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20-5593

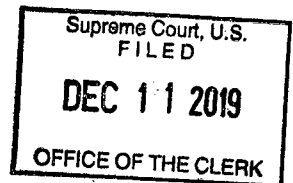
IN THE
SUPREME COURT OF THE UNITED STATES

Mr. CHAZ ANTONIO EARP — PETITIONER
(Your Name)

VS.

Mr. HAROLD W. CLARKE — RESPONDENT(S)

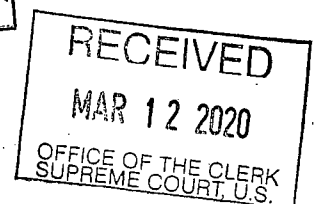
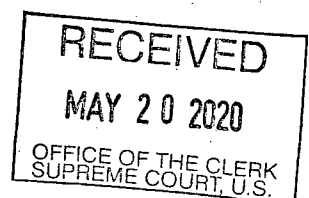
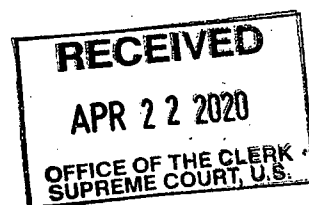
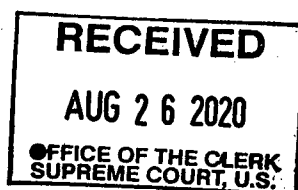
On Petition for a Writ of Certiorari to
The Fourth Circuit Court of Appeals
~~CURRENT COURT OF VIRGINIA~~
(List the court from which the



PETITION FOR WRIT OF CERTIORARI

PETITIONER :

Mr. Chaz A. Earp, #1379845
24427 Musselwhite Dr.
Waverly, Va. 23891



QUESTIONS PRESENTED

1. DID THE Appellant RECEIVE A Fair TRIAL, AS PROMISED BY BOTH FEDERAL, AND STATE CONSTITUTION.
2. DID THE VIRGINIA SUPREME COURT SHUT THE DOOR, NOT ALLOWING VIABLE CLAIMS, DUE TO ERROR OF COUNSEL'S FAILURE TO FOLLOW UP, PRESENTING CLAIMS?
3. ARE THE ISSUES CONTAINED LIBERALLY PERMITTED, WITHOUT ADVANCING NEW CLAIM?
4. ARE FACTS CONTAINED SUFFICIENT TO ESTABLISH, AND RULE ON THE MERIT OF OF THE CLAIMS, PROVIDING APPELLANT WITH A REMEDY?
5. WAS APPELLANT SATISFIED FEDERAL RULE OF CIVIL PROCESS (60) b.1.) MISTAKE; INADVERTANCE; SURPRISE... MISREPRESENTATION INTRINSIC; Judgment WAS VOID; ANY OTHER REASON THAT JUSTIFIED RELIEF.
6. WAS THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT OVERLOOKED A FACTUAL CONTENTION, WHICH INVOLVES MORE THAN ONE Question OF EXCEPTIONAL IMPORTANCE?
7. DID THE SUPREME COURT OF VIRGINIA PREJUDICE APPELLANT'S ABILITY TO RAISE, OR DEMONSTRATE BOTH A DISPOSITIVE, OR DEBATABLE CLAIM, ADEQUATELY ALLOWING FULL PANOPLY OF CONSTITUTION RIGHTS, AT THE HABEAS CORPUS STAGE?

8. DID THE APPELLANT'S AEFIDAVIT SUBMITTED, AND FILED AS MOTION FOR RELIEF SATISFY INDEPENDENTLY, A MISTAKE, OR INADVERTENCE IN THIS MATTER?
9. SHOULD APPELLANT'S HABEAS CORPUS BE CONSTRUED LIBERALLY?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Mr. Chaz Antonio Farp - petitioner

VS.

Mr. Harold W. CLARKE - respondent(s)

OPINIONS BELOW

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below. The opinion of the state circuit court or fed. district court dated Nov 25, 2014 appears at Appendix A to this petition.

The opinion of the state's highest court or fed. court of appeals dated May 2, 2016 appears at Appendix B to this petition.

