. The Court finds that the fact that the Defendant did not correct this obvious error in the application was a knowing and intentional decision on the Defendant's part.

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[63] Exh. 18, at 404.
[64] Exh. 18, at 455-458.

This is for several reasons: (1) As discussed in the Attempted False Pretenses portion of this Order, the Defendant derived enormous advantage from Mass Mutual not knowing of the existence of Hera McLeod; (2) The Defendant's listing of a false address for Prince, and his pretending that Prince lived with the Defendant instead of with his mother, further emphasized that there was no other parent with whom the insurance company needed to be concerned. As Mr. Milbier testified, a different address listed for Prince would have implied a joint relationship, it would have indicated that there were two parents in Prince's life, and would have led Mass Mutual to insist that the mother consent to issuance of the policy; and (3) When asked specifically to indicate how much insurance Prince's mother had "currently applied for, considered or [was] now in force," the Defendant listed "0"[65]. The number "0" is typed, which indicates it was placed on the form by the same individual – Mr. Donovan – who typed in that the mother was dead. But the Defendant knew that he certainly did not know whether Heather McLeod – the not-dead mother of Prince from whom he was completely estranged – had life insurance "currently applied for, considered or now in force." The claim that Prince's mother had "0" life insurance served the Defendant's purposes because it was consistent with the false statement that Prince's mother was dead. Dead people obviously do not need or have life insurance, so any number listed for the mother of Prince that was other than zero would have been a bizarre inconsistency. Given that the Defendant obviously knew that the next step in obtaining this insurance was submission of the application to Mass Mutual, the fact that he made no corrections to these errors is significant and the Court concludes it was knowing and intentional.

Sixth, the cost of the three premium policies on Prince's life amounted to $2,250.48 per year, a substantial sum of money for an individual whose home was going into foreclosure, who had no regular employment, and was contemplating bankruptcy. He never missed a payment.

Seventh, the Defendant not only purchased three policies on Prince's life but he went out to three different companies to get them. Why did he hide the Globe policy from Mr. Donovan when he filled out the Mass Mutual application? Why would he not have purchased all three through Mr. Donovan, who worked with all insurance companies according to his testimony, or purchased an even larger policy from Mass Mutual? And why, after obtaining the Mass Mutual policy, did he seek out Gerber for an additional $50,000 policy on Prince's life rather than contacting Mr. Donovan again and asking him to raise the policy amount by that sum? The answer to this is that, by going to three different companies, he prevented any one company from knowing what the other companies were doing with respect to insuring Prince's life.

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[65] Exh. 18, at 408.

Finally, the Court will address a number of arguments made by the defense in an effort to demonstrate that the life insurance policies should not be viewed as incriminating evidence. The defense makes three principal arguments:

First, the Defendant argues that while he did purchase the three policies on Prince's life he also purchased three policies on Shadow's life, as well as a policy on his own life. Certainly there is no dispute that these policies were purchased, premiums incurred and premiums paid.[66] The Court is not persuaded, however, that the purchase of these other policies is helpful to the Defendant.

With respect to the policy the Defendant purchased on his own life, it would have raised an enormous red flag to Mass Mutual – and certainly to law enforcement authorities examining the matter following Prince's death – if the Defendant, having ostensibly contacted Beamalife to purchase life insurance for himself, emerged from the process solely with large life insurance policies on his children. Indeed, John Milbier, the Mass Mutual consultant, testified that Mass Mutual believed that a mother and father needed to have their own coverage if they were asking Mass Mutual to issue a policy on a juvenile.

With regard to the policies that the Defendant purchased on Shadow's life, the Court is not persuaded that this is exculpatory evidence. The Defendant obviously knew, having acquired the three policies on Prince's life, that he stood to receive more than one half million dollars if Prince died. It would certainly look better for the Defendant if Prince's policies were not the only policies purchased but, rather, were purchased along with policies on Shadow's life. Moreover, the Mass Mutual policy purchased on Prince's life was two-and-a-half times greater than the policy purchased on Shadow's life. The Defendant justified the discrepancy by telling Mr. Donovan that Shadow had a trust fund. That explanation, however, makes another insurance decision by the Defendant even more inexplicable: when the Defendant named the beneficiary for his own life insurance policy, he had two living sons, but he named only one of them – Shadow – as the 100% beneficiary of his policy.

Second, the Defendant argues that it was John Donovan – not the Defendant – that brought up the notion of purchasing life insurance for his children. The Court accepts that this is true. But its significance is completely undermined by the fact that the Defendant – both before he signed the Mass Mutual policy and after he signed the Mass Mutual policy – was shopping around to buy additional life insurance on Prince's life. He applied to Globe for a policy on Prince's life, not his own. He applied to Gerber for a policy on Prince's life, not his own. Based on all the evidence before the Court, I have no doubt that when the Defendant first contacted Beamalife, it was always with the goal of ending up with the ownership of a substantial insurance policy on Prince's life, whoever happened to raise it first.

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[66] Exh. RR; Exh. UU; Exh.18, at 459-466, 693-701, 721, 723, 734-741.

Third, the Defendant argues that the $444,083 policy amount was essentially backed into and selected by Mr. Donovan, not the Defendant, and was based on what Mr. Donovan thought the Defendant could afford. It may well be true that the precise dollar amount was arrived at by Mr. Donovan but the Court has no doubt that it was always the Defendant's intent to end his interaction with Beamalife having secured a very large insurance policy on Prince's life. Mr. Donovan testified that he considered the policy amount to be irrelevant and that he makes his recommendations based on cash value and what the client can afford. But that in no way means that the Defendant considered the policy amount to be irrelevant, or that the Defendant made his decision based on how much cash value the policy would have when Prince turned 21, or based on what he was able to afford, which, given his true financial situation, was actually little or nothing.

The number "$444,083" appears in two different locations in the Mass Mutual application, typed in one place and handwritten in the other. The second entry was in response to the following question: "Write the total face amount of new insurance applied for that will be placed in all companies (including this Company's policies)."[67] The number "444,083" is written in by hand. Putting aside the fact that this too was a lie – for by this time the Defendant had applied for the $30,000 Globe life insurance policy on Prince's life – the point is that the Defendant knew exactly what he was getting when he applied for and obtained this policy: $444,083 if Prince died.

e. The Medical Issues

The Court turns now to the medical issues in the case.

i. Sources of Information

The Court has been provided extensive medical records, which the Court has reviewed. These include records from the following entities:

- Prince's pediatrician
- Prince's pediatric neurologist
- City of Manassas Fire & Rescue (regarding events of September 8, 2012 and October 20, 2012)
- Prince William Hospital records (regarding events of September 8, 2012 and October 20, 2012)
- 911 calls from the Jestice home (September 8, 2012 and October 20, 2012)
- Suburban Hospital records (regarding events of September 8-9, 2012)

[67] Exh. 18, at 406

- Montgomery County Fire & Rescue records (regarding events of September 21, 2012 and October 18-19, 2012)
- Medstar Montgomery Medical Center (regarding events of September 21, 2012)
- Shady Grove Adventist Hospital (regarding events of September 22, 2012)
- Inova Fairfax Hospital (regarding events of October 20-21, 2012)

The Court has also had the benefit of expert testimony from 13 physicians. They are as follows, in alphabetical order:

- **Dr. Charlene Banks** (formerly Dr. Davenport): Dr. Banks was a pediatric intensivist at Inova Fairfax Hospital who treated Prince on October 20-21, 2012.
- **Dr. Brian Bridges**: Dr. Bridges is a pediatric critical care specialist at the Vanderbilt University Medical Center.[68]
- **Dr. Tracey Corey**: Dr. Corey is a consultant in forensic pathology and, for 18 years, was the Chief Medical Examiner for the Commonwealth of Kentucky. Dr. Corey was initially retained by the Commonwealth but testified as an expert witness for the defense.
- **Dr. Constance DiAngelo**: Dr. DiAngelo is currently a medical examiner in Washington, D.C. She previously served as Assistant Chief Medical Examiner for the Commonwealth of Virginia and performed the autopsy on Prince.
- **Dr. Sylvia Edelstein**: Dr. Edelstein is a pediatric neurologist in private practice who, on September 11, 2012, examined Prince.
- **Dr. Robin Foster**: Dr. Foster is a pediatric emergency medicine and child abuse specialist at Virginia Commonwealth University Medical Center. She testified as an expert witness for the Commonwealth.
- **Dr. William Gormley**: Dr. Gormley is a pathologist and presently the Chief Medical Examiner for the Commonwealth of Virginia.
- **Dr. Steven Keller**: Dr. Keller is a pediatric intensivist at Inova Fairfax Hospital. He treated Prince on October 20-21, 2012.
- **Dr. Andrea McKinney**: Dr. McKinney is a pediatrician who treated Prince in the Emergency Room of Prince William Hospital on October 20, 2012.
- **Dr. Janice Ophoven**: Dr. Ophoven is a consultant in pediatric forensic pathology who previously served in the St. Louis County, Minnesota Medical Examiner's Office. She testified as an expert witness for the defense.
- **Dr. Joseph Scheller**: Dr. Scheller is a pediatric neurologist in private practice. He testified as an expert witness for the defense.

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[68] Exh. RR

- **Dr. Eglal Shalaby-Rana**: Dr. Shalaby-Rana is a pediatric radiologist at Children's National Medical Center. She testified as an expert witness for the defense.
- **Dr. Shlomo Shinnar**: Dr. Shinnar is a professor of Neurology, Pediatrics, and Epidemiology and Population Health and Director of the Comprehensive Epilepsy Management Center at the Montefiore Medical Center of the Albert Einstein College of Medicine. He testified as an expert witness for the Commonwealth.

ii. Did Prince Die of Natural Causes?

This question has two components: Did Prince die of a febrile seizure? And If Prince did not die of a febrile seizure, is there reason to believe he died of some other natural cause or accident?

1. Did Prince Die of a Febrile Seizure?

a. Prince's Medical History

Prince was born on July 1, 2011. According to Dr. Edelstein, who saw Prince on September 11, 2012, Prince "was born after a normal pregnancy and a term delivery without complications."[69] He was "always up-to-date for both cognitive and motor developmental milestones" and was described by his mother to Dr. Edelstein as "a happy and easygoing toddler."[70] Dr. Edelstein stated that Prince was doing exactly what he was supposed to be doing at 14 months old and there was a "complete absence of any factor that could worry me or give me the fear that he could develop problems later on."

On October 10, 2012, Prince saw his pediatrician for a "well baby/toddler visit." He was examined by Dr. Maria DelGiorno who assessed no abnormalities or illnesses. She described it as a "routine child health exam." Neurologically, he was described as having "normal tone and motor development, normal sensory system and reflexes."[71]

On the morning of October 20, 2012, Ms. McLeod took Prince to Harris Teeter to shop. Prince was captured on video. Although the video was not introduced by either party at trial, Dr. Corey viewed the video and, in her report, describes Prince as "an engaging, inquisitive, active toddler."[72] Dr. Foster viewed the same video and observed Prince as being "in no acute distress."[73]

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[69] Exh. 18, at 565.
[70] Exh. 18, at 565.
[71] Exh. 18, at 508.
[72] Exh. 18, at 690.
[73] Exh. 18, at 238.

The next day, Prince Rams was pronounced dead.

b. Prince's History of Febrile Seizures

According to Dr. Shinnar, a seizure is a clinical event due to an abnormal electrical discharge of brain cells that results in motor activity or an interruption of motor activity. Recurrent seizures without provocation is epilepsy. A seizure associated with a febrile illness in a child is a febrile seizure. Two to four percent of children have febrile seizures.

Between June 14, 2012 and October 19, 2012, Prince had five febrile seizures.

He had a first febrile seizure on June 14, 2012 at home with his mother and grandmother. It required no resuscitation and, in fact, there was no medical intervention other than a visit to the pediatrician.[74]

He had a second febrile seizure on September 8, 2012 while in the care of his father at the Jestices' home. The Defendant called 911[75]. When Fire & Rescue arrived, they reported finding the child in "what appeared to be a postictal state and was warm to the touch."[76] (A "postictal state", according to Dr. Scheller, is the period of time after the seizure has concluded when the person is "groggy".) Prince was transported by ambulance to Prince William Hospital. His temperature was 103.6 degrees.[77] "Airway, Breathing, Circulation and Neuro" were all determined to be "WNL," meaning Within Normal Limits,[78] and he was released to his mother's custody. No resuscitation was required.

Ms. McLeod took Prince directly to Suburban Hospital in Maryland, where his temperature was measured as 103.5.[79] At 12:05 am on September 9, 2012, Prince had a seizure that lasted two minutes.[80] Medical records indicate it "self-resolved"[81] and required no resuscitation. According to Ms. McLeod, he had another seizure the next day and she made arrangements to see a pediatric neurologist, Dr. Edelstein. Dr. Edelstein's findings are described above. According to her testimony, she found Prince to be "neurologically normal and developmentally normal." She reassured Ms. McLeod that her child was neurologically normal.

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[74] Exh. 18, at 470, 503A.
[75] Exh. 18, at Flashdrive.
[76] Exh. 18, at 539.
[77] Exh. 18, at 528.
[78] Exh. 18, at 528.
[79] Exh. 18, at 550-551, 554, 559, 560.
[80] Exh. 18, at 550-551, 554, 559, 560.
[81] Exh. 18, at 550-551, 554, 559, 560.

Dr. Shinnar testified that the seizure activity of September 8-9, 2012 is accurately characterized as a "complex febrile seizure," which is defined as either a prolonged seizure, meaning one that is longer than 10-15 minutes in duration, or multiple febrile seizures in a 24 hour period.

Prince's fourth febrile seizure occurred on September 21, 2012. Ms. McLeod called 911 and Montgomery Fire & Rescue responded for what it was told was a "postictal" patient, in other words, a patient whose seizure had recently concluded. The description given to Fire & Rescue was that the "seizure was a few seconds and patient became apneic during the event,"[82] which the Court understands to mean that Prince stopped breathing during the seizure. No resuscitation was required. An ambulance transported Prince to Medstar Montgomery Medical Center, where it was determined he had a 103.3 degree fever.[83] He was seen later that day at his pediatrician, who diagnosed him with "Bronchiolitis, RSV; seizures, febrile." "RSV" is Respiratory Syncytial Virus. On September 22, 2012, Ms. McLeod took Prince to Shady Grove Adventist Hospital for "difficulty breathing" and "fever."[84] According to hospital notes, "Pt [Patient] presents with mother for reported high fever and periods of apnea while sleeping with no color change, less than 10 sec. Per mother pt very congested, dx [diagnosed] with RSV yesterday."[85] Prince's temperature at Shady Grove was 104.7.[86] Later that evening, Ms. McLeod called the pediatrician's office and reported the following: "Went to ER – blood work normal and receiving IVF [intravenous fluids]. Cont. to have high fevers and now has mouth sores but drinking OK. Appt. tomorrow if not better."[87] Two days later, Prince's fever was gone, but his grandmother reported that he was standing up and falling back.[88] Dr. Edelstein was consulted and advised that Prince should not go to the Emergency Room again but just be monitored by his mother.[89] Balance problems, she testified, can be associated with just learning to walk, and is "absolutely not" an indication of epilepsy.

Prince's fifth febrile seizure occurred on October 18, 2012. Montgomery Fire & Rescue responded to a 911 call from Ms. McLeod. They arrived at her residence at 12:05 am on October 19, 2012 and were advised by Ms. McLeod that Prince had experienced a two-minute seizure due to a high temperature.[90] Emergency personnel determined that "all vitals were

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[82] Exh. 18, at 590.
[83] Exh. 18, at 574-589.
[84] Exh. 18, at 594-616.
[85] Exh. 18, at 603.
[86] Exh. 18, at 604.
[87] Exh. 18, at 491.
[88] Exh. 18, at 490.
[89] Exh. 18, at 490.
[90] Exh. 18, at 617-620.

normal and his temperature was decreasing."[91] No resuscitation was required and emergency personnel departed without taking Prince to the hospital.

c. Do Children Die from Febrile Seizures?

This Court has neither the expertise nor the hubris to believe it has the competence to make medical diagnoses or issue medical judgments. But the Court does have the duty and the capacity to make legal judgments based on evidence and, on this issue, the evidence was simply overwhelming – and I do not use that word lightly – that children do not die from febrile seizures.

I begin with Dr. Shlomo Shinnar, whom Dr. Scheller – one of the defendant's experts – described as the "febrile seizure king." Dr. Shinnar's CV reflects a deep wealth of knowledge and research regarding febrile seizures. For example, among his 204 peer-reviewed medical journal articles which he either authored or co-authored are 25 devoted to the subject of febrile seizures.[92] Among his 134 books, chapters in books or review articles are 16 devoted to febrile seizures. He is board certified not only in neurology and child neurology but also in Epilepsy and Clinical Neurophysiology.

This Court finds that, of the three pediatric neurologists who testified, Dr. Shinnar is the expert I found most experienced, most knowledgeable, and most credible on the issue of febrile seizures and other neurology issues.

This is what Dr. Shinnar's report states on the issue of whether children die from febrile seizures: "There have been multiple studies involving thousands of cases of febrile seizures including simple, complex and even febrile status epilepticus ([more than or equal to] 30 minutes which is the extreme end of complex febrile seizures). There are no cases of mortality directly associated with the febrile seizure."[93]

At trial, Dr. Shinnar was equally firm on this point: There is "not a single case report in the literature" of a febrile seizure being fatal. There is "no mortality associated directly with a febrile seizure." There is no report of a parent observing a child having a febrile seizure and then dying.

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[91] Exh. 18, at 617-620.
[92] Exh. 27.
[93] Exh. 28.

Dr. Shinnar's opinion was not an academic's theoretical construct. He personally treated over 1,000 children with febrile seizures, and these cases, he notes, are the complicated cases. (Simple febrile seizures are typically handled in the pediatrician's office.) Moreover, the medical literature to which he refers covers thousands of additional cases of febrile seizures and in none of these – not in his cases nor in those treated by other doctors in the United States and foreign countries – has death been the result.

Dr. Shinnar was far from the only witness upon whom the Court relies on this central issue:

- Dr. Banks, the pediatric intensivist at Inova Fairfax testified that she has never known febrile seizures – simple or complex – to be fatal.
- Dr. DiAngelo, the pathologist who did Prince's autopsy, testified that she has never known anyone to die from a febrile seizure.
- Dr. Bridges, the pediatric neurologist that the defense called as an expert, testified that he has seen a lot of children in the Intensive Care Unit over the years who had to be intubated due to a febrile seizure but he has never seen a patient die of a febrile seizure. Moreover, often the reason a child who has experienced a febrile seizure needs to be intubated is due to the medicines they are given in the hospital. He also testified that he has never seen a child suffer cardiac arrest from a febrile seizure.
- Dr. Gormley, the Chief Medical Examiner of Virginia, issued an Amendment to the Report of Autopsy that states in part: "[D]eath is a very unlikely result of febrile seizures...." [94]
- Dr. Keller, the pediatric intensivist at Inova Fairfax Hospital who did the first of two brain death evaluations of Prince, and who has worked in the Pediatric Intensive Care Unit for 34 years, testified that he has never seen a death from febrile seizures, nor known a child to go into cardiac arrest from febrile seizures, including complex febrile seizures.
- Dr. McKinney, the pediatrician who treated Prince at Prince William Hospital, testified that she has never known febrile seizures to be fatal.
- Dr. Edelstein, the pediatric neurologist who examined Prince on September 11, 2012, testified that she has never encountered a child who died from a febrile seizure, nor does she recall a colleague ever telling her that they were aware of this happening.

d. Did Prince Die from a Febrile Seizure?

