

No. 20-7221

IN THE

SUPREME COURT OF THE UNITED STATES

William David Cannon

Petitioner

VS.

Harold W. Clarke, Director,

Virginia Dep't. of Corrections

Respondent

ORIGINAL

FILED

NOV 25 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

on Petition For a Writ of Certiorari To the
United States Court of Appeals, Fourth Circuit

Petition For Writ of Certiorari

William David Cannon #1457842

Sussex II State Prison

24427 Musselwhite Drive

Waverly, Virginia 23891

Questions Presented

no. 1

Is the Fourth Circuit's judicial precedence of not reviewing multiple ineffective assistance of counsel claims for the cumulative effect and aggregate prejudice upon a petitioner's trial violative of his Due Process guarantee? Is the Fourth Circuit's precedence contrary to *Strickland v. Washington*, 466 US 688 (1984) and the Sixth Amendment?

no. 2

Was Defendant unconstitutionally convicted whereby Virginia's concert of action jury instruction imposes a Mandatory Presumption of INTENT upon the jury, thus relinquishing the Prosecution's 'production and persuasion' of the essential element of the charge?

Table of Contents

page

Motion For Leave To Proceed <i>in forma pauperis</i>	
Caption of the Case	i
Questions Presented	ii
Table of Contents - Index of Appendices	iii
Table of Authorities	iv
Citations of Opinions and Orders	vi
Opinions Below and Jurisdiction of the Court	1
Constitutional Provisions, Statutes	2
Statement of the case, facts material	6
Argument : Question 1 Summary	22
Argument : Question 2 Summary	25
Question 1 Argument	28
Question 2 Argument	37
Conclusion	41
Certificates under Rule 29	

Appendices

A : US Ct. of Appeals COA denied	
B : US Dist. Ct. ORDER Habeas § 2254 Dismissed	
C : Supreme Ct. of Virginia state habeas review	
D : Circuit Ct. Virginia Beach ORDER state habeas	
E : Attorney General's Brief in Support of Rule 5 Answer	
F : Direct Appeal, Ct. of Appeals of Virginia	
G : Direct Appeal, S. Ct. of Va.	

Table of Contents - Appendices

- H : Motion To Strike ; T. 4/9/14 , pgs. 249-261
I : Jury INstructions ; T. 4/9/14 , pgs. 273-287
J : pages 95-102 of §2254 w/ pp. 17-26 of prior certiorari
K : Consolidated list of Cumulative Review Cases
L : Petitioner's Response To Respondent's Motion To Dismiss
M : pages 1-6 of Cannon's COA : for Question no. 1
N : Commonwealth's Brief in Opposition { Trial }
O : Questions Presented from record no. 18-5868
P : Cannon's §2254 Petition
Q : former US S.Ct. appx. K ; Authorities & Argument
R : US Court of Appeals petition for COA
S : § 8.01-654 habeas : pp. 53, 60-65, 69
T : § 8.01-654 habeas pp. 47-52

The Appendices are in the following order in accord with Rule 14 :

> ~~A, B, C₁ and 2, D, H, I, N, K, J, M, R, L, P, Q, S, T.~~

> A, B, C₁ and C₂, F, G, H, I, E, N, K, J, M, R, L, P, Q, O, S, T.

Table of Authorities

page

Bell v. Cone	535 US 685 (2002)	23
Boyd v. United States	271 US 104 (1926)	40
Brown v. Commonwealth	130 Va. 733 (1921)	26
Clark v. Arizona	548 US 735 (2006)	26
Estelle v. McGuire	502 US 62 (1991)	26
Fahy v. Connecticut	375 US 85 (1963)	28
Fisher v. Angelone	163 F.3d. 835 (4th Cir. 1998)	7
Hickory v. United States	160 US 408 (1896)	27
In re: Winship	397 US 358 (1970)	25
Jackson v. Virginia	443 US 307 (1979)	26
Jones v. Shinn	943 F.3d. 1211 (9th Cir. 2019)	36
Kyles v. Whitley	514 US 419 (1995)	30
Lindstadt v. Keane	239 F.3d. 191 (2nd Cir. 2001)	6
Lockhart v. Fretwell	506 US 364 (1993)	23
Martinez v. Ryan	562 US 1 (2012)	36
Miller v. Beard	214 F. Supp. 3d. 304 (E.D. Pa. 2016)	23
Mueller v. Angelone	181 F.3d. 557 (4th Cir. 1999)	7
Napue v. Illinois	360 US 264 (1959)	28
Roderiguez v. Hoke	928 F.2d. 534 (2nd Cir. 1991)	6
Strickland v. Washington	466 US 668 (1984)	7
Thompson v. Louisville	362 US 199 (1960)	25
Townsend v. Sain	372 US 293 (1963)	36
US v. United States Gypsum Co.	438 US 422 (1978)	27
Wiggins v. Smith	539 US 510 (2003)	7
Williams v. Taylor	529 US 362 (2000)	7