These orders were not designated for publishing.

JURISDICTION

The date on which the state's highest court or fed. court of appeals decided my case was on Sep 26, 2019.

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

CONSTITUTIONAL PROVISIONS INVOLVED

Appellant requires and assures that Sixth Amendment Rights were violated when both the presumption of fundamental fairness, and representation was rationalized. The Constitutional Right to the assistance to counsel invokes protection which is serious and weighty. Due Process issues involved within this matter, are nevertheless, so fundamental that when as here, each stage in this process will undoubtedly, cause a "domino effect".

In closing, appellant states the most formidable weapon against "Error" of every kind is "Reason".

STATEMENT OF THE CASE

Comes now, the appellant, Mr. C.A. Earp, 1379845 Pro Se and in proper person moves this Court.

1.) Earp's Dec. 28, 2015 Habeas petition was not a successive filing with the meaning of the Va. Code § 8.01-654(B)(2), nor was there any properly filed preceeding habeas that would constitute Earp's 2015 petition "Successive."

2.) With regards to the respondents argument that claims 2(a) and 3(a)-(c) are procedurally defaulted under holdings outlined in Slayton v. Parrigan, 215 Va 27, 29 (1974).

Included with these claims were independent claims that trial Counsel was ineffective in failing to object to these violations at trial, or raise them on appeal.

3.) The evidence was insufficient to establish that Earp was present when the shooting occurred, much less the actual gunman, instead what the evidence shows is that at best, the victim was shot by someone in the stolen vehicle.

4.) Counsel failed to highlight the Commonwealth's inability to prove beyond a reasonable doubt that the evidence was sufficient to support guilt, and present a lesser offense.

5.) Trial Court plainly, erred by convicting Earp of second-degree Murder, for which he was never charged, nor given Notice.

6.) The prosecution committed misconduct by failing to disclose or suppressing statements made by witnesses that are exculpatory in nature.

7.) Counsel presented an alibi defense, however, Counsel failed to proffer an alibi explaining where Earp was and how long Earp was there, at the time of the commission of the shooting.

REASON FOR GRANTING THE WRIT

8.) The Dec 28, 2015 petition filed to the Habeas Court was Not a successive filing. The Clerk of the Supreme Court of Virginia acknowledged herself that the initial July 28, 2014 filing "does not support the issuance of a writ of habeas Corpus". SEE EXHIBIT # 1 Here, the Court provided the case "Penn V Smyth, 188 Va 367" to demonstrate why Earp's 2015 petition cannot be deemed "Successive".

9.) Secondly, Earp has produced a sworn affidavit from Minyard C. Davis, who admits that he was never granted authority from Earp, nor the Supreme Court of Virginia, to file the 2014 habeas. According to Davis, he inadvertently mailed the petition. SEE EXHIBIT # 2

10.) As indicated in an April 16, 2015 letter from the Va Sct Clerk, she found it "UNUSUAL" that included with the 2014 habeas was a verification form with "a piece of paper containing the signature of Earp's Name Taped over the signature of another inmates; Minyard Cass", ironically, the same person Earp claims submitted a habeas without Earp's knowledge. SEE EXHIBIT # 3

11.) The Notarized Verification form in question was witnessed by "Juan Parada", on March 19, 2014. The problem with this reliance is that Mr. Parada, works at the Hampton Roads Regional Jail, and Earp was housed at River North Correctional Center at this time, so Mr. Parada could not have witnessed Earp's signature while not in his presence. SEE EXHIBIT # 4

12.) Moreover, once the Virginia Supreme Court Clerk removed the name taped to the verification form, and noticed the signature of "Minyard Cass", she recognized that the habeas was without a verification form endorsed by the individual's signature endorsed on the habeas, and this does not constitute a properly filed petition. SEE Va Codes

8.01-655. This rule is couched in Mandatory language, therefore the Va. S.Ct. Clerk failed to perform the most perfunctory task of returning the improperly filed habeas petition to its filer.