Given the Court's judgment that children do not die of febrile seizures, it follows naturally and ineluctably that the Court also concludes, and concludes beyond a reasonable

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[94] Exh. 18, at 829.

doubt, that Prince Rams did not die of a febrile seizure. As Dr. Shinnar testified: It is "beyond any shadow of a doubt" that a febrile seizure was not a contributor in Prince's death.

This judgment is entirely consistent with the prior febrile seizures that Prince had experienced. In each of those prior seizures, Prince recovered on his own, even though 911 was called for some of them and Prince was transported to a hospital. In each of those prior seizures, Prince never stopped breathing. He never needed CPR or any form of resuscitation. His heart never stopped. None constituted status epilepticus, a seizure lasting 30 minutes or longer. None required critical care intervention.

e. Did Prince Even Have a Febrile Seizure on October 20, 2012?

There is only one witness who saw Prince seizing on October 20, 2012 and that witness is the Defendant. Despite the fact that Roger Jestice arrived in the bathroom just 30 seconds after being summoned, he did not see Prince seizing. He testified that his statements to 911 about Prince having a seizure were based on what had happened in the past, not what he was personally observing first hand.

For the reasons stated below, the Court concludes that the Defendant was lying with respect to what he said he observed.

i. The 911 Call and the Statements Made by the Defendant to Emergency and Medical Personnel

The Court finds that the 911 call was a charade, orchestrated by the defendant in which he used Roger Jestice as an unwitting prop to support a false claim that Prince Rams was experiencing a fatal febrile seizure.

The 911 call and the Defendant's statements to emergency and medical personnel make it absolutely clear that the Defendant is reporting having actually observed his son in the midst of a seizure:

- The following exchange occurs early in the 911 call:

> **911 Dispatcher**: So let me just ask you has the seizure stopped yet?
> **Rams**: Come on.
> **Roger Jestice**: Has the seizure stopped?
> **Rams**: He was shaking and stopped breathing.[95]

[95] Exh. 18, Flashdrive.

During trial, the issue arose as to whether the Defendant in that passage was saying "He's" shaking or "He was" shaking. The Court ultimately concluded it was "He was" shaking. But "He was" shaking, in one fundamental respect, conveys the same message as "He's shaking." That message is this: the Defendant had observed Prince actually seizing.

This is confirmed at the very end of the 911 call, in which the Defendant is overheard telling Manassas Fire & Rescue personnel that he not only had observed a seizure but had observed Prince breathing: "He had a seizure. He had long breaths and then he just couldn't breathe. He was going in and out and his eyes were rolling."[96]

The 911 call is only one piece of evidence that the Defendant was reporting having actually observed a seizure:

- Eva Rose, who was a Fire/Medic for the City of Manassas Fire and Rescue, wrote in her statement regarding the events of October 20, 2012, the following: "I asked the father when was the last time the patient was seen breathing and acting appropriately? The father stated one-hour prior he laid the patient down for a nap. While sleeping the patient started to have a seizure. He picked up the patient, noticed he was hot, and decided to put him in the bath tub to help cool him."[97]
- Karl Sampson, Master Technician for the City of Manassas Fire and Rescue, wrote in his statement regarding the events of October 20, 2012, the following: "My involvement once upstairs included asking the father of the child what happened. The father answered 'I noticed him seizing, I picked him up and he was very hot, so I cooled him off in the bath tub like I was taught.'"[98]
- The official "Prehospital Care Report," prepared by City of Manassas Fire and Rescue, states the following with regard to the events of October 20, 2012: "Father advised the patient was sleeping and he witnessed a seizure and placed the patient in an ice cold bath to cool him down."[99]
- Prince William Hospital notes from October 20, 2012 state the following: "Dad states he went to check on patient after a little nap and found baby seizing."[100]

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[96] Exh. 18, Flashdrive.
[97] Exh. 18, at 623.
[98] Exh. 18, at 624.
[99] Exh. 18, p. 627.
[100] Exh. 18, p. 636.

For the following reasons, the Court concludes that it could not have happened as the Defendant claims. As Dr. Shinnar states: The scenario does not make sense medically. Or, as he also said: An observed febrile seizure does not cause death.

First, as stated above, children do not die of febrile seizures, so the notion that Prince had a febrile seizure and it killed him is not credible or believable.

Second, it is entirely inconsistent with Prince's prior history of febrile seizures which, in most of the cases, were brief or very brief and, in all of the cases, required no resuscitation or significant medical intervention.

Third, there is the critical issue of temperature.

ii. The Temperature Issue

The significance of this issue is that, if an individual is going to pretend that his child is having a fatal febrile seizure, an element of that pretension is that he actually claims the child is febrile, in other words, that he has a fever. The defendant made that claim but it is not credible.

The 911 call is about 7:42 minutes in duration. At around 1:40 in that call, the Defendant states: "He's hot. He's really hot."[101] By approximately 7 minutes into the call, Fire & Rescue is present with Prince, because emergency personnel can be heard asking "What happened?"[102] (According to Fire & Rescue records, this would be at 2:27 pm.)[103]

Rebecca Wilson, an Emergency Medical Technician, testified that she was the first person to put hands on Prince and he was cold, had bluish lips, and was pale. This is consistent with the Fire & Rescue's documentation. The Prehospital Care Report states: "Patient was cold, wet, pulseless and apneic with poor skin color and grey/blue lips."[104] Master Technician Karl Sampson, who carried Prince to the ambulance, wrote: "I noticed immediately when I picked the child up that he was very cold to the touch."[105] Upon arrival at Prince William Hospital, Prince's temperature was taken at 2:44 pm and was 91.2 degrees rectally,[106] which is hypothermic. Dr. McKinnon, who treated Prince at Prince William Hospital, described him upon admission as "cold, clammy, wet, and very pale."

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[101] Exh. 18, Flashdrive.
[102] Exh. 18, Flashdrive.
[103] Exh. 18, at 629.
[104] Exh. 18, at 627.
[105] Exh. 18, at 625.
[106] Exh. 18, at 9,16.

Thus, this child went from "really hot," according to the Defendant, to "cold" in the space of just over 5 minutes. Moreover, this child – who had previously had febrile seizures with temperatures of 101 degrees[107], 103.5 degrees[108], and 103.3 degrees[109] – had a temperature of just 91.2 degrees upon arrival at the hospital.

It should also be noted that it is only the Defendant who makes the claim that Prince was "really hot" and that he was "hot" when he took Prince out of the crib. Neither Shadow, nor Roger Jestice, had hands on Prince until Roger Jestice began chest compressions just a few minutes before Fire & Rescue were on the scene. Even after the Defendant took Prince out of the bathtub, and even though the 911 operator issued an instruction to "roll the baby over on his side," the Defendant continued to hold Prince himself. Finally, Roger Jestice says to the Defendant: "Please sit down. I can't help if you're, if I'm chasing you around the room."[110]

Is it credible that Prince's temperature plummeted so quickly from being hot enough to provoke a febrile seizure to being "cold to the touch" and, when measured upon arrival at the hospital, being just 91.2 degrees. I conclude that it is not. Several experts found this alleged temperature drop to be inexplicable:

- Dr. Gormley testified that it was "very hard to understand" and "hard to imagine." He also said: "It doesn't make sense, somebody dying, and being that cold." The cooling, he said, "mystifies" him, given that he would expect it to take a couple of hours to cool from 98 degrees to 91 degrees. It would be "most unusual" to cool that fast.
- Dr. DiAngelo testified that the child should still have felt hot when Fire & Rescue arrived. A 5-7 minute time period would not result in that drop in temperature and she could not "reconcile" it. Prince's body temperature was hypothermic and inconsistent with a febrile seizure having occurred. She indicated that the child should still feel hot and warm to the touch even after being splashed with cold water.
- Dr. Foster testified that temperature is not something that changes very rapidly.
- Dr. Shinnar testified that it is "extremely improbable" that a person's body would go from really hot to really cold that fast, unless the person was placed in a "true ice bath with ice cubes", and that the temperature change "has no plausibility." He also notes that the temperature of a child in convulsions will actually go up.
- Dr. Shinnar's report states: "... he was profoundly hypothermic with a temperature of 91.2 rectally. Especially for a child thought to be febrile earlier this would take a very

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[107] Exh. 18, at 539.
[108] Exh. 18, at 550-551, 554, 559, 560.
[109] Exh. 18, at 574-589.
[110] Exh. 18, Flashdrive.

long time."[111] His report also states: "[I]t is not medically plausible that the child was actively convulsing and a few minutes later was dead and cold in the way the father has stated."[112]

The temperature drop is empirical evidence that what the Defendant said happened did not happen.

I recognize that a number of expert witnesses asserted that the drop in temperature was understandable and credible, given that the child was unclothed, was splashed with water, that ambient conditions would have an impact on his temperature, and the fact that he was in cardiac arrest. I was not persuaded by these witnesses and I conclude that the testimony of Drs. Gormley, DiAngelo, Foster and Shinnar are far more persuasive.

iii. Additional Defense Arguments with Respect to Febrile Seizures

Before proceeding to the next section, the Court will address four other arguments made by the defense on the issue of febrile seizures:

First, the defense argues that febrile seizures can in fact lead to death and cites Dr. Scheller's statement at trial that febrile seizures can cause very serious problems "or even death." The Court finds that Dr. Scheller's opinion on this matter is at odds with the great weight of the evidence. As Dr. Shinnar testified: There is nothing in the literature to support Dr. Scheller's statement. He added that even if you look at children with very serious febrile seizures, there is no mortality.

Moreover, the fact that Drs. Banks, DiAngelo, Bridges, Keller and McKinney – collectively with many decades of experience treating children with febrile seizures – have never seen a fatal febrile seizure is additional proof that children do not die of febrile seizures. Even Dr. Scheller acknowledged that despite the fact that he has treated hundreds of children with febrile seizures, he cannot say with certainty that a single one of these patients died of a febrile seizure.

Second, the defense cited one case report[113] to Dr. Shinnar to rebut his contention that there are no reports in the medical literature of children dying from febrile seizures. But Dr. Shinnar indicated that in this case report, the febrile seizure was merely "suspected," that it was unwitnessed, and that the report itself states that there is "no documented case of febrile

[111] Exh. 28.
[112] Exh. 28.
[113] Exh. ZZ.

seizure-induced death [that] has been reported."[114] He described the paper as "bad science."

Third, the defense argues that Prince's prior seizures involved breathing difficulties and, therefore, supports the claim that Prince had a febrile seizure, which caused him to stop breathing, which caused his heart to stop. In support of this proposition, the defense cites Dr. Scheller and Dr. Bridges who both testified to children having febrile seizures who needed to be intubated. With regard to this last point, however, Dr. Bridges also made it clear that it is sometimes the very medicines given a child to stop a seizure that require the subsequent intubation.

Certainly it is true that there are references in the medical records to breathing difficulties associated with Prince's febrile seizure. The defendant tells 911 on September 8, 2012 that his son is having "problems breathing" and that he was "gasping for air."[115] Montgomery Fire & Rescue personnel reported observing Prince having "labored breathing" following his febrile seizure on September 21, 2012.[116] Ms. McLeod reported that Prince "became apneic" during the several seconds of the seizure she observed[117] and told hospital personnel that after the seizure was over, Prince had some "noisy breathing."[118]

None of these observations, however, support the notion that Prince had a febrile seizure on October 20, 2012, stopped breathing and, as a result, experienced cardiac arrest. Although Dr. Scheller stated that if a child has a febrile seizure and becomes apneic, it is more likely that he will become apneic on a subsequent seizure, he also said that almost every child who has a febrile seizure will stop breathing for several seconds. And the one reference to Prince becoming apneic during a febrile seizure is during the September 21, 2012 febrile seizure and that seizure lasted only a "few seconds."[119] Dr. Scheller also testified that it would take two minutes without breathing for it to get "dangerous." Similarly, Dr. Bridges testified that even after 2-3 minutes of obstructed breathing, a small toddler should be able to breathe if the obstruction is removed. In addition, Dr. Shinnar testified that some times children having a seizure will appear to be breathing shallowly, or not breathing at all, but their oxygen level is normal.

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[114] Exh. ZZ.
[115] Exh. 18, Flashdrive.
[116] Exh. 18, at 590.
[117] Exh. 18, at 590.
[118] Exh. 18, at 574-589.
[119] Exh. 18, at 590.

Finally, the Court rejects the possibility that the Defendant may have thought he was observing a febrile seizure when in fact he was observing the immediate aftermath of cardiac arrest. Dr. Shinnar testified that in the few moments after cardiac arrest, an individual can have a very brief seizure and will stop breathing within seconds. But that is not what the Defendant claimed to have observed. According to Medic Eva Rose, the Defendant told her: "While sleeping the patient started to have a seizure." Master Technician Sampson stated that the Defendant told him: "I noticed him seizing." The 911 recording captures the Defendant telling emergency personnel: "He had a seizure. He had long breaths and then he just couldn't breathe. He was going in and out and his eyes were rolling." Thus, what the Defendant was claiming to have observed was a seizure that was starting, long breaths, going "in and out", and his eyes "rolling." As Dr. Bridges testified, an individual in cardiac arrest has no movement. Nor is it credible that the Defendant just happened to check on Prince in the few seconds after cardiac arrest but before breathing ceased. The fact that medics found Prince cold to the touch several minutes later also demonstrates that cardiac arrest could not have occurred in the seconds before the Defendant picked Prince up. And, finally, of course there is the fact that febrile seizures do not cause cardiac arrest.

Therefore, for the reasons recited above, I conclude that Prince did not have a febrile seizure at the Jestice residence on October 20, 2012, let alone a febrile seizure that caused or contributed to his death.

2. Did Prince Die of Some Other Natural Cause or an Accident?

Dr. DiAngelo testified that there is no indication that Prince Rams died of natural causes. The defense suggested, however, that in addition to febrile seizures as a natural cause of death, there were a number of alternative natural causes of death, including SUDEP (sudden unexplained death in epilepsy), SUDC (sudden unexplained death in childhood), cardiac arrhythmia associated with a viral infection, and some combination of a seizure and an obstructed airway in the crib.

With respect to SUDEP, there was no evidence at all that Prince had epilepsy on October 20, 2012. Febrile seizures are not epilepsy, a point that pediatricians and pediatric neurologists emphasize to worried parents, according to the testimony. Moreover, Dr. Shinnar testified that there was no indication that Prince suffered from epilepsy and that the vast majority of children with febrile seizures do not go on to develop epilepsy.

With regard to SUDC, it is completely inconsistent with the 911 call and what the Defendant told emergency and medical personnel. This is not a situation where a parent finds a child dead in his bed. Rather, the defendant claimed that he found a seizing, breathing child in his crib.

With regard to cardiac arrhythmia, there is simply nothing in the record that would support this as a cause of death.

With regard to the claim that Prince might have suffered a seizure that prevented him from avoiding an obstruction in his crib, thereby causing an unintentional and accidental blockage in his airway, the Court finds this contention to be without merit.

First, it is entirely inconsistent with the Defendant's 911 statements and his statements to emergency and medical personnel that he found Prince seizing and breathing. Those statements, if true, cannot be reconciled with the defense assertion that a mix of natural and accidental causes could have caused Prince to die in his crib. Those statements, if false – and I have found them to be false – demonstrate that the cause of death could not be accidental because why would the Defendant have told these elaborate lies, and placed Prince in the bathtub supposedly to cool him off?

Second, as Dr. Shinnar notes, it would require a scenario in which Prince is sleeping in his crib, unobstructed in his breathing, and then has a prolonged seizure that renders him unconscious, and while that prolonged seizure is underway, something would have to move into position to obstruct his breathing. Had the obstruction been present before the seizure, Prince – an active and healthy toddler – would have just moved himself out of the way.

In summary, the Court finds beyond a reasonable doubt that Prince Rams did not die in an accident, or of natural causes, or some combination of accident and natural causes. As Dr. Foster testified: "I did not find in my review of the records a natural cause of death."

iii. Did Prince Die of a Severe Hypoxic Ischemic Insult?

If Prince did not die of natural causes, such as a febrile seizure, how did he die? And did the Defendant kill him? These questions require the Court to address a series of issues.

1. The Requirement of "Criminal Agency"

In 1954, in the case of Opanowich v. Commonwealth, 196 Va. 342 (1954), the Supreme Court of Virginia addressed the core requirements of a murder prosecution:

> We have frequently had occasion to determine what constitutes the *corpus delicti* in a prosecution for the commission of a homicide. In such cases the Commonwealth must show that there has been a death, and that the death resulted from the criminal agency of another. * * * 'Death must be proved either by direct testimony or by presumptive evidence of the strongest kind; but the existence of the criminal agency as the cause of the death and the

> identity of the agency may be established by circumstantial evidence. 'An examination of the body of a dead person will not always disclose whether death was from natural causes or by means of violence. An investigation of the cause of death is, therefore, not limited to the mere appearance of the body. The circumstances surrounding the cause of death may be inquired into. They may or may not show that death was due to a criminal agency. They may or may not furnish a clue to the identity of the criminal agent. However, if death is shown to have resulted through a criminal agency, the *corpus delicti* is established. The identity of the guilty agent is an additional question for consideration. * * * 'In every prosecution for the commission of a homicide, the *corpus delicti* has two components: death as a result, and the criminal agency of another as the means.'

196 Va. at 354-355 (citations omitted).

What this means is that the Commonwealth is not required to prove the precise cause of death as long as it proves that death resulted through the "criminal agency of another."

In some cases, proof of the precise cause of death establishes that death was by the "criminal agency of another." In other cases, however, the cause of death may be unknown or uncertain but criminal agency is proved by other means. Indeed, the law is clear that an individual can be convicted of murder even when the victim's body is never found.

For example, in Epperly v. Commonwealth, 224 Va. 214 (1982), the defendant was convicted of first-degree murder based on circumstantial evidence where the victim's body was not found. Epperly cites eight other murder cases of a similar nature from other jurisdictions. In Jordan v. Commonwealth, 2008 Va. App. Lexis 417 (2008), the defendant was convicted of first-degree murder despite the fact that the medical examiner was unable to determine a specific cause of death but was able to determine that the "most likely cause of death" was asphyxiation.

Thus, in order to convict the Defendant, the Court need not find a specific cause of death but must find beyond a reasonable doubt that the victim's death was by "criminal agency."

2. Prince Rams Died of a Severe Hypoxic Ischemic Insult

The Court finds beyond a reasonable doubt that the death of Prince Rams was caused by a "severe hypoxic ischemic insult,"[120] which led directly to brain death. I should note here that the word "insult" in this medical context is something that causes an injury.

In other words, Prince's oxygen supply was cut off and he suffered cardiac arrest. As Dr. Bridges testified, if a child has cardiac arrest, the most common reason is that the child has lung failure first. Hypoxia, according to Dr. DiAngelo, is a lack of oxygen getting to the brain. According to Dr. Ophoven, this was a hypoxic event with cardiac arrest. Dr. Shinnar's report states: Prince died "of a case of severe hypoxic ischemic insult."[121].

Further, the Court finds that this insult likely occurred prior to Prince being placed in the crib by the Defendant, and that by the time the Defendant picked Prince out of the crib, he had already suffered irreversible brain damage.