Citations of Opinions and Orders

Appendix

- | | |
|--|-------|
| 1. United States Court of Appeals For The Fourth Circuit ; No. 19-6892 (1:18-cv-01071-AJT-TCB)
“... a certificate of appealability is denied and the appeal is dismissed.” August 27, 2020 | A |
| 2. United States District Court for the Eastern District of Virginia ; No. 1:18cv01071 (AJT/TCB)
ORDER: Respondent's Motion To Dismiss is Granted [DKT. No. 9] [DKT. No. 19] May 28, 2019 | B |
| 3. Supreme Court of Virginia ; Record No. 170821, Circuit Court No. CL16-4979
“... the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.” March 5, 2018 | C |
| 4. Supreme Court of Virginia ; Record No. 170821, Upon a Petition for Rehearing { Pro Se }
“... the prayer of the said petition is denied.” May 10, 2018 | C (2) |
| 5. Circuit Court of the City of Virginia Beach, Case No. CL16-4979 Final Order
“... ORDERED that the petition for a writ of habeas corpus be, and hereby is, Denied and Dismissed...” April 17, 2017 | D |

Citations of Opinions and Orders

Appendix

- | | |
|--|---|
| <p>6. Respondent's (by counsel: Attorney General of Virginia) Brief in Support of Rule 5 Answer and Motion To Dismiss, Civil Action No. 1:18cv1071</p> <p>Pertinent to the Action at bar: p. 20 at 18; p. 45 at 44 through page 46. <u>Specifically: "... federal habeas courts in the Fourth Circuit agree that cumulative prejudice claims are not cognizable."</u> November 1, 2018</p> | E |
| <p>7. Court of Appeals of Virginia; Record no. 1898-14-1</p> <p>Petition for appeal is denied. May 4, 2015</p> | F |
| <p>8. Supreme Court of Virginia; Record no. 151941</p> <p>Court refused the petition for appeal.</p> <p style="text-align: right;">August 3, 2016</p> | G |
| <p>9. Motion To Strike; Trial Transcript of 4/9/2014, pages 249-261 {pertinent to Question no. 2}</p> | H |
| <p>10. Jury Instructions; Trial Transcript of 4/9/2014, pages 273-287 {Question no. 2}</p> | I |
| <p>11. Consolidated list of cumulative review cases from the US Courts of Appeals</p> | J |

IN THE
Supreme Court of the United States

Petition For a Writ of Certiorari

Petitioner prays that a writ of certiorari issue to review the judgment below.

Jurisdiction

The date upon which the United States Court of Appeals for the Fourth Circuit decided petitioner's case was August 27, 2020.

No petition for rehearing was timely filed.

The United States District Court decided an issue contrary to Supreme Court jurisprudence per § 2254(d)(1).

The jurisdiction of this Court is invoked under:
28 USC § 1257(a), § 1254(1), § 2254(d), § 1651.

Opinions Below

The opinion of the United States Court of Appeals, Fourth Circuit, appears at Appendix A and is unpublished.

The opinion of the United States District Court, E.D. Va., appears at Appendix B and is unpublished.

The opinion of the Virginia Supreme Court appears at Appendix C and is unpublished.

Table of Appendices

A description of each Appendix hereto is provided on pages iii and iv, and is in the following Order pursuant to Rule 14(i):

A, B, C, and C₂, F, G, D, H, I, E, N, K, J, M, R, L, P, Q, O, S, and T.

Constitutional provisions, statutes...

> 28 USCA Constitutional Amendment 5

The Due Process Clause of the Fifth amendment requiring proof beyond a reasonable doubt of each element of a criminal charge. In re Winship, 397 US 358 (1970)

> 28 USCA Constitutional Amendment 6

The Sixth amendment guarantee that the jury reach the requisite finding of guilt beyond a reasonable doubt on each element of a criminal charge (jury-trial guarantee); and the "fundamental fairness of the trial" guarantee.

Sullivan v Louisiana, 508 US 275 (1993); Strickland v. Washington, 466 US 668 (1984); Fahy v. Connecticut, 375 US 85 (1963).