13.) The respondent presents the argument that the 2014 habeas was "Unsigned", but clearly, and by his own admittance it was "Davis" who forged Earp's signature to the fraudulent petition. SEE EXAMPLE #5. According to EXHIBIT #3, the 2014 habeas was not Notarized, this was the Va. S.Ct. Clerk's reason for mailing Earp an Informa Pauperis, and Verification forms July 29th and August 18, 2014.

14.) With regards to the explanation of the verification form that Earp received from the Va. S.Ct., it has always been Earp's argument that any filing submitted "during the direct appeal" proceeding was to be, simply an attack against the direct appeal, and an argument of dissatisfaction with his attorney's representation during that time, including a circumstance where the attorney filed a late pleading because of trial court's error in forwarding the record late. Any filing attacking the direct appeal proceeding only shall be considered as a filing barring another habeas petition. SEE Va. Code § 8.01-654 (b)(2).

15.) In any event, it is Earp's position that a Verification form is a separate form from the actual habeas application, thus the court has not cured the fact that the 2014 habeas was never notarized, and the verification form has a signature different than the one on the habeas, therefore, this does not constitute a proper filing. SEE Va. Code § 8.01-655. For said reasons, the 2014 habeas is Null and void.

16.) Courts have previously recognized that "where a defendant has procedurally defaulted a claim by failing to raise it on direct appeal the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent. Bousley v. United States, 523 U.S. 614 (1998); United States v. Mikalajunas, 186 F.3d 490, 492-93 (4th Cir 1999)

17.) Aside from attempting to demonstrate that he is actually innocent of the underlying offense, See Carrier, 477 U.S. at 495-96, Earp is also attempting to claim that his Counsel's ineffectiveness would establish cause, and prejudice for his default under Coleman v. Thomas, 501 U.S. 722, 753-54 (1991). As the courts in Coleman acknowledged, an attorney's error during an appeal on direct review may provide cause to excuse a procedural default. SEE 501 U.S. at 754; Evitts v. Lucey, 496 U.S. 387 (1985).

18.) Notwithstanding, the fact that the habeas court's findings were plainly unreasonable, Earp's argument (1XG) is based upon his attorney's own promise to raise the submitted issues, and they were agreed to as Meritorious. SEE EXHIBIT #6. However, Counsel failed to follow through with his promise and argue Earp's claims during the appeal, and this was the reason for Earp's claim that Counsel was ineffective during the appeal proceedings.

19.) Whether a conviction is supported by evidence sufficient to prove guilt beyond a reasonable doubt, is not a question of fact, but one of law. A conviction based upon mere speculation, or probability of guilt, however, strong cannot stand. See Bridgeman v. Commonwealth, 3 Va. App. 523 (1986)

20.) In regards to argument 3(c), it is Earp's argument that the witnesses for the Commonwealth all provided conflicting accounts of the events, making any reasonable assumption impossible for the fact finder to conclude which testimony to consider when addressing the evidence in its totality.

21.) Marco Archer, did not observe the car-thief's face in Newport News, Nor did he get a clear observation of the gunman's face in Hampton. (Dec. 11, tr at 28, 40), however, Archer testified that both the gunman and car-thief were dressed identically. (Dec 11, tr at 28, 49-53). Kurtis Toombs, the individual in possession of the stolen vehicle expressed to detectives, ~~Hours~~ after the shooting that Earp was in no way dressed remotely similar to anyone Archer saw that day. SEE EXHIBIT #8

Here, the evidence fails to prove beyond a reasonable doubt that the gunman is not the car thief believed to be someone named "Malcolm".

22.) Minutes after the shooting, Archer told the detectives that he only witnessed one person in his vehicle at the scene of the alleged shooting. SEE EXHIBIT #

8. Archer continued this narrative at trial. (Dec. 11, 2012 Tr at 39-40) Similarly, Archer alleges that he only witnessed a single person exit the window of his stolen vehicle, and this person shot and killed his brother Aaron. (Dec 11, 2012, Tr at 40, 50) SEE EXHIBIT #9