Among the factors I have considered in arriving at this judgment, in addition to those I have cited already, are the following:

First, the Report of Autopsy notes: "Hypoxia/Ischemia changes" and notes that Prince's "brain is markedly swollen with edema and autolysis, consistent with hypoxia and mechanical ventilation."[122] Dr. DiAngelo testified that the lack of oxygen caused the brain swelling. In the Report of Autopsy, Dr. DiAngelo described her microscopic examination of the brain, stating in part: "The gray and white matter appears normally formed with diffuse extracellular edema and moderate to severe acute hypoxic-ischemic changes including the cortex, deep gray nuclei, and cerebellum."[123] Similarly, Dr. Gormley stated that there was definitely hypoxia of the brain. And Dr. Ophoven testified that Prince could not survive cardiac arrest because of the damage his brain had already suffered and that death was due to a lack of oxygen.

Second, when first found by Fire & Rescue personnel, Prince had "0" pulse, "0" respiration, and "0/0" blood pressure.[124] As Dr. Shinnar states in his report: "He was found essentially dead...." He was asystole – meaning he was in full cardiac arrest – at 2:29 pm, 2:31 pm, 2:33 pm, 2:36 pm, and 2:39 pm.[125] According to Dr. Gormley, Prince had all the clinical findings of being dead when Fire & Rescue arrived.

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[120] Exh. 28.
[121] Exh. 28.
[122] Exh. 18, at 177-180.
[123] Exh. 18, at 179.
[124] Exh. 18, at 628.
[125] Exh. 18, at 628.

Third, Prince's pH level measured at Prince William Hospital was less than 6.8, which reflected "profound metabolic acidosis,"[126] according to Dr. Shinnar, and meant he had "been down" and not perfusing oxygen for a "long period of time". Dr. Bridges testified that, although hospital staff were able to get a pulse back, Prince had already suffered irreversible brain damage.

Fourth, Prince was "cold" when Fire & Rescue arrived on the scene, and his temperature upon arrival at the hospital was 91.2 degrees, meaning that he was hypothermic. As previously indicated, the Court credits the testimony of those expert witnesses who rebutted the claim that Prince's temperature could have plummeted this fast and this far in the few minutes after Prince was removed from the crib. That means the severe hypoxic ischemic insult inflicted on Prince must have occurred at a much earlier point in time.

Fifth, a blood-mixture was found in the crib, which was described by Dr. Corey as a "blood-tinged fluid stain." Based on DNA analysis,[127] the Court concludes that the blood-mixture stain on the crib sheet was that of Prince. Dr. Bridges testified that cardiac arrest can result in pulmonary edema and that the blood mixture stain is consistent with pulmonary edema. The Court is persuaded that the blood-mixture is a result of pulmonary edema leaking out of Prince's mouth or nose following cardiac arrest. This is further evidence that the severe hypoxic ischemic insult was inflicted before Prince was placed in the crib.

The next natural question is what caused the severe hypoxic ischemic insult. The Commonwealth has suggested two possibilities, drowning or suffocation. The Court will discuss both possibilities but it is important to emphasize at the outset that a finding of "criminal agency" does not require the Court to find a precise cause of death.

3. What Caused the Severe Hypoxic Ischemic Insult?

a. Did Prince Drown?

The Commonwealth relies on two types of evidence with respect to the question of whether Prince died by drowning. First, there is the alleged confession which the Defendant made to Jamal Thompson. Second, there is the medical evidence. The Court will discuss each of these in turn.

i. Testimony of Jamal Thompson

Jamal Thompson is the only witness called by the Commonwealth who testified that Joaquin Rams made incriminating admissions to him. For the reasons I will set forth below, I

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[126] Exh. 28.
[127] Exh. 18, at 830-833.

find the testimony of Jamal Thompson to be completely incredible and unreliable. I place no credence on the testimony of this witness.

On August 13, 2014, Jamal Thompson sent Captain George Hurlock, the Director of Security at the Adult Detention Center, a note.[128] It reads in part as follows: "I have issue with Rams Cell 3, he told me about his case in he killed his son for money He told me everything how it happen." Thompson stated that he had told his attorney and now the District Attorney wanted to talk to him about Rams' case. "I told Rams that I am telling him everything, now Rams mad at me calling me a snitch."

Captain Hurlock testified that the note was turned over to the Commonwealth Attorney's office. In December 2014, Thompson testified before the Special Grand Jury.

At trial, Thompson told the following story:

- In May or June 2014, the Defendant decided to unburden himself to Thompson and told him that he felt guilty because he had killed his son.
- The defendant described how he had turned his son over on his back and submerged him in water in the bathtub, with his hand over his child's face.
- The defendant described how he held his son's head down under the water and that this is how he drowned his son.
- The defendant then took the child out of the bathtub and placed him back in the crib and then called the police.
- The defendant told Thompson he did this for $500,000 in insurance money.
- The defendant told Thompson that the house in which the drowning occurred was his home in Bristow.

For the following reasons, I find Thompson's testimony to be incredible and entitled to no weight:

First, Thompson came before the Court as an individual with multiple criminal convictions, including pimping and pandering, prisoner in possession of a tool in aid of escape, destruction of property, assault on a law enforcement officer, and tampering and destroying a fire protection system, along with numerous felony probation and parole violations. At least some of these convictions were felonies and may be considered by the Court in assessing the witness' credibility.

Second, at the time of his letter to Captain Hurlock, the witness had three serious charges pending: malicious wounding of a law enforcement officer, failure to register as a sex

[128] Exh. 20.

offender, and felony destruction of property. He testified that at the time of his letter to Captain Hurlock in August 2014, he did not have a firm plea agreement but that he and his attorney were going "back and forth." Ultimately, the malicious wounding charge was reduced to assault on a law enforcement officer and the felony destruction of property was reduced to a misdemeanor destruction of property.[129] Although there is no evidence to indicate that the Commonwealth Attorney's Office offered Thompson a deal for his cooperation and testimony, Thompson – who has a wealth of experience in the criminal justice system, both here and in California – must certainly have recognized that incriminating Joaquin Rams might be beneficial to himself. Thompson stated that he understood he was facing the possibility of jail and "I wanted to go home."

Third, defense counsel played two recordings of calls made from the Adult Detention Center. The inmate on the calls makes several statements demonstrating the ability, willingness and desire to engage in fabrication and deception to gain a tactical advantage in his court proceedings. The first call was on April 18, 2014 and, in it, the inmate tells the person at the other end of the line that he is going to be going to a mental hospital to "bust a couple moves to get some shit right..." and that he has agreed to do that in order to "orchestrate some shit...."[130] Despite the fact that the person on the line with the inmate calls the inmate "Jamal" eight times during the call, and at one point even states that she is going to make a call for the inmate and state that she is calling for "Jamal Thompson," and despite the fact that the inmate call is made with Jamal Thompson's PIN number, Thompson denies that he is the inmate on the call. The second call was made on August 6, 2014, which is shortly after Thompson returned from Central State Hospital. His stay at Central State was brief, lasting slightly over two weeks. In the call, the inmate states that "my attorney just send me down there to make my case better." He then says: "You understand me, to play a little role you gotta be an actor...."[131] This call, too, was made with Thompson's PIN number. Nevertheless, Thompson categorically denied at trial that he was the caller on either call. I find that Thompson was simply lying to this Court.

Fourth, during his incarceration at the Adult Detention Center, Thompson's behavior can only be described as bizarre. On June 19, 2014, Thompson smeared feces all over his cell door.[132] Thompson admitted at trial that he has done this "multiple times," including twice on June 23, 2014. With regard to the smell of feces, Thompson said he doesn't know the smell and "it might smell like roses." Moreover, even though Thompson had been prescribed

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[129] Exh. MM, NN.
[130] Exh. CC, DD.
[131] Exh. CC, DD.
[132] Exh. II.

various antipsychotic medications – including Haldol, Seraquil and Risperdal – he acknowledged that he frequently refused to take them.

Fifth, Thompson repeatedly demonstrated his willingness to engage in disruptive or unlawful behavior in order to achieve his stated desires. On March 25, 2014, Thompson banged on the window of his cell door repeatedly and broke it. When confronted by a guard, he stated that "if he did not get moved to C-Pod he was going to bust the window all the way through."[133] He was charged with and convicted of vandalism in a Disciplinary Board proceeding.[134] He was also charged with misdemeanor destruction of property and pled guilty to that charge.[135] Similarly, he has threatened to kill himself in order to get moved to a different location in the jail. He has also smeared feces on his cell door in order to get moved to a different cell. He also threatened to break a television set in order to get moved.

Sixth, Thompson had specific reason to resent Joaquin Rams and seek retribution. On June 19, 2014, the Defendant reported to a guard that the Thompson was "doing it again," referring to Thompson smearing feces all over his cell door, which was confirmed by the guard.[136] More significantly, the events of August 13, 2014 did not begin with Thompson's note to Captain Hurlock. At approximately 1 am, the Defendant registered a complaint against Thompson for having previously exposed his penis to Rams while Thompson was released from his cell for recreation. Thompson testified that he was questioned about this around 2 am. The Adult Detention Center ultimately determined the complaint to be unfounded, based on interviews with the Defendant, Thompson and a third inmate, Jose Reyes-Alfaro.[137] Whether Rams' complaint was true or not, the fact that it was made earlier on the same day that Thompson wrote to Captain Hurlock suggests that Thompson's note was an act of revenge. Thompson also conceded that he had been taunting the Defendant by calling him a "baby killer" when Thompson was out of his cell for recreation and that he had been doing that "every day."[138]

Seventh, Thompson's justification for reporting the Defendant's supposed confession is that it was a "no go" to harm children. But defense counsel elicited that Thompson's pimping and pandering conviction involved the prostitution of a 15-year old child, which certainly casts doubt on the sincerity of his motivation. Moreover, if Thompson's justification for reporting the supposed confession was that it was a "no go" to harm children, and the supposed

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[133] Exh. GG.
[134] Exh. HH.
[135] Exh. LL.
[136] Exh. II.
[137] Exh. JJ
[138] Exh. JJ

confession was made in May or June of 2014, why did Thompson wait until mid-August to report it?

Eighth, Thompson got the location wrong. He said the Defendant told him he drowned his son at his home in Bristow when, in fact, the events in question occurred at the Jestice residence in Manassas. As to the information in the supposed confession that was accurate, all that information – the fact that the Defendant was accused of killing his son by drowning him, the fact that the alleged drowning occurred in a bathtub, and the fact that the Defendant had $500,000 in insurance policies on the life of Prince – were all facts that had repeatedly appeared in newspaper articles in The Washington Post. This was established by the testimony of defense investigator Shannon Woodward. In other words, Thompson did not need the defendant to tell him these facts in order for him to know them.

Ninth, and finally, Thompson acknowledges signing a statement along with other inmates on the cellblock, with respect to any claims of admissions that might some day be attributed to Joaquin Rams. Thompson signed the statement on April 9, 2014, which is one to two months before he claims Rams confessed. The statement reads in part as follows: "I wish to make it absolutely clear that Joaquin Rams has informed me that he has no intentions of discussing the charges against him with anyone other than his defense team. He has been very definite in his complete refusal to discuss his case with any inmate at all."[139] The Court recognizes, of course, that such a statement is almost certainly intended to act as a shield and a defense against the very types of accusations being made here by Thompson. It does not, in and of itself, prove that the Defendant did not make the statements attributed to him. But it is a factor the Court may consider in determining whether the Defendant, after seeking and obtaining Thompson's signature on this form, promptly chose to confess to him the murder of his child.

So, for the foregoing nine reasons, the Court does not believe Jamal Thompson. I recognize that the Commonwealth takes its witness as it finds them, and frequently does not have the luxury of witnesses with no criminal records, no animus toward a defendant, no reason to lie, and no expectation of reward. That is especially the case when the witness is a

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[139] Exh. OO.

fellow inmate who is facing serious criminal charges. Nevertheless, Jamal Thompson simply cannot be believed. More to the point, I do not believe him.

Therefore, I give his testimony no weight.

ii. The Medical Evidence

1. The Report of Autopsy

On October 22, 2012, Dr. Constance DiAngelo, Assistant Chief Medical Examiner for the Commonwealth of Virginia, conducted the autopsy on the body of Prince Rams. The Report of Autopsy was signed on January 16, 2013.[140]

Dr. DiAngelo concluded that the Cause of Death was "Drowning" and the Manner of Death was "Undetermined." Dr. DiAngelo's report states: "There are findings consistent with drowning including thin fluid in the sinuses, airways, lungs and intestines. When found by rescue personnel, he was naked, wet, and cold. The brain is markedly swollen with edema and autolysis, consistent with hypoxia and mechanical ventilation. There is hemorrhage and pneumonia of the lungs which can be due to mechanical ventilation; viral inclusions are not seen."

At trial, Dr. DiAngelo noted the following additional considerations that led her to conclude that Prince drown:

- She stated that the small intestines had 350 ml of thin fluid, and the large intestines had 10 ml of thin fluid. The fluid in the intestines was consistent with drowning.
- She stated that there was also thin fluid found in Prince's sinuses. If an individual has sinusitis, that could result in fluid being observed in the sinuses but, in her opinion, Prince did not have sinusitis. The fluid in the sinuses was consistent with drowning. This was in addition to finding "abundant" fluid in Prince's airways and lungs.
- Moreover, Dr. DiAngelo testified that when she cut into the lungs, there was a lot of fluid, which was consistent with drowning. The fluid was in the upper and lower airways of the lungs. This was the same type of fluid that Dr. DiAngelo has seen in drowning cases. She also stated that this was an unusual amount of fluid to find in a child of this age and it was consistent with drowning. The amount of fluid in Prince was not consistent with Prince being splashed in the bathtub as was reported.
- Dr. DiAngelo stated that the condition of the brain was consistent with drowning.

[140] Exh. 18, at 177-180.

- Dr. DiAngelo also stated that febrile seizures are not known to be fatal; moreover, a death caused by a febrile seizure would not be consistent with Prince's hypothermic body temperature of 91.2 degrees.
- Finally, she testified that there was no indication that Prince died of natural causes.

On this basis, Dr. DiAngelo concluded to a reasonable degree of medical certainty that Prince died by drowning.

Although Dr. Gormley ultimately vacated her finding of "Drowning," he indicated that she followed the autopsy protocol. Dr. Corey stated that Dr. DiAngelo did a good job on the autopsy and complied with autopsy standards.

2. Amendment to the Report of Autopsy

On October 8, 2014, the Chief Medical Examiner for the Commonwealth of Virginia, Dr. William Gormley, amended the Report of Autopsy, changing the Cause of Death from "Drowning" to "Undetermined." He stated the following:

> While drowning is supported by the reported circumstances surrounding the death and anatomic findings such as congestion and edema of lungs and fluid in the sinuses, the child was on life support and hydrated with intravenous fluids in the hospital. This treatment would obscure the findings of drowning by causing visceral congestion as well as bronchopneumonia. Other possible causes of death cannot be ruled out. The absence of identifiable traumatic injury does not rule out suffocation as a cause of death. While the circumstances surrounding this death are suspicious, the possibility of a natural death cannot be totally eliminated.
>
> While death is a very unlikely result of febrile seizures, some form of generalized epilepsy associated with febrile seizures cannot be ruled out and is supported by the history of febrile seizures, injury to the tongue, and possible sinusitis. The absence of acetaminophen or salicylates on toxicology indicates a lack of protection by fever reduction or elimination. Cardiac arrhythmia associated with a viral infection and bronchopneumonia pneumonia is also possible, though the pneumonia found at autopsy is probably an artifact of life support.

> The manner of death is undetermined. The circumstances surrounding this death create great suspicion of intentional harm to this child, but in the absence of a firm cause of death and with the presence of natural disease in the list of possible causes of death, a homicidal manner of death cannot be proven to a reasonable degree of medical certainty with the available data.[141]

Dr. Gormley did not modify or amend any other portion of the contents of Dr. DiAngelo's Report of Autopsy. At trial, Dr. Gormley made the following additional observations with respect to his decision to amend the cause of death:

- In order to diagnose drowning, a medical examiner must exclude all other causes of death to a reasonable degree of medical certainty, including suffocation.
- This is the only case in his four years as either Acting Chief Medical Examiner or Chief Medical Examiner where he has changed a cause of death.
- The build-up of fluid in the lungs, sinuses and intestines is very likely the result of Prince's hydration in the hospital during the day-and-a-half he was hospitalized before being declared dead.
- Drowning is not known to cause fluid to accumulate in the walls of the small intestines.
- Death by natural causes cannot be excluded to a reasonable degree of medical certainty.
- Dr. Gormley could not be absolutely sure there was not something else going on with the child that could lead to death, including other seizure syndromes, pneumonia, and cardiac arrhythmia.

Dr. Gormley made clear, however, that the findings were consistent with drowning and it remained high on the list of possible diagnoses for this death.

Dr. Gormley stated that the goal of an autopsy is to create a record that any other knowledgeable pathologist can review and come to a reasonable conclusion. But he also acknowledged that the person who actually performs an autopsy is in the best position to see and understand what they are seeing.

For Prince Rams, Dr. DiAngelo was that pathologist, the one – and the only one – who actually performed the autopsy, and she did so after previously having autopsied some 40 other drowning victims. Dr. DiAngelo testified that she remains certain that Prince died by drowning.

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[141] Exh. 18, at 829.

3. Testimony Relevant to Drowning

Much of the defense case was devoted to critiquing Dr. DiAngelo's conclusion that Prince drowned. These criticisms came principally from Dr. Ophoven and Dr. Corey, and included the following:

- Prince's substantial weight gain between his weight at autopsy and his weight at the pediatrician on the day before he died could be attributed to his receiving large amounts of fluids as part of the resuscitation effort. (Dr. Corey)
- Fluid in the small intestines and sinuses could be attributed to cardiac pulmonary arrest. (Dr. Corey)
- The fact that paramedics did not need to suction out water from Prince during resuscitation is inconsistent with drowning. An individual recovered from a drowning would have pure white foam coming from his mouth and the mouth and airways would be full of water. There is no indication of this. (Dr. Ophoven)
- Emergency and medical personnel did not need to use special measures to extract water from Prince's airways. He also did not have hyaline membrane problems, which occurs in some drownings, which would make ventilation more difficult. (Dr. Ophoven)
- The autopsy was incomplete and additional examinations should have been conducted, including a cardiac pathology examination, a comprehensive metabolic evaluation, an infectious disease workup and a neuro-pathology examination. (Dr. Ophoven) It should be noted here that the autopsy report indicates that there was a neuropathology procedure and Dr. Corey testified that a neuropathologist did examine the central nervous system tissue.
- There was no reported history of submersion (Dr. Ophoven and Dr. Corey) and a pathologist cannot make a hard and fast diagnosis of drowning without it. (Dr. Corey)
- The blood-tinged fluid stain in the crib indicates that whatever happened to Prince included something that was going on in the crib. If Prince was well before being placed into the crib, something happened in the crib. If Prince was not well before being placed into the crib, the process could have started before he was placed in the crib. The stain could be pulmonary edema, hemorrhage in the tongue, or injury to the inside of the mouth due to seizure activity. (Dr. Corey)
- The fact that Prince had pulmonary edema is a non-specific finding found in many different types of deaths. (Dr. Corey)
- Prince was found with dried blood in the nose, which would rule out an immediate drowning. (Dr. Corey)
- There is a possibility of a natural cause of death. (Dr. Corey) There is no evidence that it was not a natural death. (Dr. Ophoven)

- The Cause of Death should have been listed as "Undetermined." (Dr. Corey and Dr. Ophoven)
- Drowning is ruled out as a cause of death. (Dr. Corey)

However, there was also this evidence:

- Dr. Bridges testified that suctioning is not always required in drowning cases.
- Dr. McKinnon testified that Prince's abdomen, upon admission, was distended. Dr. Bridges testified that a distended abdomen is something he has seen in drowning cases.
- Dr. Keller testified that Prince's lungs were congested with what are called "opacities," with more on the right lung than the left lung, which can be seen in drowning, aspiration, regurgitation or vomiting. Dr. Shalaby-Rana testified, however, that the opacity differential could well be related to the location of the breathing tube used for ventilation.
- Dr. Keller also testified that some children who drown do not aspirate a lot of water because their vocal chords seize.
- Finally, we come to the testimony of Dr. Robin Foster, an emergency room doctor and child abuse expert. She testified that Prince's weight on autopsy is 2.2 pounds more than can be accounted for with the fluids he was given during his stay in the hospital. Prince's weight was 19.5 pounds on October 19, 2012 but 23.8 pounds at autopsy. Dr. Foster testified that when she added up all the fluid that Prince was given and all the fluid output for which she had records, which was only from Fairfax Hospital, Prince had one more liter of fluid in his body than could be accounted for through fluid hydration. The weight of that 1-liter was 2.2 pounds. This testimony was offered by the Commonwealth in support of a theory of drowning.