> 28 USCA Constitutional Amendment 14

The Due Process Clause of the Fourteenth amendment dictates that Federal habeas corpus jurisdiction is conferred by allegation of unconstitutional restraint and is not defeated by anything that may occur in state proceedings; requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which defendant is charged; it is not within the province of a legislature to declare an individual... presumptively guilty of crime or to command that the finding of an indictment... should create a presumption of the existence of all the facts essential to guilt; Burden of Proof rests solely on prosecution of every element, Burden of

production and burden of persuasion. Jackson v. Denno, 378 US 368 (1964); Patterson v. New York, 432 US 197 (1977).

> 28 USCA § 1257. State courts; Certiorari

(a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States... Twitchell v. Commonwealth of Pa., 74 US 321 (1868); Ashcraft et al. v. Tennessee, 322 US 143 (1944)

> 28 USCA § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

> Va. Code Ann. § 18-2-22 : Concert of Action

considered as a class of conspiracy. Has been defined as: Action that has been planned, arranged, adjusted, agreed on and settled between the parties acting together pursuant to some design or scheme. All participants in such planned enterprises may be held accountable for incidental crimes committed by another participant during the enterprise even though not originally or specifically designed.

Berkeley v. Commonwealth, 19 Va. App. 279, 283 (1994),
Tweed v. Commonwealth, 36 Va. App. 362, 550 SE 2d 345
(2001)

▷ Burglary: Va. Code Ann. § 18.2-89 Statutory Burglary is defined as: If any person break and enter the dwelling house of another in the nighttime with intent to commit a felony or any larceny therein, he shall be guilty of burglary. Under Virginia Law, specific intent is essential element of crime of statutory burglary and it is necessary for intent to be established. Williams v. Peyton, 414 F. 2d 776 (1969)

▷ Va. Code Ann. § 18.1-86, § 18.1-215: Where Statute makes offense consist of an act combined with particular intent, such Intent is as necessary to be proved as act itself and intent must be established. Taylor v. Commonwealth, 150 SE 2d 135, 207 Va 326 (1966)

▷ Va. Code Ann. § 18.2-18 Principle in the 2nd degree:
- To constitute one an aider and abettor, he must be guilty of some overt act, or he must share the criminal intent of the principal or party who commits the crime. Triplett v. Commonwealth, 141 Va 577, 586 (1925); Jones v. Commonwealth, 157 SE 2d 907, 208 Va 370 (1967)

- "mere presence of a party when a crime is committed is not sufficient to constitute one an aider and abettor..." Snyder v. Commonwealth, 202 Va 1009, 1015 (1961); 208 Va. at 374

- to find a defendant guilty as a principal in the 2nd degree, the Commonwealth must prove that the defendant "consented to the felonious purpose and the defendant contributed to its execution." "... it is essential that the Commonwealth establish that the defendant shared in the criminal intent of the principal who committed the crime." McMorris v. Commonwealth, 276 Va 500, 666 SE 2d 348 (2008); Rogers v. Comm., 242 Va. 307, 317 (1991); Augustine v. Comm., 226 Va. 120, 123-24 (1983); Jones, 208 Va. at 373.

§ 2254(d)(1): resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; OR

§ 2254(d)(2): resulted in a decision that was based on an unreasonable determination of the facts in light of evidence presented in the state court proceeding.

U.S. Supreme Court jurisprudence:

Strickland v. Washington, 466 US 668 (1984)

Martinez v. Ryan, 566 US 1 (2012)

Thompson v. Louisville, 362 US 199 (1960)

In re: Winship, 397 US 358 (1970)

Statement of the Case

as it pertains to Question no. 1

The United States Court of Appeals For the Fourth Circuit has entered Judgment, and in fact set judicial precedence, in conflict with the decisions of the: 1st., 2nd., 3rd., 5th., 6th., 7th., 9th., 10th., and D.C. Circuit US Courts of Appeals. In fact, the Fourth Circuit's opinion and precedence involves each of the US Supreme Court's considerations under Rule 10. > see: list of Cases: Appendix K

Rule 10(a): The Fourth Circuit's judgment and precedence of finding 'cumulative review of petitioner's alleged ineffective assistance of counsel claims for aggregate prejudice' non-cognizable on habeas review conflicts with almost every state court of last resort in the nation; it's decision on this important federal question conflicts with the decisions of Nine (9) US Courts of Appeals over a three decade long period.