23.) From Archer's account, the gunman "jumped out the window, and landed on his hands and knees. As he got up, he looked behind him pulled his gun fired and ran. (Dec 11, 2012 Tr at 40) This account, and the account given by Marshall Turner are both indicative of a close range shot near the vehicles involved. (Dec 11, 2012 Tr. at 148) This theory was found incredible, and experts determined that the shot was fired from

an "upright position" and not from "One Knee as Archer claims he witnessed. (Dec 11, 2012 Tr at 40, 147)

24.) It is Earp's position that any reasonable fact finder could conclude that the only reasonable explanation consistent with the evidence is Archer's original Narrative, that the gunman attempted to retreat, and Aaron Archer "Chased" the gunman on foot, cornering him on Anthony Drive, a dead-end street. SEE EXHIBIT # 10. Because the evidence reflects that Earp was victim of a vehicular assault and cornered by Archer, who showed no regard for Earp's or his own life, Earp was legally justified in defending himself.

25.) Even more disturbing is the Commonwealth's unsupported claim that Aaron Archer was shot with a .45 caliber Glock pistol. The trial court judge noted that the Experts could not "identify the make, or Model of the bullet" introduced into evidence. (Dec 11, 2012 Tr at 161), therefore Archer could have been shot with a multitude of other caliber firearms not consistent with a .45. Similarly, the prosecution presented a .45 caliber shell casing, however, experts could not determine that this shell is connected to this case (Dec 11, 2012 Tr at 141). Without a weapon to test-fire, the Commonwealth fails to prove that the shell and bullet were from the same fire-arm. (Dec 11, 2012 Tr at 163)

26.) "It is an axiomatic that the Commonwealth bears the burden of proving each element of an offense beyond a reasonable doubt". See Twre Winship, 397 U.S. 358 (1970); Hill v Commonwealth, 17 Va. App. 480, 484, 438 S.E. 2d 298 (1993)

27.) In regards to Claim 1(F), arguing for a moment the Commonwealth's "theory" that Earp was present during the the shooting and the gunman, the evidence was insufficient to prove he acted with malice, and without legal justification, or provocation, or acted with the specific intent to cause the deceased death. SEE Jackson v Virginia, 443 U.S. 307, 318-19 (1979); Essex v Commonwealth, 228 Va. 273, 280-281 (1984)

28.) In Virginia, Malice is an essential element of Second-degree Murder which requires the prosecution to prove the defendant "formed a design to commit a willfully or purposefully cruel act with a sedated mind, without the heat of passion upon sudden provocation. SEE ESSEY, 225 Va. 273, 280-82 (1984). Here, the prosecution has failed to resort to any specification that Earp participated in any acts contemplating that the life of another would be taken, or committed any offense after substantial planning or premeditation. (Dec 11, 2012 Tr at 61-72, 92-93, 184, 186, 201-202)

29.) According to the evidence, at the time of the shooting Earp and Toombs were both under the impression that they were being robbed. SEE EXHIBIT #11. From witness accounts there was a legitimate reason for Earp to believe that Aaron and Marco Archer were capable of carrying out such a design into immediate action. This incident began with Aaron emerging in an infuriating fit of road rage, unlawfully and forcefully maneuvering his SUV on the opposite side of the road to block the stolen vehicle. At this point, Marco exited the SUV, "ran up" to the stolen vehicle, attempting to open the door. (Dec. 11, 2012 Tr at 18, 34-37)

30.) According to the witnesses, Toombs quickly put the stolen car in reverse, backing away at a high rate of speed, as Aaron positioned his SUV "front bumper to front bumper" against the stolen vehicle, using his SUV as a plow. (Dec 11, 2012 Tr at 18-19, 34-38, 55-56, 67, 84). Aaron's vehicular was not simply a threat of potential bodily harm-- his conduct prompted a (3) car pile-up, which then gave Earp legal justification to arm himself. SEE 161 Va. 1084;

31.) The trial court judge explained that Earp was found guilty of Second-degree Murder because the victim's conduct was not threatening, and Earp did not retreat. (Dec 11 2012 Tr at 224). This premise is inconsistent with the evidence