So now, having summarized what I consider to be the most important evidence with regard to drowning, I come to the following judgment: In light of Dr. DiAngelo's autopsy report and her testimony, drowning remains – as Dr. Gormley put it – high on the list of possible causes of death. However, in light of all the other testimony I heard, I cannot find conclusively that the precise cause of death was drowning, especially since I would have to exclude suffocation as a cause of death if I were to do so.

I would also note that given Mr. Jestice's testimony that it took him just 30 seconds to get upstairs, and given Mr. and Ms. Jestice's testimony that they did not hear the water turn on until Mr. Jestice got to the top of the stairs or into the upstairs hallway, it leaves little opportunity for an act of drowning to occur. However, that testimony is only relevant to events that occurred after Prince was removed from the crib, not to events that occurred before the Defendant placed Prince in the crib. Just because the parties have focused on what occurred after Prince was removed from the crib does not mean the Court needs to do so as well. The

same bathroom, the same bathtub, and the same faucet were as accessible and available to the Defendant before the Defendant placed Prince in the crib as they were afterwards.

I now turn to the issue of suffocation.

b. Did Prince Suffocate?

If Prince died of a severe hypoxic ischemic insult, and it was not by natural cause, his oxygen supply had to be cut off by some other means. As the preceding section makes clear, it may have been by drowning. The Court now finds beyond a reasonable doubt that if the cause of the severe hypoxic ischemic insult was not drowning, it was suffocation. As stated above, the "criminal agency" requirement does not require the Court to find a precise cause of death.

The Defense offered evidence to rebut suffocation, but the Court is not persuaded that any of its evidence undermines suffocation as a cause of death. The evidence included that the frenulum of the tongue was not torn, that there was no petechial hemorrhaging, and that the hyoid bone was not fractured. But expert witnesses also testified that the tearing of the frenulum is associated with a struggle; that petechial hemorrhaging may or may not occur in a suffocation; and that the lack of a fracture in the hyoid bone, which is sometimes found in manual strangulation, is of no significance in an individual of Prince's age because the bone has not yet ossified and is mostly cartilage and, therefore, rarely fractures in a child.

Dr. Ophoven also testified that some of the typical signs of intentional suffocation – swallowed blood, blood in airway, esophagus, nose and mouth, fingernail marks and scratches on the nail and neck, abrasions in the mouth, petchial hemorrhages – were not present. The Court would note, however, that the autopsy does make reference to seven different contusions or abrasions on Prince. The report notes a contusion in the right temple area, a contusion in the medial left forehead area, a contusion of the left lateral eyebrow, a contusion of the left temporal area, an abrasion to the corner of the mouth, an abrasion on the chest, and an abrasion on the back. Indeed, at Prince William Hospital, hospital records note "obvious unexplainable injuries, such as bruising above left eye and nosebleed" and listed "suspected head trauma" as one of its diagnoses, and notified Prince William County Child Protective Services.[142]

Dr. Gormley stated that he could not eliminate intentional suffocation as a cause of death, noting that it is sometimes difficult to tell if someone suffocated as the cause of death. He stated that if there was no struggle during the suffocation, there could be no marks of suffocation present at all and there might be no direct pathological findings. Dr. Corey also testified that she could not rule out suffocation.

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[142] Exh. 18, at 13.

An intentional suffocation – if committed by the Defendant – would certainly not have required a struggle. Prince was a toddler who, on the day before he died, weighed just 19.5 pounds. He was in the 6th percentile of weight for his age, according to Dr. Foster. The Defendant was a 35 year old man who, according to the medical paperwork he filled out for the policy on his own life, took no prescription medicines, did not have a physician, did not have heart disease, diabetes, or high blood pressure and did not use tobacco in any form.[142] Suffocating Prince would not have required a struggle.

To summarize: I find beyond a reasonable doubt that Prince Rams died of a severe hypoxic ischemic insult, which was caused either by drowning or by suffocation. The Court turns now to the final question before the Court.

f. Did the Defendant Kill Prince?

There are three components to this question: First, did the Defendant have the time and opportunity to kill Prince? Second, did Prince's death result from the criminal agency of another and, if so, was the Defendant the person who committed the crime? Third, has the Commonwealth proven beyond a reasonable doubt each element of capital murder?

i. Did the Defendant Have the Time and Opportunity to Kill Prince?

There are two components to this issue: First, based on the expert testimony, how long would it have taken to either drown or suffocate this child? Second, would the Defendant have had the time and opportunity to commit an act of murder?

1. The Time Required

With respect to the first question, the Court concludes that a severe hypoxic ischemic insult would take 5-10 minutes, both to do the deed and insure that it was irreversible. The Court bases this conclusion on the following testimony:

- Dr. DiAngelo testified that drowning can take place in as short a time period as a couple of minutes.
- Dr. Scheller testified that apnea becomes dangerous when it is two minutes long.
- Dr. Gormley testified that 5-10 minutes without oxygen would cause irreversible brain damage.
- Dr. Shinnar testified that it would take a minimum of 5-10 minutes with zero oxygen before an individual reached asystole (cardiac arrest).
- Dr. Ophoven testified that it would take 4-5 minutes of complete airway obstruction to cause death.

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[142] Exh. R.

2. The Time and Opportunity Available to the Defendant

With respect to the second question, the Court concludes that the Defendant had both the time and opportunity to commit an act of murder. Resolving this question requires consideration of the testimony of three witnesses: Sue Jestice, Roger Jestice and Shadow Rams.

Sue Jestice testified that after Prince arrived at the house, Roger and Sue and Shadow were upstairs with Prince and the Defendant. At some point, Roger and Sue went downstairs to watch television. Sue said it was around noon. Roger said it was about 45 minutes before he heard the Defendant shout: "Rog, call 911." That would place the time he and Sue went downstairs at about 1:35 pm. So, there was a time period of at least 45 minutes and no more than two hours and twenty minutes when the Defendant, Prince and Shadow were upstairs by themselves.

Thus, it is not at all surprising that there has been considerable focus on the testimony of Shadow. In closing argument, both sides explicitly or implicitly asked the Court to accept – but also to reject – portions of Shadow's testimony with regard to the events that occurred between the time the Jestices went downstairs and 911 was called.

The Commonwealth asked the Court to accept, and adopt as fact, that Prince could not have had a seizure in the crib in part because Shadow said he did not hear any noise coming from the crib. On the other hand, the Commonwealth asserted in closing that the Defendant was essentially alone with Prince for 45 minutes before the 911 call was placed, which is at odds with portions of Shadow's testimony.

Similarly, the Defendant asked the Court to accept, and adopt as fact, Shadow's testimony regarding his several interactions with Prince and the Defendant in that same time period, because they narrow or eliminate the Defendant's opportunity to have inflicted a hypoxic ischemic insult. On the other hand, the Defendant asked the Court to discount the significance of the fact that Shadow did not hear Prince seizing, arguing that Shadow was distracted by his video game.

To understand the significance of Shadow's testimony, it is first necessary to describe three events.

The first event took place in the Defendant's bedroom. Shadow states that after the Jestices went downstairs, the Defendant laid Prince down on the Defendant's bed to nap. At some point, the Defendant asked Shadow to watch Prince while the Defendant went to the bathroom. Shadow said that Prince was snoring, had no blood on his nose and the color of his

face was normal. The significance of this is that, if it is a true and accurate report, it indicates that an inflicted hypoxic ischemic insult had not occurred by this point in time.

The second event took place in Shadow's bedroom. The Defendant came in to the bedroom and placed Shadow face down in the crib. When asked how long it was between the time the Defendant came out of the bathroom and the time when the Defendant entered Shadow's room with Prince, Shadow initially said he did not remember but, after his recollection was refreshed, said it was "about" five minutes. In response to questions from defense counsel, Shadow agreed that there was nothing unusual about Prince at the time, that he was not bleeding, that his clothes were on, and he was dry. Although Shadow's time estimate – "about" five minutes – is a sufficient duration for the infliction of a severe hypoxic ischemic insult resulting in death, Shadow's supposed observation of normality, if it is a true and accurate report, would make such an event less likely.

The third event also took place in Shadow's bedroom. Shadow got up to go to the bathroom. In response to questions from defense counsel, Shadow agreed that he stood over the crib, reached his hand inside and rubbed Prince on the back and observed nothing unusual, saw no bloodstain in the crib, and no blood coming out of Prince's nose. Again, the significance of this is that, if it is a true and accurate report, it is less likely that an inflicted hypoxic ischemic insult had occurred at this point in time.

Thus, it is important for the Court to resolve whether it believes it can rely on the testimony of Shadow with respect to these three events. The Court finds that it cannot.

To be clear, the Court is not at all suggesting that Shadow came into this courtroom and lied. It is the Court's impression that Shadow sincerely attempted to tell the Court the truth as Shadow understood it to be. Nevertheless, for a number of reasons, the Court has no confidence in his observation of events, his recollection of those events, and his reporting of the events to this Court. This applies both to those incidents and circumstances that support the Defendant's theory of the case, and those incidents and circumstances that support the Commonwealth's theory of the case. I find that I simply cannot rely on the testimony of Shadow Rams.

First, in the early afternoon hours of October 20, 2012, Shadow Rams was a 13-year old child engrossed in an Xbox video game called Borderlands 2. He was wearing a headphone/microphone combination which he used to communicate with his friends with whom he was playing the game. The headphone covered one ear. With respect to the microphone, Shadow stated that he could not recall whether he was using the microphone that day to speak with his friends, but did add that "typically that's what it is used for."

Shadow recalled that on the day in question he was playing online with three friends and that usually, when he is online with his friends playing Borderlands 2, "we're either making jokes or we're just talking about what we're going to do next in the game." He agreed that "sometimes" he and his friends strategized and worked together as a team with the goal of killing or rescuing people. Thus, on October 20, 2012, Shadow Rams was a child absorbed in an action-oriented video game with three of his buddies, staring into a video screen with his headphone on. This could be the definition of a distracted individual.

Far from challenging that Shadow was distracted, the defense embraces the claim. Indeed, the defense asserts that it was precisely Shadow's distraction that kept him from noticing that Prince (allegedly) was in the throes of the seizure that would ultimately take his life. Yet, at the same time, the defense asserts that Shadow was apparently so focused on his father and Prince that he was aware of their every movement, how long those movements took, that he observed their clothing, Prince's breathing, and even when his father went to the bathroom and when he came back.

Distraction, however, is not a concept that one can invoke and revoke at will. If Shadow was distracted, and he most certainly was, the distraction applied to each of the three events about which Shadow testified. Throughout, Shadow was either in the midst of hanging out online with his three friends as they collectively engaged in playing this video game or he was being interrupted by his father while in the midst of his game. He was not serving as the upstairs hall monitor, walking around with a stopwatch, timing his father's and Prince's movements and activities, and periodically stopping to take Prince's vital signs.

Second, Shadow – when seated at his desk to play his video game – had only a limited view of Prince. Several of the photographs introduced at trial are of Shadow's room and they clearly show that when Shadow was at his desk he could only see a part of the crib, and only then out of his peripheral vision.[143] Shadow acknowledged this point during his testimony. Moreover, the crib itself had bumpers on all four sides and vertical wooden slabs from top to bottom, which would further have blocked his view of Prince.[144] Finally, Shadow almost certainly would not have been able to see Prince actually placed in the crib by the Defendant because the Defendant would have had to carry Prince between Shadow's desk and the crib, and then turned his back to Shadow in order to place Prince in the crib.

Third, the events Shadow was being asked to recall were the completely unremarkable and unmemorable events of routine daily life. Watching his brother for a moment while his father went to the bathroom. Being in the same room when his father put his brother down for a nap. Going to the bathroom himself. These events only became momentous and

[143] Exh. C1, C2, G, J, M.
[144] Exh. 6.

consequential in retrospect, after this tragedy unfolded. Shadow simply had no reason to pay attention to the events at the time they occurred or to observe precisely when they occurred. He had no reason to notice them, to register them as strange or unusual, to scrutinize and examine them, or to fix them in his memory.

Fourth, Shadow's ability to recall these events from when he was 13 – almost five years ago – was limited. On seven occasions during his testimony, he either indicated he did not recall or remember an event or had to have his memory refreshed, which was not always successful. This is not surprising, given the witness' youth at the time of Prince's death and given the passage of years, but it is yet another consideration that undermines the Court's confidence in the accuracy of his testimony.

Fifth, and finally, I come to two matters that – unlike the routine, unremarkable and unmemorable events described above – were anything but routine, and were both remarkable and memorable. Shadow should have been able to remember these matters precisely, accurately and completely. The first matter is how Roger Jestice came to learn of the emergency. The second matter is how long it took Roger Jestice to get upstairs.

With regard to the first matter, Mr. Jestice testified that the Defendant shouted – "Rog, call 911" – and Mr. Jestice came running up the stairs with the telephone. In contrast, Shadow says that the Defendant sent him downstairs to get Mr. Jestice. "I just went down and said, 'my father needs you, something is going on with Prince,' or something along that context." Shadow says that Mr. Jestice seemed annoyed to have been summoned, that he did not rush upstairs and took his time. Mr. Jestice's testimony, however, is fully corroborated by Ms. Jestice on this point. She testified that she heard the shout – "Roger, call 911" – and that Shadow did not come downstairs to get her husband. I find that the Jestices' recollection on this matter is accurate and Shadow's is not.

With regard to the second matter, Mr. Jestice testified that it took him just 30 seconds to get upstairs. That makes complete sense given the urgency of the situation as conveyed to Mr. Jestice and the Court finds Mr. Jestice's testimony to be accurate. Strangely, however, Shadow says the same thing, that it took him about 30 seconds to get back upstairs and that Mr. Jestice was actually ahead of him. But the process Shadow describes – of going downstairs to summon Mr. Jestice, of telling him something that would not have conveyed the emergency nature of the situation, of Mr. Jestice seeming annoyed with Shadow, and of Mr. Jestice not rushing to go upstairs but, rather, taking his time – would certainly have taken longer than 30 seconds. This calls into question not only Shadow's recollection of events but his ability to accurately estimate time regarding the events of October 20, 2012, a critical matter given the Defendant's assertion that Shadow's time estimates for that day proves that the Defendant could not have murdered his son.

Shadow's testimony on these critical points – about an event that occurred in the middle of this life and death emergency and which should be clearly and accurately fixed in Shadow's mind – deeply undermines my confidence in Shadow's recollection of other events, specifically the three events described above that were neither memorable nor obviously significant at the time they occurred.

For the foregoing reasons, I do not find Shadow to be a credible reporter of the events he described, even though I do not doubt his sincerity. The implication of this conclusion is significant, for it leads the Court to the judgment that the Defendant did have both the time and opportunity to inflict on Prince the severe hypoxic ischemic insult that killed him. This is because I conclude that the Defendant had at least 45 minutes to end Prince's life, this being the time period, according to Roger Jestice, when he and his wife were downstairs.

There is one important point that must be noted before I move on to the next section of this verdict. Even if this Court were to credit and accept every aspect of Shadow's testimony – instead of rejecting it, as the Court has done – the Court would still find that the Defendant had the time and opportunity to kill his child. That is because Shadow states that for a period of "about" five minutes, neither the Defendant nor Prince were with him. At the end of that five minutes, the Defendant brought Prince into Shadow's bedroom and placed Prince in his crib. Even if I were to accept that Shadow checked on Prince before going to the bathroom, which I do not, Prince could have been dead already and Shadow never have known it. Prince was placed face down in the crib so Shadow would not have been able to observe his lack of breathing or necessarily seen dried blood in his nose or a blood-mixture stain on the crib sheet, which would have been obscured or hidden entirely by Prince's head.

In short, I do not credit Shadow's testimony. But if I did, it would not change my judgment that the Defendant had the time and opportunity to kill Prince.

ii. Did Prince's Death Result from the "Criminal Agency of Another" and, if so, was the Defendant the Person who Committed the Crime?

Prince's death was a criminal act and it was a criminal act committed by the Defendant.

Prince did not die of natural causes, whether due to a febrile seizure or some other natural process or disease. He did not die by accident. He did not die by suicide. He died from a severe hypoxic ischemic insult and it was an inflicted severe hypoxic ischemic insult, inflicted by the Defendant.

Prince Rams entered the Defendant's residence a healthy, happy toddler. As Dr. Edelstein said, there was a "complete absence of any factor that could worry me or give me the fear that he could develop problems later on." On the morning he stopped breathing, he was

captured on video at Harris Teeter and, according to one expert, he appeared to be "an engaging, inquisitive, active toddler" and, according to another expert, he appeared to be "in no acute distress." He did have a slight fever for which his mother had given him Tylenol. Diane Tillery, the intermediary, said Prince was happy and healthy that morning. Roger Jestice said they played with Prince as usual, including "hide and go seek." Sue Jestice said Prince was "giggling" and had the "sweetest little laugh."

Then the Defendant took Prince away, ostensibly to nap. At some point thereafter, the Defendant caused Prince to stop breathing, which killed him. The evidence of this includes the following:

First, the Defendant had the motive. He was in desperate financial straits. Having exhausted the life insurance money he had obtained after his mother died, having lost Hera McLeod as the source of his mortgage money, having had to move out of his house because he could no longer afford to live in it, having seen his income cut by three-quarters, he was desperate. So he went out and secured by deceit a $444,083 life insurance policy on Prince's life. He had already purchased a $30,000 life insurance policy on Prince's life, so now he had $474,083 in life insurance on Prince's life. But that was not enough so he went out and bought an additional $50,000 life insurance policy on Prince's life, making himself sole primary beneficiary on all three policies. And even though he was so broke he couldn't pay his mortgage, he never missed a premium payment on Prince's life insurance policies.

When John Donovan, the insurance agent, sent the Defendant the Mass Mutual policy for his signature, he thought he was selling the Defendant an insurance policy. But what the Defendant sent back was Prince's death warrant. The Defendant stood to gain over one half million dollars – but only if Prince was dead.