Rule 10(b): Furthermore, Virginia's Supreme Court - in refusing Cannon's Petition For Appeal AND denying his Petition For Rehearing (~~en banc~~) on this Sixth Amendment claim - decided the same federal question in a way that conflicts with New York's Superior courts and the 2nd. Circuit US Court of Appeals. > Lindstadt v. Keane, 239 F.3d. 191 (2nd.Cir. 2001); Roderiguez v. Hoke, 928 F.2d. 534, 538 (2nd.Cir. 1991)

> a "claim of ineffective assistance of counsel can turn on the cumulative effect of all counsel's actions".

Rule 10(c): Finally, the Circuit Court of Virginia Beach and the federal District Court, E.D. Va., in following the Fourth Circuit's decision in > Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998), aff'd. > Mueller v. Angelone, 181 F.3d 557, 586 n. 22 (4th Cir. 1999) have decided an important Sixth Amendment question in a way that squarely conflicts with Strickland v. Washington, 466 US 688 (1984), Williams v. Taylor, 529 US 362, 399 (2000) and Wiggins v. Smith, 539 US 510, 538 (2003).

Petitioner first proffered his Sixth Amendment claim on his Virginia state habeas petition under Va. code § 8.01-654 in the Virginia Beach Circuit Court. [see: Claim III(b)/III(f) on pages 50-55 of Cannon's state petition {the Final Order notes this claim as "III (f)" - Appx. D pp. 19-20}]

Claim III(f): "Trial counsel was ineffective based upon the cumulative prejudice of her errors."

"The Court finds that Virginia law does not recognize such a claim. 'Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel.' >

Lenz v. Warden of the Sussex I State Prison, 593 SE 2d 292, 305 (2004) " "Therefore, because claim III(f) does not set forth a cognizable basis for habeas corpus relief, it is Dismissed."

Cannon appealed to the Virginia Supreme Court asserting as an Assignment of Error, among others, the same claim and supporting grounds of argument. The Virginia Supreme Court refused the petition. [Appendices C(1) and C(2)]

Petitioner next filed a Petition For a Writ of Certiorari to the Supreme Court of Virginia pursuant to US Supreme Court Rule 20(2) and (4)(a) : Case No. 18-5868. The petition was denied.

Petitioner filed his federal § 2254 petition in August of 2018 with US District Court, ED. of Va. The federal petition includes the same claim derived from the state petition.

" Claim IV(e) : The cumulative effect and aggregate prejudice of trial counsel's errors and omissions violated Cannon's Sixth Amendment guarantee of a fair and adversarial trial. "

[see: Cannon's § 2254 petition, pages 95 - 102 with habeas appx. K for the full argument. > Included hereof as Appendix J]

> the Claim includes the proffer of sixteen (16) grounds of specific errors and omissions, with exhibits, to corroborate Cannon's allegations and conclusions of law.

The District Court Dismissed Cannon's federal claim {identifying the claim as "4.e" and 4(e)} in the following manner: quoted from Appendix B, p. 30:

"IN a portion of Claim 4(e) (which was state claim III(f)) Cannon asserts that he is entitled to habeas relief based on the cumulative prejudice of the totality of trial counsel's performance. The Virginia courts determined the claim did "not set forth a cognizable basis for habeas corpus relief" because "Virginia law does not recognize such a claim." Resp. Ex. 10, Final Order at 19. Further, the court expressly looked to applicable Fourth Circuit precedent which holds that federal law likewise recognizes that the cumulative effect of non-errors does not amount to error. See Fisher v. Angelone, 163 F.2d. 835, 852 (4th Cir. 1998) (noting that, where it is determined that none of counsel's actions amounted to constitutional error, "it would be odd, to say the least, to conclude that those same actions, when considered collectively" deprived defendant of a fair trial); Mueller v. Angelone, 181 F.3d. 557, 586 n. 22 (4th Cir. 1999) (holding that the "cumulative effect" argument is "squarely foreclosed" by Fisher). Under these circumstances, this portion of Claim 4(e) patently warrants no relief." - end quote -

> Of particular Note, and thus Petitioner's Writ of Certiorari request, is that the 'noted section' of

Fisher, above - and thus the Fourth Circuit's panel of judges reasoned opinion - is unambiguously CONTRARY to Strickland, supra : 466 US at 694 ; 695-696 (noting "but for counsel's unprofessional errors, the result of the proceeding would have been different") and cumulative error review cases legion in number from the other US Courts of Appeals.

Cannon filed a response to the respondent's Motion To Dismiss. Cannon again addressed the illegitimacy of the state court holding, and of the Attorney General's opinion "federal law" supported the lower courts' decisions. [See: Petitioner's Response To Respondent's Motion To Dismiss and Rule 5 Answer Brief ; pages: 5, and 17-19 > Appendix L hereof] The District Court granted the Motion To Dismiss on May 28, 2019.