Unreasonable and has no factual basis. The record clearly demonstrates that this incident was accompanied with circumstances of great palliation from which no inference of malice can be drawn. Courts have acknowledged "a Motor Vehicle improperly used can be a weapon, as dangerous as a gun or knife." Essex, 228 Va 273, 281 (1984). Here, the record is clear that the Archers were the actual aggressors, and there were several overt acts for the trial court to exercise discretion and admit such facts when Common Sense tells us that they could legitimately affect a defendant's apprehensions. (Dec 11, 2012 Tr at 71-72)

32.) Secondly, the record demonstrates that once the vehicles crashed, Earp made an effort to retreat, Aaron eliminated this option by positioning his SUV next to the stolen vehicle, barricading the occupants so he could make contact with the occupants attempting to escape. (Dec 11, 2012 Tr. at 38, 71-72). More importantly, Virginia does not require a person to retreat before using force when confronted by an aggressor. SEE Dodson, 159 Va. 976, 167 S.E. 261; McCoy v. Commonwealth, 125 Va. 771, 776, 99 S.E. 644, 646 (1919).

33.) It is Earp's position that trial counsel could have argued how it could be inferred from the Commonwealth's evidence that Earp acted in the heat of passion (McClung, 215 Va. 1009), and counsel's failure to do so contravened Strickland, because murder requires malice. Lee v. Clarke, 81 F.3d 114 (2015) Under Virginia law, second-degree murder is punishable by a maximum (40) years in prison. Va Code § 18.2-35, 18.2-10(e). Here, Earp was sentenced to (24) years in prison for second-degree murder... because there is a reasonable probability that the court would have found Earp guilty of manslaughter, he would have received a sentence at least (14) years shorter, the difference is

undoubtedly prejudicial. See Glover v United States, 531 U.S. 198, 202-204, 121 S.Ct 696, 148 L.Ed 2d 604 (2001)

34.) A second lesser offense that trial counsel could have raised is justifiable homicide. In Virginia, the principals governing justifiable homicide occurs "where a person, without any fault on his part in bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself". See Avent v Commonwealth, 279 Va. 175, 199, 688 S.E. 2d 24, 257 (2010). Earp contends that for reasons explained in ¶28-32, the deceased victims actions were legal justification for Earp to not only fear for his life, but also stand his ground to preserve his life as well. See (2018 U.S. Dist. Lexis 7).

35.) Here, Earp was sentenced to (24) years for second-degree Murder... because there is a reasonable probability that the Court would have found Earp's acts justifiable he would have been acquitted and "no commendation other than blame". (Citing Davis Criminal Law, prepared by J.A.G Davis... pg 70, 72 76 and 77), the difference is undoubtedly prejudicial

36.) The Due process clause of the United States and Virginia Constitution mandate that an accused be given Notification of the charges against him. U.S. Constitution Amend XIV; Va Const, art. 1 & 8. Simpson v Commonwealth, 221 Va 109, 115, 267 S.E. 2d 134, 139 (1980).

37.) It is Earp's argument that the record, which includes trial transcripts, demonstrate that Earp filed "Several hand-written Motions" Challenging the Commonwealth to prove that any indictments existed, in connection to the charges he was arrested for, and if so, that these indictments were presented in open court, as required by Va Code § 19.2-220. SEE EXHIBIT # 12 (a) & 13 (B); (Dec 11, 2012 Tr at 8)

38.) Because the purpose of an indictment "is to give an accused notice of the nature and character of the accusations against him in order that he can adequately prepare," (King v. Commonwealth, 40 Va App. 193 (2003)), Common Sense should tell us that no one can make an intelligent decision without proper knowledge. Thus, it should be hard for this court to conclude that Earp received a fair trial when he was never advised of the charges he would eventually be tried for.