Second, the Defendant had the opportunity. That opportunity was Prince's febrile seizures, a medical problem that the Defendant could employ to cover the infliction of a mortal injury. On September 21, 2012, Prince was supposed to have an unsupervised visit with the Defendant but the visit was cancelled due to Prince's seizure and sickness. There is no question that the Defendant was informed of this. And what did he do? He texted Mary Palmer, his realtor, the next day: "Hi Mary just so you know I'm thinking of moving back home." The Defendant's financial situation was as bleak as ever. There was nothing in his financial life that would warrant confidence that he could pay the $18,000 he would owe in mortgage arrearages to bring the house out of foreclosure, let alone new monthly mortgage payments, let alone the "new appliances", let alone the "pool or deck" he contemplated "doing" in his October 7, 2012 text message to Mary, just two weeks before Prince died.

There was, however, one cause for financial optimism, but it required killing his son. And he was much closer to making that a reality.

Prince's second febrile seizure established a pattern and made a claim of an additional seizure a believable event. Now that the Defendant knew that Prince had experienced two febrile seizures, he could plan Prince's death with confidence that he would get away with it. After all, it would do no good for the Defendant to kill Prince and not get away with it, either because he was caught by law enforcement or because the insurance company refused to pay. As the Gerber policy said: "The Company retains its right to conduct an investigation before benefits are paid."[146]

Prince's second febrile seizure made a third febrile seizure plausible. It could be used to demonstrate to emergency and medical personnel that Prince's cold and lifeless body was attributable to a febrile seizure. Indeed, it was used for that exact purpose. The Fire & Rescue Prehospital report notes that the patient's father reported "a history of febrile seizures" and gave emergency personnel documentation concerning the September 21, 2012 seizure.[147]

It is only in this tragic and awful sense that Dr. Shinnar was wrong when he testified that children do not die of febrile seizures. This child did – but not because he had a seizure, but because his prior febrile seizures gave the Defendant his alibi, his way to justify how Prince came to die in his care.

To be clear, the Defendant had homicidal intent when he bought those three policies, which was long before Prince had his first febrile seizure. What the seizures did was provide the Defendant the solution to a problem – how to cover up a murder that he intended to commit from the time he first put a half million dollar bounty on the head of his infant son.

Third, the Defendant had the means. Suffocation required no more than a pillow, of which there were many available.[148] Drowning required no more than a faucet and water, which was also available.[149] But the Defendant also needed access to Prince, he needed it to be unsupervised, he needed to have Prince alone for a sufficient period of time to inflict the severe hypoxic ischemic insult, and he needed his cover story to be in place. All these requirements came together on October 20, 2012.

Fourth, the Defendant was the only person in the Jestice household on October 20, 2012 who had the motive, the opportunity and the means to commit this act of murder.

Fifth, the Defendant's lies to emergency and medical personnel, as recorded on the 911 call and in the Fire & Rescue documents, evidence not only guilty knowledge but further evidence of criminal intent and proof of his scheme.

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[146] Exh. 18, at 393.
[147] Exh. 18, at 627.
[148] Exh. K.
[149] Exh. N.

Finally, the fact that Prince did not die of natural causes or accident and, of course, did not commit suicide, leaves the intentional infliction of the severe hypoxic ischemic event as the only reasonable and rational explanation for his death.

Therefore, the Court finds that Prince's death was caused by the criminal agency of another and that the person who committed the crime, with the specific intent to murder his son, was the Defendant.

iii. Has the Commonwealth Proven Beyond a Reasonable Doubt Each Element of Capital Murder?

The first element of capital murder is whether the defendant killed Prince Elias McLeod Rams. The Court finds beyond a reasonable doubt that he did.

The second element of capital murder is that the killing was willful, deliberate and premeditated. The Court finds beyond a reasonable doubt that the Commonwealth has proven this element as well beyond a reasonable doubt. Specifically, I find that the defendant had a specific intent to kill Prince and that it was adopted some time prior to the killing. Inflicting a severe hypoxic ischemic insult upon Prince Rams was a willful and deliberate act but I find that the premeditation in this case reaches all the way back to the Fall of 2011 when the Defendant purchased the three policies on Prince's life and continued with every premium payment on every one of the three policies. The criminal act itself on October 20, 2012 also required premeditation: premeditation to get Prince alone and premeditation to inflict the severe hypoxic ischemic insult that took Prince's life.

The third, and final, element of capital murder is that the killing was of a person under the age of fourteen by a person age twenty-one or older. This element has been proven beyond a reasonable doubt as well. Both Prince's age and the Defendant's age are established by Prince's Certificate of Live Birth[150], along with other documents in evidence.

g. Verdict on the Charge of Capital Murder

Therefore, the Court finds Joaquin Shadow Rams, Sr., the Defendant, GUILTY of Capital Murder.

Finally, the Court makes the following additional statement with respect to the Attempted False Pretenses count. Earlier, in this Verdict, the Court found the Defendant Guilty on this charge. I stated that it was not an element of the Attempted False Pretenses count that the Defendant intended to murder Prince when he bought the policy. I believe that is correct but I could find no case law exactly on point. Therefore, out of an abundance of

[150] Exh. 18, at 1.

caution, and now that I have completed the Verdict with respect to Capital Murder, I take this opportunity to state for the record with relationship to the Attempted False Pretenses count that, if in fact an element of the Attempted False Pretenses count is that the Defendant at the time he purchased the policy intended to murder Prince, I have also found that to be true beyond a reasonable doubt.

Sentencing on both counts of conviction is set for June 22, 2017 at 10:00 a.m. The Court orders a Pre-Sentence Investigation and Report.

SO ORDERED, this 13th day of April, 2017.

JUDGE RANDY I. BELLOWS
CIRCUIT COURT JUDGE DESIGNATE

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	**CASE NUMBERS:**
VERSUS	)	**CR13002303-00**
	)	**CR14003686-00**
JOAQUIN SHADOW RAMS, SR.	)	**Judge Randy I. Bellows**

ORDER OF CORRECTION OF TWO TYPOGRAPHICAL ERRORS IN VERDICT

It appearing to the Court that a witness' name was misspelled on page 13 and that the victim's name was incorrectly stated on page 55 of the Verdict entered on April 13, 2017 in this case; therefore,

The Court **ORDERS** that the name "Dr. Diageo's" on page 13, line 10 of the Verdict be amended to the correct spelling "Dr. DiAngelo's".

The Court further **ORDERS** that the name "Shadow" on page 55, line 4 of the Verdict be amended to the correct name "Prince."

SO ORDERED, this 14th day of April, 2017.

JUDGE RANDY I. BELLOWS
CIRCUIT COURT JUDGE DESIGNATE

VIRGINIA: IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 153

Hearing Date: August 1, 2017
Judge Designate: Randy I. Bellows

Commonwealth of Virginia

v.

JOAQUIN SHADOW RAMS, SR,
(A.K.A.: JOHN ANTHONY RAMIREZ, JR.;
JOHN ANTHONY RAMIREZ;
JUQUIN ANTHONY RAMS;
JOAQUIN SHADOW RAMS;
JOAQUIN S. RAMS)

Defendant

SENTENCING ORDER

The cases came before the Court for sentencing of the defendant, who appeared in person with counsel, Christopher Leibig, Joni Robin, and Tracey Lenox. The Attorneys for the Commonwealth, Paul B. Ebert and James Willett were present.

On April 13, 2017, the defendant was found guilty of the following:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	CODE SECTION
CR13002303-00	CAPITAL MURDER (Felony)	10/20/2012	18.2-31(12)
CR14003686-00	ATTEMPTED FALSE PRETENSES (Felony)	09/15/2011	18.2-178

Presentence Report. The presentence report was considered and is ordered filed as a part of the record in accordance with the provisions of Section 19.2-299 of the Code of Virginia.

Commonwealth's Evidence. The Commonwealth introduced evidence and rested.

Defendant's Evidence. The defendant rested without presenting any evidence.

Before pronouncing the sentences, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

Sentencing. The Court sentences the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of:

CR13002303-00 - Life Imprisonment without the Possibility of Parole and a fine in the amount of one hundred thousand ($100,000.00) dollars

CR14003686-00 - ten (10) years

for a total sentence of Life Imprisonment without the Possibility of Parole plus ten (10) years; and a fine in the amount of one hundred thousand ($100,000.00) dollars.

These sentences shall run consecutively with each other and to all other sentences.

Post-Incarceration/Post-Release Supervision. In addition to the above sentence of incarceration, the Court imposes an additional term of **three (3) years of post-release incarceration.** This term is suspended and the defendant shall be subject to a period of **post-release supervision of three (3) years**, which is to commence upon release from incarceration. The defendant shall comply with all the rules and requirements set by the Virginia Parole Board.

Court Costs. The defendant shall pay court costs.

Judgment For Court Costs. The Court orders the Clerk of this Court to docket a judgment against the defendant for the court costs.

DNA Analysis. The Court Orders that, prior to being released, the defendant shall submit to the taking of a blood sample for DNA analysis pursuant to Section 19.2-310.2 of the 1950 Code of Virginia, as amended, et seq.

Right to Appeal. The Court proceeded to advise the defendant of his right to appeal, including the right to note defendant's appeal to the appropriate Appellate Court, with due and timely written notice to the Clerk of this Court, and the right to have an attorney to represent the defendant or to have an attorney appointed to represent the defendant and to have the attorney's fees, costs and expenses in connection with any appeal paid for in the event the defendant is financially unable to pay same.

Court Appointed Attorney For Appeal. Upon the representations of the defendant that the defendant was unable to retain counsel, the

Court appoints Meghan Shapiro and Christopher Leibig to represent the defendant upon appeal.

Cash Appearance Bond. In the event a cash appearance bond has been posted in this matter, the Court orders that the cash appearance bond posted be returned or, with the consent of the payer, be applied to any fine and/or costs.

Attorney Certification. The Court certifies that at all times during the trial the defendant was personally present, as was defense counsel who capably represented the defendant.

Credit For Time Served. The defendant shall be given credit for time spent in confinement pursuant to Section 53.1-187 of the Code of Virginia.

It is further ORDERED that the defendant is remanded to jail to await transfer to the Department of Corrections.

ENTERED: 8/11/17

Randy I. Bellows

HONORABLE RANDY I. BELLOWS,
CIRCUIT COURT JUDGE DESINGATE

DEFENDANT IDENTIFICATION:
Alias: JOHN ANTHONY RAMIREZ, JR.
JOHN ANTHONY RAMIREZ;
JUQUIN ANTHONY RAMS;
JOAQUIN SHADOW RAMS;
JOAQUIN S. RAMS

DOB: [redacted]/1972 Sex: M

SSN: [redacted]-3317

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Life without the Possibility of Parole plus ten (10) years, and a fine in the amount of one hundred thousand ($100,000.00) dollars

TOTAL SENTENCE SUSPENDED: NONE

FOR ADMINISTRATIVE USE ONLY:
Virginia Crime Code: MUR-0927-F1, FRD-2743-A9

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Decker,* Judge Malveaux and Senior Judge Haley
Argued at Fredericksburg, Virginia

PUBLISHED

JOAQUIN SHADOW RAMS, SR., A/K/A
JOHN ANTHONY RAMIREZ, JR., A/K/A
JOHN ANTHONY RAMIREZ, A/K/A
JUQUIN ANTHONY RAMS, A/K/A
JOAQUIN SHADOW RAMS, A/K/A
JOAQUIN S. RAMS

v. Record No. 1453-17-4

COMMONWEALTH OF VIRGINIA

OPINION BY
CHIEF JUDGE MARLA GRAFF DECKER
FEBRUARY 26, 2019

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
Randy I. Bellows, Judge Designate

Meghan Shapiro, Deputy Capital Defender (Christopher Leibig; Law Offices of Christopher Leibig, on briefs), for appellant.

Christopher P. Schandevel, Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Joaquin Shadow Rams, Sr., appeals his conviction for capital murder in violation of Code § 18.2-31.[1] He argues that the circumstantial evidence was insufficient to prove that the death was a homicide and, consequently, that he was the criminal agent. The appellant also contends that the circuit court's denial of his request for a bill of particulars regarding the specific cause of death that the Commonwealth sought to prove violated his due process rights. We hold that the

* On January 1, 2019, Judge Decker succeeded Judge Huff as chief judge.

[1] This Court has jurisdiction to hear appeals from capital murder convictions that do not result in the death penalty. See Code § 17.1-406(A)(i); see also Code § 17.1-406(B) ("[A]ppeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed."). The appellant was sentenced to life without parole.

evidence was sufficient to support the appellant's conviction and the denial of his request for a bill of particulars was not reversible error. Consequently, we affirm the challenged conviction.

I. BACKGROUND[2]

A. The Victim and the Crime

The appellant's son, P.R., was born on July 1, 2011. The appellant and P.R.'s mother resided together at the time of the birth, but the mother moved out with P.R. when he was about two weeks old. The mother had sole legal and physical custody of the child, and the appellant was eventually permitted to have unsupervised visitation.

P.R. developed normally as an infant and met all developmental milestones. Between eleven and fifteen months of age, P.R. had at least five febrile seizures, which were described by various doctors as "benign."[3] Each seizure was "brief," lasting two seconds to ten minutes. P.R. stopped breathing briefly during one of the seizures, but each one resolved on its own without the need for resuscitation. P.R. had one of those seizures during a visit with the appellant.

A pediatric neurologist examined P.R. after the first three seizures and opined that he was a "neurologically . . . and developmentally normal" infant who was experiencing "classic febrile seizures." After that visit, P.R.'s mother provided the appellant with information regarding the seizures. That information included cooling P.R. during a seizure with a sponge bath.

On October 20, 2012, during visitation with the appellant, fifteen-month-old P.R. became unresponsive and later died. The appellant, who reported that he found P.R. unresponsive in his

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[2] When addressing a challenge to the sufficiency of the evidence, the appellate court reviews the evidence "in the light most favorable to the Commonwealth, the prevailing party below," and considers all "reasonable inferences fairly deducible from that evidence." Stevens v. Commonwealth, 38 Va. App. 528, 533 (2002).

[3] The evidence established that a febrile seizure is a seizure triggered by a fever. Two to four percent of children have febrile seizures. These children "are neurologically normal but their brains are sensitive to the presence of a temperature."

crib, claimed that P.R. was "very hot" and in the midst of a seizure. Others in the home who responded to the appellant's pleas for help could not confirm these claims. In the presence of witnesses, the appellant splashed the child with cold water in the bathtub while waiting for emergency medical personnel to arrive. First responders found P.R. cold, wet, and unresponsive. They began cardiopulmonary resuscitation (CPR) and other emergency measures, and transported P.R. to the hospital by ambulance. He was eventually resuscitated at the hospital, but he died the next day. The death occurred after the appellant had purchased more than $500,000 of insurance on P.R.'s life.

B. Pre-Trial Motions and Theories of the Case

The appellant was charged with capital murder under an indictment alleging in relevant part that he "kill[ed]" P.R. "deliberately and with premeditation." The parties consulted numerous medical experts in preparation for trial. Those experts agreed that P.R.'s death resulted from oxygen deprivation, which led to irreversible brain damage and cardiac arrest. However, opinions varied regarding the precise cause of P.R.'s death.

The appellant filed several pre-trial motions seeking a bill of particulars requiring the Commonwealth to specify what cause or causes of death it sought to prove. The trial court denied the motions. The Commonwealth's initial theory of the case, which the prosecutor conveyed to the appellant verbally prior to trial, was that the appellant drowned P.R. for the insurance money. The appellant contended that P.R. died from a febrile seizure or some other noncriminal cause. During trial, the prosecution altered its theory to contend that in addition to drowning, the death could have resulted from suffocation.

C. The Trial Court's Ruling

After considering the evidence, the court convicted the appellant of capital murder and sentenced him to life in prison without possibility of parole.[4] The court also ordered him to pay a fine of $100,000. In the course of finding the appellant guilty, the court made extensive factual findings, many of which are outlined below.

1. Natural Causes of Death and the Appellant's Credibility

The trial judge rejected the theory that P.R. died from a febrile seizure. In doing so, he relied in large part on the testimony of Dr. Shlomo Shinnar, a professor and pediatric neurologist. The judge, in finding Dr. Shinnar to be the "most experienced, most knowledgeable, and most credible on the issue of febrile seizures and other neurology issues," noted that even one of the appellant's experts recognized Dr. Shinnar as "the 'febrile seizure king.'" Shinnar opined to a reasonable degree of medical certainty that given P.R.'s "strong family history of [such] seizures, he [fell] into" a particular category of inherited febrile seizures and that children in this category are "at high risk for frequent febrile seizures but not at increased risk of mortality."[5] The judge accepted Shinnar's specific testimony that children do not die from febrile seizures and that "[i]t is 'beyond any shadow of a doubt' that a febrile seizure was not a contributor in [P.R.]'s death." The judge also noted numerous other expert witnesses who confirmed Dr. Shinnar's opinion that febrile seizures do not lead to cardiac arrest or death.

The judge next recounted the evidence surrounding the events of October 20, 2012. He noted that the only evidence tending to indicate that P.R. had a seizure that day came from the

[4] The appellant also was convicted of attempted false pretenses in violation of Code § 18.2-178. This conviction stemmed from misrepresentations that he made when he applied for the insurance on the child's life. The validity of this conviction is not in dispute in this appeal.

[5] P.R.'s mother, like P.R., experienced febrile seizures as a child, and she eventually outgrew them. P.R.'s maternal grandfather had also exhibited febrile seizures.

appellant, and he concluded that the appellant was lying. The judge based this finding on evidence contradicting the appellant's stated observations about P.R. The appellant reported that he had observed P.R. having a seizure just before another member of the household called 911 at 2:20 p.m. The judge additionally noted that during the call, at approximately 2:21 p.m., the appellant stated that P.R. was "really hot." When emergency medical personnel arrived "at the patient's side" at 2:27 p.m., they found the child in cardiac arrest and attempted to resuscitate him. However, in contrast to the appellant's report that P.R. was "really hot," the emergency responder who was "the first person to put hands on" the child upon arriving six minutes later testified that P.R. was "cold" and "pale" and "had bluish lips." Another first responder, who carried P.R. to the ambulance before it departed minutes later, noted that when he picked the child up, "he was very cold to the touch." Finally, when P.R.'s temperature was taken at the hospital at 2:44 p.m., it was 91.2 degrees, which was "hypothermic." At 3:00 p.m., hospital personnel resuscitated P.R., but he was later declared brain dead and was removed from life support the following day.

The judge found, based on evidence that P.R. was cold to the touch at 2:27 p.m. and had a hypothermic temperature of 91.2 degrees at the hospital seventeen minutes later, that P.R. could not have been "really hot" at 2:21 p.m. as the appellant had claimed. He noted expert testimony that it would take "a couple of hours," not a mere twenty-three minutes, for the child's body to cool from 98 to 91 degrees and that a "child should still feel hot" or "warm to the touch even [if] splashed with cold water," as P.R. had been. Dr. Shinnar also opined that it was "not medically plausible that the child was actively convulsing . . . in the way the [appellant] ha[d] stated" and "a few minutes later was dead and cold." The judge recognized that other witnesses testified that the reported drop in temperature was "understandable and credible," but he "was not persuaded by these witnesses." Further, the judge concluded from the seizure and breathing

activity that the appellant reported, as well as his claim regarding the child's temperature, that the appellant did not simply misperceive the immediate aftermath of cardiac arrest for a febrile seizure. The judge specifically found that the appellant "was lying" about P.R.'s temperature to support his bigger "false claim" that he had witnessed the child having a febrile seizure that turned fatal.