Cannon timely filed a Petition for a Certificate of Appealability on July 23, 2019, under 28 USCS § 2253 (c)(2).

Pertinent to the facts material of Question no.1 are pages 1 thru 6 at 18. Cannon had moved for the District Court to abrogate the Holding in Fisher on Constitutional grounds; Aprapoe of that, petitioner again asserted:

"This specific language [from Strickland]: adversarial process ; trial ; having produced ; result ; is all expressly cumulative."

"Therefore, although Strickland specifically

articulates that a single error could have a "pervasive effect" and thus in and of itself violate the Sixth Amendment, the entirety of the Court's instructions for evaluation of the grounds of an Ineffective Assistance of Counsel claim - invoking the Sixth Amendment in 466 US 668, 695 thru 696 - is a Cumulative Effect of Errors review." [See: Appendix M, page 3 at 7-8 for above quote; pages 1 thru 6 for full argument.]

The US Court of Appeals, Fourth Circuit, issued its per curiam Opinion and denied Cannon a certificate of appealability on August 27, 2020.

Petitioner asserts he inarguably made a substantial showing of the denial of a constitutional right; namely the Sixth Amendment's guarantee of a fair trial. Additionally, petitioner proffered a substantial showing under § 2254(d) that the Fourth Circuit's judicial precedence - per Fisher and its progeny - is blatantly contrary to Strickland and its progeny.

Wherefore, As Question no. 1 is of import to the entire judicial process of EVERY court in the nation, Cannon prays the Court to abrogate Fisher on Constitutional grounds, and specifically Hold: "cumulative review for aggregate prejudice" of ineffective assistance of counsel grounds is, in fact, expressly held in Strickland.

Statement of the Case as it pertains to Question no. 2:

William David Cannon was charged with: conspiracy to commit armed statutory burglary, abduction, robbery, rape, object sexual penetration, and 5-counts of use of a firearm in commission of a felony.

A jury convicted Cannon, As a principle in the 2nd. degree {under Va. Code §18.2-18}, of: robbery⁽¹⁾, rape, armed statutory burglary, abduction, and 4 counts of use of a firearm in commission of a felony. [Appendix D; Circuit Court of the City of Virginia Beach, Case No. CL16-4979, Final Order]

Germane and material to the Question is:

- (a) Cannon was acquitted of the conspiracy to commit armed statutory burglary; and object sexual penetration.
- (b) within the purview of being charged as a "principle in the 2nd. degree", pursuant to Va. Code §18.2-18, an essential element of the charge requires a showing of Intent; the Mens rea of Intent.
- (c) Each of the charges: Robbery, Rape, Abduction, armed statutory burglary, Requires as an essential element of each charge, a showing of Intent.

(1) Cannon conceded the Robbery charge in his state habeas. As such, it is not argued nor pertinent to any argument herein.

(d) Virginia's concert of action jury instruction abrogate's the essential element of Intent by use of Mandatory Presumption.

> Additionally, there are still TWO substantial, material factual issues IN Dispute and unresolved. Petitioner has proffered the arguments at each stage of appeal, including his Direct Appeal; he has moved for a plenary hearing in both state and federal habeas proceedings.

- pursuant to § 2254(d)(2) and (e)(1), there is substantial evidence Cannon is NOT GUILTY of the charges of: rape and armed statutory burglary as a principle in the 2nd. degree. Accordingly, the facts of the case and statute for abduction would necessarily acquit him of abduction should he be acquitted of the aforementioned charges.

Whereby, the substance of Cannon's Question to this Court is provided:

If the victims own testimony acquits Cannon of the charges pursuant to the essential elements of the charges, ~~does~~ Virginia's 'Concert of Action' jury instruction relinquish the prosecution's duty of 'production and persuasion' (of the essential element of Intent) by an unconstitutional mandatory presumption OF Intent?

Facts Material

Cannon's trial counsel made a verbal Motion To Strike the charges of rape, abduction, and armed statutory burglary (hereinafter "the charges") as a principle in the 2nd degree upon insufficiency of evidence. [See: T. 4/9/2014, pp. 249-261 {as Appx. B in petitioner's state habeas ; as appx. G. in Cannon's prior brief to this Court, Case no. 18-5868}]

Counsel next filed a Motion To Set Aside The Verdict upon an argument of INSUFFICIENCY OF EVIDENCE. It was Denied.