39.) Earp contends that the Hampton City Circuit Court failed to properly secure personal or subject matter jurisdiction to render the judgment which it gave, and under which Earp is being held prisoner. On the same date that the grand jury supposedly indicted Earp of first-degree murder, an indictment was received by the Hampton Public Defender's office and bares the VCC "MUR-0935-F9" SEE EXHIBIT #13. This is a Second-degree indictment, clearly not the indictment handed down by the grand jury on August 6th, 2012. SEE EXHIBIT #14. Recently, ~~this~~ Court has articulated that an indictment, or criminal information is wholly insufficient if it charges the accused with being guilty of another offense. SEE Descamps v. United States, 570 U.S. Slip Op., 17 (2003)

40.) The Va. S.Ct held that subject matter jurisdiction "must affirmatively appear on the face of the record, that is, the record must show affirmatively that the case is one of a class of which the court rendering the judgment was given cognizance." Dwusu v. Commonwealth, 11 Va. App. 451 S.E. 2d 431, 671 (Va App 1991) (quoting Shelton v. Sydnor, 126 Va. 625, 630, 102 S.E. 83, 85 (1920), Jones v. Commonwealth, 42 Va. App. 142, 590 S.E. 2d 572 (Va. App 2004))

41.) Common law tells us that when an indictment is filed with the Court, no change can be made in the body of the instrument without a resubmission of the case to the grand-jury. As a consequence of the Court not following mandatory provisions of [re]indicting and giving Earp proper notice of the nature and characteristics of the charge, it failed to establish subject matter jurisdiction over Earp personally and legally, thus lacking authority to convict him for an offense not charged. Accordingly, "[a] Courts authority to exercise its subject matter jurisdiction over a case may be restricted by a failure to comply with Statutory requirements that are mandatory in nature" SEE Moore v. Commonwealth, 259 Va. 431, 437, 527 S.E. 2d 406, 409, 2000 Va. Lexis 54 *9 (2000)

42.) Moreover, the Second-degree murder indictment for which Earp stood trial does not indicate an open Court return; Nor does any other contemporaneous or subsequent document. This indictment was not signed by the foreman of the grand jury and bares no proof that a grand-jury ever saw it. This issue matters because "in the absence of an open Court return, a wholly unsigned document cannot serve as an indictment". SEE Anguiera v. Christian, 280 Va. 486, 489, 699 S.E. 2d 517, 519 (2010); Rule 3A:6(d). Lastly, this indictment is made with a requisite specificity of a charge that was obviously amended outside of the record, violating the Due Process Clause of the United States and Virginia Constitution. SEE U.S. Constitution amendments VI and XIV, Va. Const., Art 1, 8.; SIMPSON v. Commonwealth, 221 Va. 109, 115, 267 S.E. 2d 134, 139 (1980)

43.) Due Process of law requires the Commonwealth to disclose the identity of those witnesses who have information that is favorable to the accused, when the evidence is material to the defendant's guilt, or punishment. SEE Monroe v.

Angelone, 2003, 323 F.3d 286. It is Earp's argument that the Commonwealth withheld witness's statements to police although it was obvious that this evidence would call into account the credibility of the prosecution's alleged eye-witnesses accounts of the events that took place. For instance, Marco Archer testified that he never entered the stolen vehicle at the scene of the shooting since the "doors [on the stolen car] were locked"; SEE (Dec 11, 2012 Tr at 43), however, Virginia Karr told police that "the Malibu wasn't there when [she] originally looked out", and she witnessed Marco "get into the Malibu, shift it and move it.."
SEE EXHIBIT #15.

44.) The trial judge found Marco's testimony "highly credible", (Dec 11, 12 Tr at 222), simply because the Court did not hear Virginia Karr reveal that Marco abandoned his injured brother to enter his stolen car, leave the scene, and return explaining to his brother "We have to go". SEE id EXHIBIT #16. With Karr's testimony, trial counsel could have not have simply impeach Marco Archer but also raise the argument that Archer could have left the scene to discard weapons, or further continue to assault Earp, all of which have strengthened Earp's argument in ¶ 31-32. of this writ.

45.) Some time after trial, through an independent source, Earp discovered Karr's involvement in the incident and had his mother track down Ms. Karr. SEE EXHIBIT #16 Listening to Karr describe her recollections over speaker phone, Earp learned that Karr observed several armed individuals at the scene, apparently with the Archers.

46.) Had Karr testified, Marco Archer's credibility would have been severely damaged since her testimony would have created more equilibrium in the evidence to form the factual basis that the Archers were threatening, stalking and chasing

but then get to play the victim role when they could have called the police when they spotted their vehicle.