Finally, the judge found nothing in P.R.'s medical records to indicate that he died of some other natural cause or accident. The judge discussed and rejected theories of "natural" death including sudden unexplained death in epilepsy, sudden unexplained death in childhood, cardiac arrhythmia, and "some combination of a seizure and an obstructed airway in the crib." He also concluded that the statements of the appellant that he found to be false, made during the course of the emergency, proved that "the cause of [P.R.'s] death [was] not . . . accidental." The judge reasoned that if the occurrence had been accidental, the appellant would have had no reason to "have told these elaborate lies[] and placed [P.R.] in the bathtub . . . to cool him off."

2. *Corpus Delicti*: Unnatural Death and Criminal Agency

The judge then turned to the issue of the *corpus delicti*. He pointed to established case law providing that a court considering the cause of a death is not limited to evidence regarding the body itself and may also consider the surrounding circumstances. He noted further that the Commonwealth was not required to prove the precise cause of death as long as the trier of fact found beyond a reasonable doubt that the victim's death was caused by the criminal agency of another rather than by suicide, accident, or some noncriminal natural cause.

The judge specifically found that "[P.R.'s] oxygen supply was cut off," causing cardiac arrest and "irreversible brain damage." He further found that the oxygen deprivation resulted from drowning or suffocation and that these were not natural causes on the facts of this case. The judge instead concluded from the evidence that P.R.'s death resulted from the criminal

agency of another. He noted that the appellant told several lies to emergency medical personnel and that these showed guilty knowledge and criminal intent. Finally, the judge held that the appellant was the only person who had motive, opportunity, and means to commit the murder.

a. Motive

Regarding motive, the judge found that the appellant was "in desperate financial straits" at the time of P.R.'s death and "st[ood] to benefit financially" from it. He noted that the appellant's finances were "on a downward spiral" from 2009 to 2012. The appellant initially received financial help from his girlfriend, P.R.'s mother, but within a few weeks of P.R.'s birth on July 1, 2011, she moved out of the appellant's residence with P.R. and stopped paying the mortgage. The appellant then began renting out his home in order to pay the mortgage, while he and his teenaged son S.R. lived with his friends Harold and Sue Jestice.

In September of 2011, the appellant filed for custody of P.R. and began purchasing insurance on P.R.'s life. Between September and November 2011, the appellant obtained three insurance policies totaling almost $525,000, which was about $6,000 more than the outstanding mortgage balance on the appellant's home.

In July 2012, the appellant was granted unsupervised visitation with P.R. On September 8, 2012, P.R. had a febrile seizure during a visit with the appellant. On September 21, 2012, the appellant's visitation was cancelled "due to [P.R.'s] seizure and sickness." Consequently, the appellant knew by that time that P.R. had experienced at least two febrile seizures. The very next day, September 22, 2012, despite the fact that the appellant's financial situation remained "bleak" and the bank had referred his home mortgage for foreclosure, the appellant texted his realtor that he was "thinking of moving back home." Then, less than a month later, the appellant again texted his realtor and confirmed that she should take the house off the market because he would be "moving . . . back [in]to [it]," buying new appliances, having the house repainted, and

maybe even "doing the deck or pool." The judge found "nothing" in the appellant's "financial life" at that time that would cause him to believe that he could pay the mortgage arrearages and the new monthly mortgage payments, as well as buy new appliances and put in a deck or pool. Finally, the judge specifically noted that "even though [the appellant] was so broke he couldn't pay his mortgage, he never missed a premium payment on [P.R.'s] life insurance policies."

b. Opportunity

Regarding the appellant's opportunity to kill P.R. on the day in question, the judge found that the murderer would have needed five to ten minutes alone with the child to commit the crime. The judge accepted evidence, including the testimony of the Jestices, that P.R. seemed normal during his visit that morning. The Jestices further related that they left the appellant's portion of their home, located on the second floor, between 12:00 and 1:35 p.m. so that P.R. could nap. The appellant was then alone in his room with P.R. for some period of time and later put P.R. in his crib in S.R.'s bedroom. Sometime after 2:00 p.m., the appellant yelled to Roger Jestice to "call 911." Roger grabbed the phone and ran upstairs while dialing. Upon arriving upstairs, he saw the appellant holding P.R. in the bathtub while splashing water onto the lower portion of the child's body.

The judge evaluated the testimony of S.R., upon whom the appellant relied in part for his alibi. He concluded that S.R.'s testimony about when various things happened that day was unreliable because the thirteen year old was distracted while playing a video game. The judge determined, based on his finding that S.R. was not a credible reporter of events due to inattention, that the appellant had a period of at least forty-five minutes, between when the Jestices departed and when the appellant claimed to have discovered P.R. having a seizure, during which the appellant could have inflicted the fatal injuries. In the alternative, the judge concluded that even if he credited S.R.'s testimony, the appellant had what S.R. testified was

"'*about*' five minutes" alone with P.R. before putting the child into his crib during which the appellant could have killed him. (Emphasis added). The judge found that S.R. could simply not have noticed that P.R. was dead when he passed the child, who was lying on his stomach in the crib, on his way to the bathroom.

c. Means

Regarding means, the judge noted that the appellant had ready access to the water needed to drown P.R., as well as to a pillow with which to suffocate him. The judge also observed that the appellant, in defending himself, "focused on what occurred *after* [P.R.] was removed from the crib." (Emphasis added). The court, however, emphasized that the appellant had access to the same sources of water *before* he put P.R. in his crib. Further, the judge noted that experts who ruled out drowning as a possible cause of death did so at least partially because no witnesses reported seeing P.R. "submer[ged]" in water to an extent that could have caused drowning. Although those experts obviously took the reported observations of the witnesses, including the appellant, at face value, the judge was not required to do so. Accordingly, the evidence left open the possibility that P.R. had in fact been submerged in a sufficient amount of water to cause drowning. Consequently, the judge found that the evidence proved that the appellant killed P.R. by either drowning or suffocating him.

II. ANALYSIS

The appellant contends that the evidence was insufficient to support his conviction for capital murder. He also suggests that the circuit court's denial of his request for a bill of particulars violated his due process rights.

A. Sufficiency of the Evidence

The appellant argues that the evidence did not support his conviction in two ways. First, he suggests that the Commonwealth did not prove the *corpus delicti*—that P.R.'s death resulted

from a criminal act. Second, the appellant contends that the circumstantial evidence as a whole failed to establish his guilt.

"When considering a challenge to the sufficiency of the evidence to sustain a conviction, th[e appellate court] reviews 'the evidence in the light most favorable to the prevailing party at trial and consider[s] all inferences fairly deducible from that evidence.'" Clark v. Commonwealth, 279 Va. 636, 640 (2010) (second alteration in original) (quoting Jones v. Commonwealth, 276 Va. 121, 124 (2008)). "Viewing the record through this evidentiary prism requires [the court] to 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn [from that evidence].'" Cooper v. Commonwealth, 54 Va. App. 558, 562 (2009) (quoting Parks v. Commonwealth, 221 Va. 492, 498 (1980) (emphasis omitted)).

"The fact finder, who has the opportunity to see and hear the witnesses, has the sole responsibility to determine their credibility, the weight to be given their testimony, and the inferences to be drawn from proven facts." Hamilton v. Commonwealth, 279 Va. 94, 105 (2010) (quoting Commonwealth v. Taylor, 256 Va. 514, 518 (1998)). When expert witnesses give conflicting opinions, "a credibility battle" arises, and it is up to the fact finder to determine which expert's testimony is more credible. See Riner v. Commonwealth, 268 Va. 296, 329-30 (2004). Similarly, where a single witness makes contradictory statements on direct and cross-examination, those statements "go not to competency but to the weight and sufficiency of the testimony. If the trier of the facts sees fit to base [its ruling] upon that testimony[,] there can be no relief in the appellate court." Towler v. Commonwealth, 59 Va. App. 284, 291 (2011) (quoting Swanson v. Commonwealth, 8 Va. App. 376, 379 (1989)). Additionally, in drawing inferences from the evidence, the fact finder may conclude regarding even a non-testifying

defendant that his false statements establish that he has lied to conceal his guilt. See Shackleford v. Commonwealth, 262 Va. 196, 209-10 (2001); Rollston v. Commonwealth, 11 Va. App. 535, 545, 548 (1991).

The sufficiency "inquiry does not distinguish between direct and circumstantial evidence, as the fact finder . . . 'is entitled to consider all of the evidence, without distinction, in reaching its determination.'" Commonwealth v. Moseley, 293 Va. 455, 463 (2017) (quoting Commonwealth v. Hudson, 265 Va. 505, 512-13 (2003)). Circumstantial evidence is not "viewed in isolation" because the "combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable [fact finder]" to conclude beyond a reasonable doubt that a defendant is guilty. Muhammad v. Commonwealth, 269 Va. 451, 479 (2005).

When circumstantial evidence is involved, the evidence as a whole must be "sufficiently convincing to exclude every reasonable hypothesis except that of guilt." Dowden v. Commonwealth, 260 Va. 459, 468 (2000). However, the Commonwealth is "not required to exclude every possibility" of the defendant's innocence but, rather, "only . . . hypotheses of innocence that flow from the evidence." Id. "The reasonable-hypothesis principle . . . is 'simply another way of stating that the Commonwealth has the burden of proof beyond a reasonable doubt." Moseley, 293 Va. at 464 (quoting Hudson, 265 Va. at 513). The reasonableness of "an alternate hypothesis of innocence" is itself a question of fact, and thus, the fact finder's determination regarding reasonableness "is binding on appeal unless plainly wrong." Wood v. Commonwealth, 57 Va. App. 286, 306 (2010) (quoting Emerson v. Commonwealth, 43 Va. App. 263, 277 (2004)). "By finding the defendant guilty, therefore, the [fact finder] 'has found by a process of elimination that the evidence does not contain a reasonable theory of innocence.'"

Haskins v. Commonwealth, 44 Va. App. 1, 9 (2004) (quoting United States v. Kemble, 197 F.2d 316, 320 (3d Cir. 1952)).

Finally, "[i]f there is evidence to support the conviction[], the reviewing court [may not] substitute its own judgment, even if its opinion might differ from the conclusions reached by the finder of fact at the trial." Clark, 279 Va. at 641 (quoting Commonwealth v. Jenkins, 255 Va. 516, 520 (1998)). Again, the appellate court will reverse the judgment of the trial court only if it is "plainly wrong or without evidence to support it." Id. at 640 (quoting Wilson v. Commonwealth, 272 Va. 19, 27 (2006)).

It is in light of these guiding legal principles that the Court considers the appellant's arguments.

1. *Corpus Delicti*

The appellant challenges various aspects of the evidence related to proving the *corpus delicti*.

"The *corpus delicti* is a material fact to be established in every criminal prosecution." Bowie v. Commonwealth, 184 Va. 381, 389 (1945) (quoting Nicholas v. Commonwealth, 91 Va. 741, 750 (1895)); see Jackson v. Commonwealth, 255 Va. 625, 645 (1998). The term "means, literally, 'the body of a crime'" and refers to "the fact that the crime charged has been actually perpetrated." Aldridge v. Commonwealth, 44 Va. App. 618, 648 (2004) (first quoting Corpus Delicti, Black's Law Dictionary (7th ed. 1993); and then quoting Lucas v. Commonwealth, 201 Va. 599, 603 (1960)). In other words, the prosecution must prove "that the alleged offense was attributable to a criminal act, and not to mere accident or chance." Id. As it relates to murder, "the *corpus delicti* has two components—death as the result, and the criminal agency of another as the means." Nicholas, 91 Va. at 750 (quoting Smith v. Commonwealth, 62 Va. (21 Gratt.)

809, 813 (1871)), cited with approval in Opanowich v. Commonwealth, 196 Va. 342, 355-56 (1954).

Virginia courts "have long held that the *corpus delicti* may be proven by circumstantial evidence." Epperly v. Commonwealth, 224 Va. 214, 229 (1982); see Opanowich, 196 Va. at 355 (quoting Bowie, 184 Va. at 390); Cochran v. Commonwealth, 122 Va. 801, 817 (1917); see also United States v. Russell, 971 F.2d 1098, 1110 n.24 (4th Cir. 1992). This is so because "[a]n examination of the body of a dead person will not always disclose whether death was from natural causes or . . . violence." Opanowich, 196 Va. at 355 (quoting Bowie, 184 Va. at 390). Consequently, "[t]he circumstances surrounding the cause of death may be inquired into[,]" and "[t]hey may or may not furnish a clue to the identity of the criminal agent." Id. (quoting Bowie, 184 Va. at 390). Virginia law also clearly permits proof of the "death" prong of the *corpus delicti* by circumstantial evidence. See Epperly, 224 Va. at 228-30; Edwards v. Commonwealth, 68 Va. App. 284, 297 (2017).

Finally, for at least a century, legal scholars have recognized that in many cases, proof that a death was criminal rather than natural and that the defendant was the criminal agent is "shown at the same time" because "the two matters are so intimately connected." 1 Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues § 325f, at 655 (O. N. Hilton ed., 10th ed. 1912), quoted with approval in, e.g., State v. Deslovers, 100 A. 64, 68 (R.I. 1917); see Abdell v. Commonwealth, 173 Va. 458, 465-66, 470-72 (1939).

Notably, contrary to the appellant's argument, Virginia law also provides that motive is among the types of circumstantial evidence that may be used to establish both that a death was not the result of natural causes and that it was caused by the defendant. In Abdell v. Commonwealth, 173 Va. 458, for example, the Supreme Court of Virginia affirmed the defendant's conviction for murdering his wife based on circumstantial evidence proving beyond

a reasonable doubt that her death was a killing rather than a suicide, thereby establishing the *corpus delicti* as well as proving that the defendant was the criminal agent. The Court relied on evidence that the defendant authored two fake suicide notes ostensibly written by his wife; had numerous fights with her; and wanted "to escape the threat of a penitentiary sentence" after he beat her, providing "a specific motive" for the killing. Id. at 465-66, 470-72; see Edwards, 68 Va. App. at 297-301 (considering motive as part of the circumstantial evidence proving that the missing victim had been killed and the defendant was the criminal agent).[6]

The appellant relies on Betancourt v. Commonwealth, 26 Va. App. 363 (1998), to argue that motive may not be considered in establishing the *corpus delicti* of a murder. However, this Court held in Betancourt only that the circumstantial evidence in that case was insufficient to prove that the death of the adult victim was an intentional killing rather than a suicide or "self-inflicted" accidental overdose. Id. at 374-75. The Court ruled that all of the evidence, *including* that of motive, did not "prove beyond a reasonable doubt *either* the existence of a homicide *or* the identity of [the] appellant as the criminal agent." Id. at 375-76 (emphasis added). Consequently, Betancourt supports the principle that evidence of the appellant's motive was relevant to determining whether P.R.'s death was criminal rather than accidental or natural.

The appellant's reliance on Ferrell v. Commonwealth, 177 Va. 861 (1941), and Van Dyke v. Commonwealth, 196 Va. 1039 (1955), to support his argument regarding motive is

[6] Courts in other jurisdictions have also considered evidence of motive as proving that a death was not natural. See Beasley v. Holland, 649 F. Supp. 561, 568-69 (S.D. W. Va. 1986) (stating that under West Virginia law, the *corpus delicti* may be proved by circumstantial evidence including "means[and] motive"), appeal dismissed, 841 F.2d 1122 (4th Cir. 1988) (*per curiam*) (unpublished); State v. Larson, 577 A.2d 767, 770-71 (Me. 1990) (in a case in which the defendant's new wife died in a suspicious fall, considering the defendant's purchase of "a substantial life insurance policy" on her, providing him with a motive to kill her, as evidence that "criminal agency [was] involved" to prove the *corpus delicti*); cf. People v. Washington, 585 N.Y.S.2d 407, 408 (N.Y. App. Div. 1992) (stating that proof of motive may adequately corroborate a confession for purposes of establishing the *corpus delicti* for a robbery).

similarly misplaced. Neither case involved any question regarding proof of the *corpus delicti* because it was undisputed that each victim was wounded by a gunshot fired by another. Ferrell, 177 Va. at 864-65; Van Dyke, 196 Va. at 1042-43. In that limited context, the Court stated in *dicta* that "the *absence* of motive is a factor for the consideration of the jury, but only as bearing on the question whether or not the crime was committed by the accused." Ferrell, 177 Va. at 873-74 (emphasis added) (quoting 2 Wharton, supra, § 878, at 1647); see Van Dyke, 196 Va. at 1046, 1049 (citing Ferrell, 177 Va. at 873-74). Consequently, Ferrell and Van Dyke are not controlling on the issue of whether the *presence* of motive is relevant to prove that a death resulted from criminal rather than natural causes.

Applying the relevant legal principles regarding proof of the *corpus delicti* in the appellant's case, including considering whether anyone had a motive to kill P.R., the trial court found that the circumstantial evidence proved that P.R.'s death was criminal and did not result from natural causes. That evidence included the appellant's false claims that he discovered P.R. seizing and "very hot" to the touch. It also included the motive derived from his dire financial condition combined with the more than $500,000 of insurance policies on P.R.'s life. Finally, the evidence also established that the appellant texted his real estate agent twice during the month prior to P.R.'s death that he could afford not only to move back into his home but also to undertake major improvements. This evidence was sufficient to disprove all reasonable hypotheses that P.R. died from natural, noncriminal causes.

The law does not require the Commonwealth to prove the precise cause of death, only that the death "resulted through a criminal agency." See Bowie, 184 Va. at 390; see Epperly, 224 Va. at 228-30 (affirming a conviction for first-degree murder despite the fact that the victim's body was never found and the cause of death never established because the evidence proved that the death was unnatural and the defendant was the criminal agent). The

Commonwealth was not required to furnish medical evidence independently excluding every conceivable natural cause of death in order to establish the cause was criminal. Further, contrary to the appellant's suggestion, the record establishes that the trial court did not improperly shift the burden to the appellant to disprove the *corpus delicti* and to establish a natural death. Instead, the trial court conducted a thorough analysis and found that the evidence excluded the natural cause of death advanced by the appellant, a febrile seizure, in part because the appellant lied about P.R.'s physical condition, including his temperature. The court also discussed and eliminated other natural and accidental causes of death, as analyzed in greater detail below. Finally, it found that the evidence as a whole, including the appellant's lies at the time of the medical emergency, proved a criminal cause.

The trial court was entitled to conclude that the only reasonable hypothesis flowing from the evidence, including the medical testimony, is that P.R. did not die of natural causes and that his death was a homicide caused by drowning or suffocation. The evidence established that Dr. Constance DiAngelo, who performed P.R.'s autopsy, concluded that the child died from drowning. Dr. William Gormley, the Chief Medical Examiner of Virginia, apparently acted within his authority as Dr. DiAngelo's supervisor when he later set aside her conclusion regarding the cause of P.R.'s death in the official autopsy report and issued an amended report changing the cause of death from drowning to "undetermined." Nevertheless, the trial court was not bound by Gormley's determination, and Gormley conceded that because DiAngelo performed the autopsy, she was "in the best position to see and understand what [she was] seeing." Gormley also explained that part of the reason that he set her conclusion aside was because he did not believe the evidence ruled out suffocation as a potential cause of death. Additionally, Dr. Shinnar opined that the "severe hypoxic ischemic insult" that led to P.R.'s death "was due to asphyxiation or to drowning" and that as a neurologist, he could not

distinguish between the two because "their effects on the brain would be very similar (oxygen deprivation)." As the appellant concedes, Drs. Tracey Corey and Janice Ophoven also stated that they could not exclude the possibility that the death was caused by suffocation.