Counsel filed a direct appeal in the Court of Appeals of Virginia, Record no. 1898-14-1 [Appx. F] arguing insufficient evidence to sustain "the charges". Subsequently the Virginia Supreme Court refused Cannon's Petition for Appeal [Appx. G.] [Record no. 151941]

Cannon filed for post conviction relief in his state habeas petition, CL-16-4979. Petitioner asserted the substance of the argument and legal foundation he relies upon in bringing Question no. 2 justifiably and jurisdictionally to the Court.

IN his state petition, Cannon proffered:

Claim II - There was insufficient evidence as a matter of law to sustain the verdicts.

- claim II was procedurally Dismissed without adjudication. [Final ORDER, CL 16-4979 ; p. 8 "not cognizable on habeas..."]

> However, argued within Claim II, Cannon avers that not only was there no intent to co-conspire, the crimes were not even conceivably "incidental" to "robbing from cars".

Claim IV(d): Appellate counsel was ineffective for failing to assert a lack of factual foundation to support the concert of action jury instruction.

[See: Final Order, Appx. D., pp. 24-25. Claim was Dismissed on its merits; the court citing to, among others: Strickland, *supra*; Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000); Brown v. Commonwealth, 107 SE 809, 811 (1921); and Carter v. Commonwealth, 348 SE 2d 265, 267-268 (1986).]

IN Summary, concerning the Question at bar:

- (a) "it is well settled in Virginia that each co-actor is responsible for the acts of the others, and may not interpose his personal lack of intent as a defense."
(Carter) [p. 25]
- (b) "... the Court finds that, although Cannon's counsel objected to the instruction at trial, the jury instruction was supported by precedent and the evidence² at trial."
- (c) "the Virginia Supreme Court has previously examined this instruction and found that it "did not establish an improper presumption but merely stated a permissive inference." "quoting Schmitt v. Commonwealth, 547 SE 2d 186, 198-199 (2001). [id]

² Cannon proffered lengthy, detailed, specifically corroborated argument averring, inter alia, Nineteen (19) evidentiary misrepresentations by the Commonwealth that were material to his guilt or innocence and materially exculpatory. See:

Petitioner, believing the District Court would not over turn the Virginia Supreme Court's affirmation of its lower court's decision, submitted a petition for a writ of certiorari - [See: Case No. 18-5868 ; Question # 2 { Appendix O hereof }]

"Is the Courts Holding in In re Winship 397 US 358, 364 (1976) of "proof beyond a reasonable doubt of every fact necessary..." disregarded and invalidated when a State uses multiple jury instructions to supplant the proof needed of the elements of the charges?"

- the petition was denied October 15, 2018.

While the Petition For Certiorari was pending, Cannon filed his federal habeas petition under §2254 on or about August 20th., 2018.

Pertinent and Material to the resolution of Question 2 is the following:

> Trial Transcripts of April 8-9, 2014 ; {4/9/14 at 271-272}
> §2254 petition: pages: 9; 11 at 31 thru 12 at 32; 14; 18 at 52 thru 19 at 54; 20-26; 27-32; 33-34 at 51; 57-63; 69, 70 at 25-27, 71-72; 73; 80 at 60-61; 103-109; 109 at 26; 109-113; Addendum: n3; n4 on p. 118 at 11-12; n7
Martinez Motion, pp. 120-122. > All as Appendix P

² state habeas, Claim III (a), (d), and (e); Claim IV (a), and (b) asserted along with an ^{annotated} ~~annotated~~ copy of the Commonwealth's Brief In Opposition To Defendant's Motion To Set Aside the Verdict, {Appendix N hereof} [Appx. F in Cannon's habeas.]

Cannon submitted three (3) distinctive arguments to the district court concerning the unconstitutionality of Virginia's Concert of Action jury instruction.

"Claim III (c): There is no factual evidentiary foundation to have included a concert of action jury instruction. The instruction violated Cannon's 5th, 6th, and 14th Amendments. Appellate counsel not presenting an argument on Direct Appeal of the unconstitutional instruction violated Cannon's 6th Amendment guarantee of the effective assistance of counsel."

> habeas petition at: p. 2, 57-63 ; ORDER at p. 5

"Claim IV (f): Trial counsel did not object that the concert of action jury instruction was unconstitutional, nor proffer an argument against its use. [this ground is included under the Martinez Rule; Martinez v. Ryan, 566 US 1 (2012) and Trevino v. Thaler, 133 S.Ct. 1911 (2013)]"

> habeas petition at: p. 2, 64ii, 102-109 ; ORDER at p. 6

"Claim V: Petitioner's 5th, 6th, and 14th Amendment guarantees were violated whereby two of the jury instructions stated Mandatory Presumptions which shifted the burden of proof of the elements of the charges onto the defendant to negate them.