47.) The respondent claims that Karr's statements were in the prosecution's "open file", but the prosecution's e-mail history says different. SEE EXHIBIT #17. Because the respondent has not verified that trial counsel reviewed the file, counsel should be required to give testimony regarding this statement, seeing that the respondent failed to acquire affidavits from counsel concerning this claim.

48.) A second witness from the scene of the shooting gave a description of the gunman, consistent to Archer's account. According to this un-named witness, they observed a "lighter skinned" male run in the direction Kurtis Toombs testified he himself ran, and this witness observed "a flash". SEE EXHIBIT #18; (Dec 11, 2012 Tr at 49-50, 74) Earp did not fit the description of the gunman in any way.

49.) Without knowledge of these witnesses, counsel was unable to call upon them to undermine the trust of detective Bond's investigation and highlight Archer and Toombs' perjured testimony. Since these (2) two witnesses were important for the trial court's determination of Earp's involvement, any evidence that could have been used to impeach them would have ultimately changed the outcome of the trial. "A lawyer who fails adequately investigate, and introduce into evidence, information that demonstrates his client's actual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance. SEE Lord v Wood, 184 F.3d 1083 (9th Cir. 1999)

50.) Here, Earp was denied effective assistance of counsel since his trial lawyer practically functioned as a second prosecutor by failing to present readily available evidence of exculpatory nature, and pursue Earp's claim of innocence.

51. With regards to claim 1(c), there was credible medical evidence that Earp could not have done that which he stood accused of, because, just days prior he suffered a heart-attack and required hospitalization. SEE EXHIBIT # 2019

Earp was diagnosed with chest inflammation which made it both factually, and legally impossible for him to have ran around after the alleged shooting. SEE Hix v Commonwealth, 270 Va. 335 (2005); United States v. Saradomlin, 704 F.3d 314 (4th Cir 2013).

52. In regards to claim 1(b), the record is clear that there was zero physical evidence linking Earp to the scene of the shooting, the prosecutious case was relatively weak, and this Court "Must evaluate the potential prejudice effect of counsels deficient performance... in the light of the fact." Johnson, 114 F.3d at 838.

53. Just minutes after the alleged shooting and during each proceeding, Marco Archer explained that he witnessed (1) one person exit from the window of his stolen Malibu, and this was the gunman who was never identified by Archer, prior to trial. (Dec 11, 2012 Tr at 40, 50) Arguing the commonwealth's theory that there were (2) two individuals who exited from the passenger window of the stolen vehicle... common since tells us that if Earp, fell from the window first, and Tombbs exited second (Dec 11, 2012 Tr at 72-74), it is more plausible that Archer would have missed Earp exiting and saw Tombbs, who was the only one dressed consistently to witness accounts of the gunman. Earp did not fit the description of anyone from the scene. SEE EXHIBIT # 8

54. It should be hard to articulate why counsel failed to ascertain evidence that would ultimately undermine his clients involvement, and possibly change the outcome of the trial. Counsels failure to preserve Earps GPS / phone records prevented counsel from revealing that Tombbs' narrative

would place the occupants of the stolen vehicle at the scene of the alleged shooting, well over an hour and a half too early, because Toombs omitted crucial details of where he, "Malcolm," and Earp really traveled. Even more importantly, Toombs' false narrative leaves out Earp's opportunity to exit the stolen vehicle at his mother's house, minutes before Toombs arrived at the scene of the shooting. SEE EXHIBIT # 20(a) and 20(b)

55.) Trial Counsel has offered no credible explanation for his failure to vigorously pursue Earp's claim of innocence, and his failure to recover these records violated Earp's 5th and 14th Amendment rights to Due Process, especially seeing that police lost, or destroyed Earp's GPS/Phone records which possessed exculpatory value that was apparent before the evidence disappeared. SEE EXHIBIT # 21; (Dec 11, 2012 Tr at 199)... had the court heard the totality of Earp's defense there is a very reasonable probability that the court would have returned a different verdict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Name *Chay Esp*

Date: *3-5-2020*