The appellant argues that drowning as a possible cause of death was disproved. He notes that "even the shortest expert opinion" regarding the length of time that P.R. would have to have been submerged in order to drown was "at least a couple of minutes." The appellant emphasizes that "consistent witness accounts" indicate that he was "alone with [P.R.] with the tub running for mere seconds" and that he could not have drowned P.R. in this short a period of time. However, this argument relies on the appellant's view of S.R.'s testimony in the light most favorable to the appellant. Further, given the trial court's view of the evidence as establishing that P.R. suffered the fatal oxygen deprivation significantly earlier than right before the 911 call at 2:20 p.m., the evidence leaves open the possibility that the appellant could have drowned P.R. at an earlier time. Finally, the fact that experts had differences of opinion regarding whether death by drowning was a possibility did not prevent the trial court from finding that drowning was one of two possible causes of death. The court was entitled to weigh the testimony of the experts and make necessary findings of fact. See Riner, 268 Va. at 329-30.

The appellant also contends that the Commonwealth failed to disprove the reasonable hypothesis that P.R. died from natural causes.[7] He specifically mentions sudden infant death syndrome (SIDS), sudden unexplained death in childhood (SUDC), sudden unexplained death in epilepsy (SUDEP), and accidental suffocation during a febrile seizure. The evidence, viewed

[7] The appellant recognizes that the trial court rejected his assertion that P.R. was seizing when the appellant found him. He further concedes that, under the applicable standard of review, the prosecution "disproved the reasonableness of a death due solely to febrile seizure." Nevertheless, he argues that "other natural-death hypotheses remained" in part because "all experts," "*[t]aken together,*" "agreed that various natural-death hypotheses were possible." (Emphasis added).

under the proper standard, permitted the trial court to conclude that P.R. did not die from any of these noncriminal causes.

Dr. Shinnar opined that the fact that P.R. died from a hypoxic ischemic injury to the brain, which "takes a while to occur," was "not consistent with" the various forms of "sudden unexplained death" advanced by the appellant as possible natural causes. Dr. Shinnar explained that children with a history of complex febrile seizures who die from SUDC also have "malformations of the hippocampus" and that P.R.'s autopsy did not reveal such a malformation.[8] See Dowden, 260 Va. at 468 (explaining that the Commonwealth is required to exclude "only . . . hypotheses of innocence that flow from the evidence"). Dr. Shinnar further explained that SIDS differs from SUDC essentially based on the age of the child.[9] Consequently, his testimony that P.R. did not die from SUDC also refutes the theory that he died from SIDS.

Shinnar also eliminated SUDEP because P.R.'s medical records contained no indication that he suffered from epilepsy. The doctor further noted that even in children with epilepsy, which P.R. did not have, the rate of sudden unexplained death in otherwise normal children in P.R.'s age group is "extraordinarily low" and "basically doesn't happen." Consequently, the suggested hypothesis that P.R. had both (i) developed epilepsy, i.e., unprovoked seizures, and (ii) died from SUDEP did not flow from the evidence in the record. See id.

[8] The appellant argues that "while it is true that no malformed hippocampus was found" during the autopsy of P.R., "it is more accurate to say that it wasn't looked[]for," in part because an MRI scan was not performed. Dr. Shinnar, however, stated that "all the descriptions of those hippocampal [abnormality] cases are from autopsy studies," and he opined that P.R.'s "autopsy should have been able to find [such a malformation] if it was there."

[9] The record establishes overlap in the definitions. Dr. Shinnar testified that SIDS covers children "under" two years of age. Other evidence in the record indicates that SUDC covers children "older than [one] year of age." P.R. was fifteen months old.

Additionally, Dr. Shinnar ruled out the possibility that P.R. might have suffocated by accident in his crib immediately following a seizure. First, Shinnar testified "to a reasonable degree of medical certainty[] that febrile seizures were not a contributor to [P.R.'s] death." Second, Dr. Shinnar's testimony excluded the theory that P.R. could have suffocated during a febrile seizure because his breathing was obstructed in some noncriminal way. Shinnar explained that if a breathing obstruction was present in the crib prior to the seizure, a healthy, active toddler such as P.R. would simply have "pushed it away." He further explained that to suffocate during a seizure, the child "would have to[,] while convulsing[,] remain prone even though [he was] shaking all over, and somehow be in a position that something [was] impairing [his] ability to breath[e] which before [he] started having the seizure wasn't there." Dr. Shinnar opined that this scenario was merely "a theoretical construct that [doctors] don't typically encounter or see" and that it would be "extraordinarily unusual" for it to occur. This testimony allowed the trial court to reject the notion of accidental suffocation.

Finally, the court rejected the hypothesis that P.R. could have died from a heart malfunction such as a spontaneous cardiac arrhythmia because "nothing in the record . . . would support this as a cause of death." Although Drs. Gormley, Ophoven, and Shinnar testified that such a cause of death was "possible," none of them stated that the autopsy report or anything else in the record tended to indicate that this was what occurred in P.R.'s case. Dr. Shinnar in fact testified affirmatively that nothing in P.R.'s medical history indicated that he had a cardiac arrhythmia. Dr. Robin Foster emphasized that if a child P.R.'s age had a "cardiac dysrhythmia" significant enough to lead to death, it would have "manifested [itself] in some way" prior to causing death. Consequently, this "possibility" also did not flow from the evidence. See id.

Based on the record in this case, the circumstantial evidence supports the trial court's finding that P.R.'s death was criminal and did not result from natural, noncriminal causes. The *corpus delicti* was proven.

2. Sufficiency of the Circumstantial Evidence Regarding Time and Opportunity

The appellant contends that the circumstantial evidence was insufficient to support his conviction because it established that he did not have the time or opportunity to kill P.R.

Settled principles provide that "[w]here the evidence is entirely circumstantial, . . . [t]he chain of necessary circumstances must be unbroken. The circumstances of motive, time, place, means, and conduct must all concur to form an unbroken chain [that] links the defendant to the crime beyond a reasonable doubt." Bishop v. Commonwealth, 227 Va. 164, 169 (1984). However, "not all of the listed circumstances must be proved in every case." Cantrell v. Commonwealth, 229 Va. 387, 398 (1985). Rather, "those circumstances [that] *are* proved must each be consistent with guilt and inconsistent with innocence, and . . . they must also be consistent with each other[;] that is to say, they must *concur* in pointing to the defendant as the perpetrator beyond a reasonable doubt." Id. "While no single piece of evidence may be sufficient, the 'combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion [of guilt].'" Stamper v. Commonwealth, 220 Va. 260, 273 (1979) (quoting Karnes v. Commonwealth, 125 Va. 758, 764 (1919)).

The appellant relies on the testimony of his teenaged son S.R. about the appellant's movements and P.R.'s condition at various times to suggest that the evidence failed to prove the factors of time and opportunity in the circumstantial evidence chain. Consistent with this argument, he also challenges the trial court's assessment of S.R.'s credibility. The appellant notes that the court found S.R. unreliable—rather than dishonest—due to a variety of factors.

The appellant further points out that it was the Commonwealth that called S.R. to testify and that the court denied the Commonwealth's pre-trial request to treat S.R. as an adverse witness. He argues that the effect of the judge's ruling was "to *sua sponte* and retroactively find [S.R.] incompetent" to give evidence. We reject these arguments for several reasons and conclude that the evidence was sufficient to support the conviction.

S.R., who was thirteen years old at the time of his brother's death, testified that when he first saw P.R. in the appellant's room during his nap time on the day at issue, P.R. was lying on his back and snoring. The color of P.R.'s face was normal, and no blood was visible on his nose. Afterward, the appellant was alone with P.R. for what S.R. thought was "[a]bout" five minutes, but the teenager admitted that he "[didn't] really remember" how much time passed. At the end of that period of time, the appellant took P.R. to S.R.'s room and laid P.R. face down in his crib. S.R. was about six feet from the crib, playing an online action video game with three friends while wearing "one-sided" headphones. He did not "hear anything from [P.R.] at all" and did not "notice anything unusual." When S.R. later got up to go to the bathroom, "stood over the crib," and "rubbed [P.R.] on his back," S.R. did not "notice anything unusual about him." Finally, S.R. testified that "[m]aybe 15 to 25 minutes" after the appellant put P.R. in the crib, the appellant came back in to check on P.R., "scream[ed] out [P.R.]'s name," and took him to the bathroom.

The appellant's reliance on S.R.'s testimony to prove that he lacked the opportunity to kill the child is unavailing. The trial court was entitled to reject the teen's testimony, in whole or in part, and to accept the contradictory testimony of other witnesses. See Lea v. Commonwealth, 16 Va. App. 300, 304 (1993). Contrary to the appellant's suggestion, "[n]o litigant is bound by contradicted testimony of a witness even though []offered by the litigant." Williams v. Commonwealth, 234 Va. 168, 176 (1987). Also, in addition to assessing a witness' "veracity,"

the trier of fact may consider the impact of "perception, memory, [and] narrat[ive ability]" on the accuracy of the witness' testimony. See McCarter v. Commonwealth, 38 Va. App. 502, 506 (2002) (quoting Charles E. Friend, The Law of Evidence in Virginia § 4-1, at 101 (5th ed. 1993)). In short, based on a variety of factors, the trier of fact is free to believe or disbelieve, in whole or in part, the testimony of any witness. Carosi v. Commonwealth, 280 Va. 545, 554-55 (2010).

Here, it was entirely within the purview of the trial judge as the trier of fact to determine the credibility and accuracy of the testimony of S.R. and the other witnesses. The judge accepted the testimony of the Jestices that they left the appellant's area of their house between 12:00 and 1:35 p.m. The evidence relied upon by the judge also proved that P.R. was cold to the touch when rescue personnel arrived at the residence at 2:27 p.m. and had a "hypothermic" body temperature of 91.2 degrees at 2:44 p.m. Further, Dr. Shinnar, whose testimony the trial judge expressly credited, opined that it was "extremely improbable" that P.R.'s body temperature could have "go[ne] from really hot to really cold that fast" and, thus, that the claimed temperature change "ha[d] no plausibility." Finally, the trial court also expressly accepted the testimony of Dr. Gormley that it would have taken "a couple of hours" for P.R.'s body temperature to drop from the normal range to the hypothermic temperature measured at 2:44 p.m. Consequently, the evidence supports a finding that P.R. must have stopped breathing around 1:00 p.m. or earlier, rather than around the time of the 911 call at 2:20 p.m. Additionally, this evidence supports the judge's finding that S.R.'s testimony regarding P.R.'s condition at various points during his nap that day was inaccurate due to various factors. Those factors include the degree of S.R.'s distraction during his videogame, his limited view of P.R., and the "unmemorable" nature of the "routine" events that he was asked to recall.

The appellant argues that the timeline evidence does not fit the trial judge's findings of fact regarding when P.R. went into cardiac arrest. Pointing to the testimony of two defense witnesses, Dr. Ophoven and Dr. Brian Bridges, he asserts that the maximum length of time a patient can be in cardiac arrest before CPR is started and still have his or her heartbeat successfully restored is "10-15 min[utes]" or "[l]ess than 10 min[utes]." Calculating backward using this testimony, he reasons that the earliest that P.R. could have gone into cardiac arrest was fifteen minutes before the first responders began CPR at about 2:30 p.m., which would have been at about 2:15 p.m.

This argument mischaracterizes the evidence from Dr. Bridges. His testimony of "less than 10 minutes" was given in response to a different question—"how long" it takes to sustain "irreversible brain damage" "from the time the heart stops . . . if there is no resuscitation effort." Only after Bridges provided that response did the judge ask him about the subject that the appellant raises, concerning "the outer limit" of "restart[ing] . . . the heart . . . after a prolonged period without CPR." Dr. Bridges, a pediatric intensive care physician, candidly replied that he did not "know a specific time for that" and did not "know if anyone knows that." Bridges said that he had personally restarted a heart after "more than a half hour or an hour" without a heartbeat. Finally, when the judge asked specifically about P.R.'s case, in light of the fact that he had no pulse at 2:27 p.m. when emergency personnel arrived and began CPR and had his pulse restored at 3:00 p.m., Bridges said he was unable to opine how long before 2:27 p.m. P.R. "might not have had a pulse."

Consequently, the record contains conflicting evidence regarding how long a patient can be in cardiac arrest before CPR is begun and still have his or her heartbeat successfully restored. The trial judge was entitled to accept Dr. Bridges' testimony on this subject, that he did not "know if anyone knows that," over Dr. Ophoven's testimony, that the outer limit is "10 to 15

minutes." Additionally, the remaining evidence, such as that concerning P.R.'s cold body temperature, supports the trial court's finding that the child stopped breathing much longer than fifteen minutes before CPR was begun.[10]

For these reasons, the record supports the trial court's finding that the appellant had the time and opportunity to commit the crime and was the criminal agent in the murder of P.R.

B. Bill of Particulars

The appellant argues that the trial court improperly denied his numerous motions for a bill of particulars regarding the Commonwealth's theory of the *corpus delicti*. He represents that he received "unofficial" verbal notice from the Commonwealth that "it planned to 'go with' the cause of death of 'drowning.'" He suggests that he was prejudiced because the Commonwealth began midway through trial to pursue suffocation as a cause of death and the trial court ultimately concluded that the cause of death was either drowning or suffocation. Although the appellant claims that he had an absolute right to this information prior to trial, the real crux of his claim is that he did not have adequate notice of suffocation as a possible cause of death in time to address it during the trial. He asserts that these errors violated his right to due process under both the United States and Virginia Constitutions.

On appeal of the denial of a request for a bill of particulars, the appellate court reviews the trial court's decision for an abuse of discretion. See Swisher v. Commonwealth, 256 Va.

[10] The trial court found in the alternative that the evidence remained sufficient to prove the offense even if it credited most of S.R.'s testimony about his observations of P.R. S.R. testified regarding a period of "'about' five minutes" during which "neither [the appellant] nor [P.R.] [was] with him," and he indicated that this period occurred immediately before the appellant put P.R. in his crib in S.R.'s room. S.R. expressed uncertainty regarding how much time passed between various events, and he provided mostly "yes" and "no" answers in response to leading questions on the subject of P.R.'s condition once the appellant put P.R. into the crib. Consequently, the trial court concluded that S.R. could simply have failed to notice that P.R., who was lying on his stomach, was already dead when S.R. later passed his crib. Based on our ruling, we do not address this alternative finding.

471, 480 (1998). To the extent the challenge involves interpreting the federal or state constitution, however, this is a question of law reviewed *de novo* on appeal. See Shivaee v. Commonwealth, 270 Va. 112, 119 (2005).

"Both the United States and Virginia Constitutions recognize that a criminal defendant enjoys the right to be advised of the cause and nature of the accusation lodged against him." Simpson v. Commonwealth, 221 Va. 109, 114 & n.3 (1980) (first citing U.S. Const. amend. VI; then citing Va. Const. art. I, § 8). The Supreme Court of Virginia has held that "[t]he important concerns evident in these provisions are fully honored" by Code §§ 19.2-220 and -221. Id. at 114. Code § 19.2-220 "requires that an indictment name the accused, describe the offense charged, identify the location of the alleged commission, and designate a date for the offense." Id. It further provides that the indictment need state only "so much of the common law or statutory definition of the offense as is sufficient to advise what offense is charged." Id. at 114-15 (quoting Code § 19.2-220). Code § 19.2-221 clarifies that "'short form indictments for murder and manslaughter'" are permitted, and it "specifically validates murder indictments [that] allege only that the defendant 'feloniously did kill and murder' the victim." Id. at 115 (quoting Code § 19.2-221). "As long as an indictment sufficiently recites the elements of the offense, the Commonwealth is not required to include all evidence upon which it plans to rely to prove a particular offense . . . ." Sims v. Commonwealth, 28 Va. App. 611, 619-20 (1998).

Pursuant to Code § 19.2-230, a court of record "may direct the filing of a bill of particulars." However, where the indictment "give[s] the accused 'notice of the nature and character of the offense charged so he can make his defense[,]' a bill of particulars is not required." Strickler v. Commonwealth, 241 Va. 482, 490 (1991) (citation omitted) (quoting Wilder v. Commonwealth, 217 Va. 145, 147 (1976)). Further, it is "improper" for a defendant to use a bill of particulars "to expand the scope of discovery in a criminal case." Quesinberry v.

Commonwealth, 241 Va. 364, 372 (1991); see Sims, 28 Va. App. at 620. A defendant is "not entitled to a bill of particulars as a matter of right," and whether the Commonwealth must file one is "within the discretion of the trial court." Quesinberry, 241 Va. at 372.

Applying these principles here, we conclude that the appellant has established no constitutional entitlement to notice of the precise manner in which the Commonwealth alleged that he caused his son's death. Cf. Simpson, 221 Va. at 115 (holding that indicting a defendant using the phrase "'during the commission of robbery while armed with a deadly weapon' did not constitute a waiver" of the Commonwealth's right to prove first-degree murder in some other way); id. (noting the absence of a constitutional or statutory requirement that "the indictment charge the degree of murder alleged or use the specific statutory language constituting that degree of offense"). The appellant was charged with capital murder under an indictment alleging in relevant part that he "kill[ed]" P.R. "deliberately and with premeditation." The record shows that by the time of the appellant's March 5, 2014 request for a bill of particulars, he knew that Dr. Shinnar had opined that the "severe hypoxic ischemic insult" that deprived P.R.'s brain of oxygen and led to his death was from *drowning or asphyxiation*. Additionally, the record reflects that Dr. DiAngelo's original autopsy report concluded that the child died from drowning while Dr. Gormley set aside that conclusion in his amended report of October 8, 2014, because he could "not rule out suffocation as a cause of death." The appellant referenced both Shinnar's and Gormley's statements in a pre-trial motion filed March 4, 2015, in which he sought to require the Commonwealth to elect a cause of death or require dismissal of the murder indictment, making clear that he was aware of these theories regarding the cause of death significantly in advance of his 2017 trial.

Further, when the appellant claimed surprise at trial based on the Commonwealth's change in its theory of the case to prove suffocation rather than drowning, he did not request a

continuance. Instead, at the close of the Commonwealth's case in rebuttal, he moved to strike the Commonwealth's evidence based on his claims that the Commonwealth was not permitted to change its theory regarding the cause of death and that the evidence did not prove drowning. Finally, the appellant concedes that "[i]t is fair to say that" any prejudice "might have been remedied by a continuance."

Thus, the record shows that the appellant had notice of the existence of an alternate theory of the case in time to satisfy any due process right to notice of the precise manner in which he was alleged to have caused his son's death. Cf. Coley v. Commonwealth, 55 Va. App. 624, 635-36 (2010) (holding that the appellant failed to prove reversible error when he learned at trial that the Commonwealth had exculpatory evidence because he "did not claim surprise, did not ask for a continuance," and "therefore suffered no prejudice"); cf. also Ortiz v. Commonwealth, 276 Va. 705, 723 (2008) (holding that where the trial court permitted a midtrial amendment to the time frame covered by the indictment and the court denied the defendant's request for a continuance, he was not entitled to reversal because he failed to prove that the amendment operated as a surprise or that the denial of his continuance motion prejudiced him); Lane v. Commonwealth, 20 Va. App. 592, 595 (1995) (rejecting the defendant's challenge to the admissibility of late-produced evidence under a state criminal discovery rule based on a claim of surprise because the defendant did not request a recess or continuance and instead "sought only suppression of the truth"). Accordingly, the appellant has failed to establish that the trial court erred by denying his request for a bill of particulars and convicting him for murder based upon the theory that he drowned or suffocated P.R.