* Although the subject, the issue of the claim, is the same as Claim IV(f), this Claim V is presented and argued without the onerous additional complexities of Strickland. This Claim is presented and argued as a Due Process violation that caused and effectuated Cannon's verdicts. * " 14th. Amend.

> habeas petition at: p. 2, 109-113 with Appx. Q; ORDER at p. 6 (3)

The district court used various methods to dismiss and deny Cannon's three claims.

> See Respondent's Brief in Support of... Motion To Dismiss at: 4-5, 6-7, 19-21. [Appx. E]

> See Petitioner's Response to Respondent's Motion To Dismiss at:

- p. 2: "...although Cannon may have "augmented" or expounded his arguments (particularly claims III(a)-(c) and IV(a)-(d)) as Respondent suggests, [Cannon] has not changed the "theory" or "factual foundation" of the claim and its argument as presented to the lower courts." > pursuant to Pruett v. Thompson, 771 F.

Supp. 1428, 1436 (E.D. Va. 1991), aff'd, 996 F. 2d. 1560 (4th Cir.

1993) "essential legal theories and factual allegations advanced in federal court... [are] the same as those

(3) the habeas petition references "Appendix K" ; as previously noted, Appx. K is now Appendix Q hereof.

advanced at least once to the highest state court.")

> Ergo, according Pruett and Martinez, the court may NOT summarily DISMISS Cannon's federal grounds - as proffered in Claims III and IV - without Adjudicating the entire argument as written and presented to the federal court. But, the court did just that.

IN truth, the Merits of Cannon's 7-grounds of ineffective assistance of counsel {Claims III (a) - (c) and IV (a) - (d)} have not been adjudicated. [> ORDER, p. 9 - 10] This injustice bears Directly upon Question no. 2.

To Wit:

- p. 4 thru 6 : specific material argument annotated in Appendix L
- p. 7 ■ of Petitioner's Response...
- p. 11 thru 15 ; with Martinez exception on p. 15 id.
- p. 16 - 17 id.

> District Court's ORDER Dismissing : [Appx. B]

- Claim III (c) pp. 19 - 21 ;

~~= Claim IV (e) pp. 30~~

- Claim IV (f) pp. 30 - 34 :

" IN claim 4(f) ... argument[s] [is] deemed to be simultaneously exhausted and defaulted because Cannon did not raise [it] in the Supreme Court of Virginia. Cannon asks this Court to excuse the default... [pursuant to] Martinez... " [p. 30 - 31]

- Claim IV(f) : p. 32-34 as underlined and annotated in Appx. B.

- Claim V : p. 10-11 :

" In his Response to the Motion To Dismiss, Cannon argues that Claim 5 should be considered exhausted because he argues in Claim 4(f) that trial counsel was ineffective for failing to object to the concert of action jury instruction as unconstitutional, and in Claim 5 he challenges the constitutionality of the jury instruction directly. [Dkt. No. 16 at 7] *4 The problem with Cannon's position is that ... Claim 4(f) was never presented to the Supreme Court of Virginia and since it thus remains unexhausted it cannot have served to exhaust Claim 5. Accordingly, Claim 5 is defaulted from federal consideration. "

- As noted below, the Court's finding is erroneous. Federal claim 4(f) was in fact submitted as an Assignment of Error and argued on pages 12-13 and 35 of Cannon's habeas Petition For Appeal to the Supreme Court of Virginia.

Cannon filed his Petition for a Certificate of Appealability with the US Court of Appeals, Fourth Circuit on July 23, 2019. No: 19-6892 (1:18cv 01071 - AJT/TCB).

(4) the essential theory and factual allegations of "4(f)" were in-fact presented to the Va. S. Ct., Petition For Appeal, pages 12-13 and 35; Circuit Court's Final Order p. 24-25; Appx. G. in the Federal petition. > Also see: Appx. S as proffer of ground.

IN Cannon's Appellant brief he raised the material factual issues, regarding Question no. 2 hereof, in Claim no. 5 :

" The jury instructions shifted the Burden of Proof upon the Defendant, therefore violating his Fifth, Sixth, and Fourteenth Amendment rights." [p. 56-61] (5)

Complicit to the argument proffered in Claim no. 5 therein, the material facts of Appellant's "INSUFFICIENCY of Evidence ..." argument, Claim no. 2 on pages 6 thru 20, proffer by a preponderance of evidence WHY Question no. 2 hereof bears consideration by this Court.