III. CONCLUSION

We hold that the evidence, viewed under the proper standard, was sufficient to prove that P.R.'s death was a homicide and that the appellant was the criminal agent. The record also

establishes that the denial of his request for a bill of particulars was not reversible error. Consequently, we affirm the challenged conviction.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 21st day of October, 2019.

Joaquin Shadow Rams, Appellant,

against Record No. 190399
Court of Appeals No. 1453-17-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Prince William County shall allow Christopher Leibig, Esquire the attorney's fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Justice Chafin took no part in the resolution of the petition.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee	$475.00 plus costs and expenses
Public Defender	$475.00 plus costs and expenses

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:

Deputy Clerk

IN THE SUPREME COURT OF VIRGINIA

ON APPEAL FROM THE COURT OF APPEALS OF VIRGINIA AND THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

JOAQUIN SHADOW RAMS	)	**RECORD NO.: 190399**
	)	
v.	)	
	)	
COMMONWEALTH OF VIRGINIA	)	
	)	

PETITION FOR REHEARING

Respectfully Submitted,

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Counsel for Mr. Rams.

Table of Contents

I. This Court should review Mr. Rams's sufficiency claims (Assignments of Error C&D) to apply the constitutionally-correct *Jackson* standard and this Court's *Boone* doctrine.

This is a rare case in which the Commonwealth's own evidence established a reasonable hypothesis of innocence, which it then failed to disprove. In a circumstantial case, such an unusual evidentiary situation can not satisfy the Due Process Clause, even if it could satisfy a state-law analysis – and in his Petition for Appeal Mr. Rams raised both claims (Assignments of Error C&D). But no state court has yet undertaken a proper Due Process analysis.

This Court's refusal of Mr. Rams's Petition affirmed the Court of Appeals' opinion on the merits. *Jackson v. Virginia*, 443 U.S. 307, 311 n.4 (1979); *Sheets v. Castle*, 263 Va. 407, 412 (2002). In so doing, this Court may have inadvertently endorsed a constitutionally-deficient standard of review for Appellant's federal sufficiency claim under the Due Process Clause and *Jackson*. The state-law standard for sufficiency claims, found in Virginia Code § 8.01-680, is more stringent for petitioners than *Jackson*. *See infra*. That may be what allowed the Court of Appeals to look past the Commonwealth's evidence of Mr. Rams's innocence, and deny his Assignments of Error. This Court should not replicate that mistake.

Mr. Rams respectfully urges this Court to grant his Petition for Rehearing, and reconsider his Assignments of Error C&D. These claims raise important questions that implicate the federal constitution pursuant to *Jackson*, and significant doctrines

of this Court, including *Boone v. Commonwealth*, 212 Va. 686, 688 (1972), concerning when one may disregard exculpatory Commonwealth's evidence. *Infra*.

Further, because the Court of Appeals decision failed to apply significant caselaw from both the U.S. Supreme Court and this Court, there is a "substantial possibility that error has been committed in the conviction of the defendant," warranting further review. *Saunders v. Reynolds*, 214 Va. 697, 703 (1973); *see also id.* at 701.

II. The Court of Appeals applied the incorrect standard of review in rejecting Appellant's constitutional sufficiency claim.

In denying Mr. Rams's sufficiency claims, the Court of Appeals applied a standard equivalent to the "no evidence" rule rejected by the United States Supreme Court in *Jackson v. Virginia*.[1]

The Court of Appeals applied the following standard to Appellant's sufficiency claims: "[i]f there is evidence to support the conviction[.]" *Rams v. Commonwealth*, No. 1453-17-4 (Va. Ct. App. Feb. 26, 2019), *slip op.*, p.12.[2] The court alternatively phrased this standard, consistent with § 8.01-680 for state-law sufficiency reviews, as whether the conviction was "'plainly wrong or without evidence to support it.'"[3]

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[1] *Jackson v. Virginia,* 443 U.S. at 320 ("That the *Thompson* 'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent.").
[2] Quoting *Clark v. Commonwealth*, 279 Va. 636, 641 (2010) (brackets in original).
[3] *Id.* (quoting *Clark* at 640).

However, Mr. Rams raised his sufficiency claim under both state and federal law, and the Court of Appeals' standard falls below *Jackson*'s federal constitutional requirement. *Jackson*, 443 U.S. at 320 (rejecting the "no-evidence" standard).

The correct federal constitutional standard is whether the evidence "rationally support[s] a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320. It is not enough to ask whether a verdict is "without evidence to support it," as the Court of Appeals did; a reviewing court must, under the federal Due Process Clause and *Jackson*, go beyond that to examine the trial court's rejection of exculpatory evidence for "rational[ity]". The court below failed to do that; and this Court's summary refusal of Mr. Rams's Petition affirms that failure.

III. Under the correct standard, the Commonwealth's evidence cannot rationally support a conviction.

A. The Commonwealth established a reasonable likelihood of natural death.

The Commonwealth's evidence established an innocent explanation for the death in this case: SUDC (Sudden Unexplained Death in Childhood).

After the Commonwealth's case-in-chief expert, former assistant medical examiner Constance DiAngelo, testified she believed the child drowned, she acknowledged that reasonable minds could differ.[4] The Commonwealth then went on to introduce positive evidence of SUDC in the form of three additional expert

[4] J.A. 1987, 1993, 2062, 2070-2071.

opinions – the written reports of Drs. William Gormley and Tracy Corey, and the live testimony of Dr. Shlomo Shinnar.

Dr. Gormley, the statewide Chief Medical Examiner, amended the official autopsy report in the case to remove DiAngelo's "drowning" conclusion, and replace it with "undetermined."[5] He further added to the autopsy report that the death may have been natural, in additional to inconclusive possibilities of drowning and suffocation.[6] Dr. Gormley's written report was introduced by the Commonwealth in its case-in-chief; he later testified for the defense.

Dr. Corey, a national expert on SUDC and the only witness with specialty expertise in pediatric forensic pathology, was retained by the Commonwealth pretrial to consult in the case. She explicitly opined that SUDC was likely.[7] Her written report was introduced by the Commonwealth in its case-in-chief; she later testified for the defense.

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[5] Exh. 18, J.A. 4492 & 3825-3828.

[6] J.A. 4492, 587 (listing possible causes of death, including natural, and concluding: "a homicidal manner of death cannot be proven to a reasonable degree of medical certainty with the available data").

[7] Dr. Corey's opinion stated: "I do not believe that [Prince] died as a result of drowning"; "[m]any findings in this case are consistent with a diagnosis of SUDC"; and the cause should be labeled "undetermined." J.A. 4352-4355. The only reason Dr. Corey didn't definitively label Prince's death SUDC was her (faulty) belief that Prince was actively seizing when found. J.A. 2960. She testified that the evidence in the case made her immediately think SUDC was possible. J.A. 2949-2950, 2965.

Dr. Shinnar, a seizure expert called as the Commonwealth's main rebuttal to other theories of natural death raised by the defense (pertaining to seizures), acknowledged on the stand that he had only discounted the possibility of SUDC because of his (faulty) belief that the child was actively seizing when found.[8] (Instead, the Circuit Court explicitly found the child was *not* seizing when found.[9])

The Commonwealth's own evidence thus established a reasonable hypothesis of SUDC.

B. The Commonwealth's expert evidence supporting SUDC cannot be disregarded under *Boone v. Commonwealth*.

Although permitted in other situations, the trial court could not legally disregard the expert evidence of SUDC in this case. This is so because the evidence of SUDC was introduced by the Commonwealth, and was neither impeached, contradicted, nor inherently improbable. This rare situation implicates a line of this Court's

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[8] J.A. 3072, 3084, 3087, 3125-3133, 3167-3168. The lower courts unfairly cherry-picked Dr. Shinnar's testimony speculating that the child's severe hypoxic brain injury would have taken "a while to occur" and therefore was inconsistent with SUDC, a sudden event. *Rams,* at 18. In fact, Dr. Shinnar revised that testimony, recognizing that the child's lengthy period of life-support could also explain the severity of his brain injury, putting SUDC back on the table. J.A. 3072, 3084, 3087, 3125-3133, 3167-3168. The Court of Appeals also misunderstood testimony from Dr. Shinnar that "children with a history of complex febrile seizures who die from SUDC also have malformations of the hippocampus," not seen in Prince's autopsy. *Rams* at 18. Dr. Shinnar did not say that. J.A. 3070-71 (testifying to increased *rates* of SUDC in children with febrile seizures and malformed hippocampuses; not that all children with febrile seizures and SUDC have the malformation).

[9] J.A. 570, 576.

jurisprudence in which the factfinder loses its discretion to disregard evidence that exculpates the accused. *Boone*, 212 Va. at 688.

The Commonwealth's expert evidence establishing SUDC was not impeached, contradicted by other evidence, nor inherently improbable. As stated *supra*, DiAngelo's expert testimony supporting a homicide also acknowledged that reasonable minds could disagree; Dr. Gormley was open to the full panoply of causes of death in this case – natural and unnatural; Dr. Corey explicitly supported the likelihood of SUDC; and Dr. Shinnar's testimony was ultimately supportive of SUDC. Thus, no expert actually contradicted the evidence supporting SUDC.

Furthermore, all the circumstantial evidence of *corpus delicti* in this case (chiefly, a financial motive) may be assumed true, and yet still does not impeach, contradict, nor render improbable the expert evidence supporting SUDC. They coexist.

Pursuant to *Boone*, therefore, the courts below should not have disregarded the Commonwealth's exculpatory expert evidence of SUDC. The Court of Appeals failed to even acknowledge *Boone*, or related cases of its own.

C. The Commonwealth failed to disprove SUDC.

In an entirely circumstantial case (as this is), the Commonwealth's burden extends to disproving reasonable hypotheses of innocence that flow from the evidence. The Commonwealth must "exclude every reasonable hypothesis, other

than that of guilt."[10] The evidence must be inconsistent with innocence.[11] And where the evidence "establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof, however great the probability may be."[12]

The hypothesis of SUDC in this case was eminently reasonable and more than "flowed" from the evidence; it was explicitly raised as a possible cause of death by the Commonwealth's evidence (*supra*). Even the Commonwealth's rebuttal expert, called for the purpose of squashing various theories of natural death, ultimately confirmed the reasonableness of SUDC (detailed *supra*).

The Commonwealth failed in this case to disprove the reasonable hypothesis of natural death, *i.e.* innocence, SUDC.

D. The lower courts should not have disregarded exculpatory lay testimony foreclosing "opportunity."

The expert opinions on SUDC were not the only exculpatory evidence improperly disregarded by the lower courts under *Boone*, *supra*. The Court of Appeals, in fact, inaccurately portrayed the critical testimony of the last person to have physical contact with the decedent before his infirmity, in a way that falsely bolstered the trial court's disregard of that testimony. *Infra*.

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[10] *Opanowich v. Commonwealth*, 196 Va. 342, 357)(1954); *see also Rogers v. Commonwealth*, 242 Va. 307, 319 (1991).

[11] *Massie v. Commonwealth*, 140 Va. 557, 564 (1924) ("It is not sufficient that the facts and circumstances proven be consistent with his guilt. They must be inconsistent with his innocence.").

[12] *Massie*, 140 Va. at 564-565 (citing *Johnson v. Commonwealth*, 70 Va. 796 (1878).

The Commonwealth introduced lay testimony that foreclosed the circumstantial element of "opportunity." Where evidence is entirely circumstantial, as here, all necessary circumstances must be "consistent with guilt and inconsistent with innocence."[13] The circumstantial factors, including "opportunity," must concur,[14] and "[t]he chain of necessary circumstances must be unbroken."[15]

The exculpatory testimony came from the only eyewitness to Mr. Rams's opportunity – Mr. Rams's teenaged son Shadow. Shadow's testimony established he was the last person to physically touch the child before his health failed: in a tender moment, he stopped to rub the baby's back as he napped in a crib in Shadow's room; and, he testified, he observed nothing unusual in that moment.[16] Other evidence established that the crib sheet later had a noticeable blood/fluid stain, likely from a nose and/or mouth bleed.[17] The Circuit Court acknowledged the "significance of this [moment] is that, if it is a true and accurate report, it is less likely that [the baby's infirmity] had occurred at this point in time."[18]

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[13] *Bishop v. Commonwealth*, 227 Va. 164, 169 (1984); *Cantrell v. Commonwealth*, 229 Va. 387, 389 (1985).
[14] *Dean v. Commonwealth*, 73 Va. 912, 924 (1879); *Tilley v. Commonwealth*, 90 Va. 99, 105 (1893) (citing 1 Stark. 494).
[15] *Bishop*, 227 Va. at 169.
[16] J.A. 1751-1755 (Shadow stood over the crib and rubbed Prince's back; he looked at Prince and did not see anything unusual, nor any blood on the bedding).
[17] J.A. 2746, 2766-67, 2772-73, 2875-77, 2949-2950, 2987-2988 (experts testifying about blood stain in crib).
[18] J.A. 593.

Shadow's testimony was therefore critical, and exculpatory, because the Circuit Court found Mr. Rams's only opportunity had fallen before the moment Shadow last touched his brother.

The court rationalized Shadow's testimony by concluding he must not have realized his brother was ailing (or dead) at the time he rubbed his back.[19] The court provided these reasons: Shadow was distracted by a video game before and after the back-rubbing; and Shadow's length-of-time estimates, concerning how long the baby was napping and how long it later took to call an ambulance, may have been inaccurate due to his age at the time (13).

But the record in fact establishes that during this critical moment Shadow was not distracted by his game (he had paused it, and walked away from his computer). And any time-length estimates are irrelevant to Shadow's recollection of the last time he touched his baby brother. The Court of Appeals not only skimmed over the trial court's logic-gap here, but itself inaccurately described Shadow's underlying testimony, downplaying its significance.[20]

Shadow's testimony of his final, loving contact with his baby brother was unimpeached, uncontradicted, and not inherently improbable. The lower courts

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[19] The court found that Shadow's testimony was not dishonest. *Id.*

[20] The Court of Appeals paraphrased the Circuit Court's analysis of Shadow's testimony by stating that Shadow merely "passed his crib." *Rams* at 24, n.10. In fact, Shadow testified that he paused his game, stood at the crib, looked down at his brother, and rubbed his back. J.A. 1751-1755.

therefore failed to follow *Boone* with regard to this exculpatory lay testimony that broke the circumstantial chain, in addition to the expert evidence of SUDC *supra*.

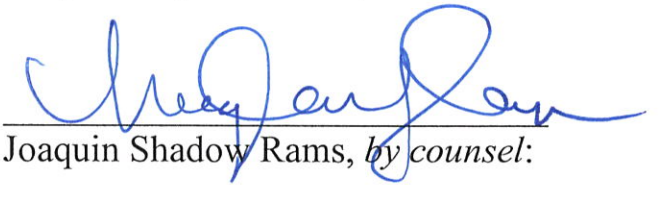
E. The Commonwealth's evidence does not rationally support conviction.

The Commonwealth introduced significant evidence exculpating Mr. Rams, and failed to disprove a reasonable hypothesis of innocence. These deficiencies render the evidence insufficient, under the Due Process Clause and *Jackson v. Virginia*, to support a conviction.

Although it may be true that "there is evidence to support the conviction" in this case, *Rams* at 12 (quoting *Clark*), and it cannot be said the conviction is "without evidence to support it,'" Va. Code § 8.01-680; *Clark* at 640, that is not the standard for a *Jackson* claim. Instead, under the correct constitutional standard and a proper application of *Boone*, *supra*, Mr. Rams's conviction is not "rationally support[ed] . . . beyond a reasonable doubt." *Jackson*, 443 U.S. at 320.

Mr. Rams urges this Court to reconsider his Petition, in order to apply the correct standard under *Jackson* and the federal Due Process Clause.

Respectfully Submitted,



Joaquin Shadow Rams, *by counsel*:

Meghan Shapiro, Va. Bar No. 79046
Christopher Leibig, Va. Bar No. 40594
(full contact information on cover and in certificate)

CERTIFICATE PURSUANT TO RULE 5:20(c)(ii)

I hereby certify the following:

1) The name of the Petitioner is Joaquin Shadow Rams; the name of the Petitionee is the Commonwealth of Virginia; and counsel is as follows:

Meghan Shapiro, Va. Bar No. 79046
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Counsel for Appellant

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202 North Ninth Street
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Tel. 804-786-2071
Email oagcriminallitigation@oag.state.va.us
Counsel for Appellee

2) A true and correct copy of this Petition was this day mailed to Donald E. Jeffrey III, Senior Assistant Attorney General/Chief, Criminal Appeals Section, Office of the Attorney General, 202 N. 9th St., Richmond, VA 23219.

---

[21] The Assistant Attorney General handling this case in the court below (Christopher Schandevel) has left the office and counsel has not yet received notice of who will take his place. Service of this Petition is being sent to Donald E. Jeffrey III, Chief of the division.

3) The number of pages, excluding cover page, table of contents, table of authorities, and certificate, in this Petition is 10.

4) Counsel for the Appellant in this case were appointed by the Circuit Court for purposes of his appeal.

Meghan Shapiro

11/4/19
Date

VIRGINIA DEFENDERS

Damaris Johnson <dajohnson@vadefenders.org>

[APPELLATE EMAIL] SCV PFR Confirmation

1 message

SCV PFR <scvpfr@vacourts.gov>
To: Meghan Shapiro <mshapiro@vadefenders.org>

Mon, Nov 4, 2019 at 4:02 PM

This will acknowledge receipt of your e-mail. If there are any deficiencies in your filing, you will be contacted by the Clerk's Office via a separate e-mail describing the problem(s) and the deadline for correcting your filing. When the Court has made a decision, it will be forwarded to you via e-mail.

Supreme Court of Virginia – SCV PFR Filing Account

VIRGINIA DEFENDERS

Meghan Shapiro <mshapiro@vadefenders.org>

Joaquin Rams v. Commonwealth of Virginia, No.190399

1 message

Meghan Shapiro <mshapiro@vadefenders.org> Mon, Nov 4, 2019 at 4:02 PM
To: scvpfr@vacourts.gov
Cc: Chris Leibig <chris@chrisleibiglaw.com>, oagcriminallitigation@oag.state.va.us

Dear Clerk of Court,

Please find attached a Petition for Rehearing in the case of Joaquin Rams v. Commonwealth of Virginia, Record No. 190399.

The Petition has been mailed this same day to opposing counsel.

Truly,

Meghan Shapiro
Va. Bar No. 79046
email address: mshapiro@vadefenders.org
(address and other contact information below)

--

Meghan Shapiro
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VIRGINIA DEFENDERS
INDIGENT DEFENSE COMMISSION

190399 Petition for Rehearing (Rams v Comm) - filed 2019-11-04.pdf
646K

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 14th day of February, 2020.

Joaquin Shadow Rams, Appellant,

against Record No. 190399
Court of Appeals No. 1453-17-4

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on October 21, 2019 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Chafin took no part in the resolution of the petition.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: 

Deputy Clerk