The US Court of Appeals Denied Cannon's C.O.A. on August 27, 2020.

Wherefore, having brought the material facts, legal theory, and authorities regarding both Question no. 1 and 2 hereof to the (a) court of first instance; (b) to the state's Supreme Court; and (c) to the US Court of Appeals for the Fourth Circuit, the jurisdiction to decide these matters rests squarely upon this Court to aid in its appellate jurisdiction.

(5) Cannon COA brief included as Appendix R

Summary of Arguments

Question no. 1

The novelty of petitioner's Question is that it effects every defendant petitioner in the Fourth Circuit's purview. The important federal question under predecessor to Rule 10 is of national importance to the Court's appellate jurisdiction. The Fourth Circuit's proscription of cumulative review of ineffective assistance of counsel grounds for aggregate prejudice upon the trial proceedings - citing Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) - calls to attention its diverse and contrary decisions to that of other US courts of appeals. Petitioner's State and Federal habeas petitions were considered and decided upon contemplating Strickland v. Washington, 466 US 668 (1984) in a way both contrary to federal law and objectively unreasonable in light of US Supreme Court jurisprudence. citing to: Strickland, 466 US at 694; Williams v. Taylor, 529 US 362, 396-397; Wiggins v. Smith, 539 US 510, 522, 525-526 (2003).

First, petitioner's federal question of substance is an important one under predecessor to Rule 10(a). The US court of appeals for the fourth circuit has decided Cannon's Petition for a Certificate of Appealability in conflict with the decision of Nine (9) United States courts of appeals on the EXACT SAME federal allegation of Sixth Amendment

violation. Furthermore, the US court of appeals' decision conflicts with ALMOST ALL of the nations 'state courts of last resort' decisions.

Of particular Import: the US court of appeal's decision has sanctioned it's lower courts to depart from the accepted and usual course of habeas proceedings to the prejudice of every defendant making a "cumulative review" claim. citing to: Williams, supra, at 373, 375, 379, 409; Wiggins, supra, at 520-521; § 2254(d)(1); Bell v. Cone, 535 US 685, 694 (2002).

Second, in accord under predecessor to Rule 10(b), the Supreme Court of Virginia, in summarily accepting it's lower court's denial of Cannon's federal claim (of cumulative review, affecting a Sixth Amendment violation) as "non-cognizable" decided an alleged sixth amendment violation in a way that conflicts with the decision of another state court of last resort and of a United States court of appeals. citing to: Lindstadt v. Kaine, 239 F. 3d. 191 (2nd. Cir. NY., 2001); Miller v. Beard, 214 F. Supp. 3d. 364 (E.D. Pa. 2016); Lockhart v. Fretwell, 506 US 364, 369 (1993); Harrington v. Richter, 562 US 86 (2011).

Finally, Cannon's Question is of significance under predecessor to Rule 10(c), and in more than one fashion. The courts of the fourth circuit are denying defendant petitioner's due process in the adjudication of their writs of habeas

corpus through an illegitimate and objectively unreasonable application of Strickland. IN the instant case⁽⁶⁾, the state habeas court, quoting Strickland as their guidance, dismissed petitioner's claim of "cumulative effect and aggregate prejudice" of trial counsel errors without a merits review; simply denied the claim as "non-cognizable under Virginia law". The US court of appeals, in denying Cannon's C.O.A., presumptively affirmed the U.S. District Court's dismissal of the same claim on the same ground as the state court; the district court citing to: Fisher v. Angelone, 163 F.3d. 835, 852 (4th Cir. 1998).

The opinion in Fisher, 163 F.3d. at 852, is SQUARELY at odds ^{with} literally hundreds of other courts of appeals' decisions spanning the past three decades, and Strickland. Ergo, the Virginia state court and the US Court of Appeals for the fourth circuit decided an important question of federal law - one that Strickland implies repeatedly with it's dicta - that has not been expressly settled by THIS Court.

Alternatively:

Given the Holdings and dicta of Strickland and Lockhart v. Fretwell, 506 US 364, 369 (1993) { Strickland, 466 US at

(6) the Argument is attributable to EVERY state court though: see: Cavalieri v. Commonwealth, CL 953P3 (2015), and the S.Ct. Va Record No. 160885 SAME claim, SAME Denial.

694} coupled with the decisions of Williams v. Taylor, 529 US 362 (2000) and Wiggins v. Smith, 539 US 510 (2003) - both cases where the Court's decision was expressly of cumulative review of trial counsel ERRORS for their aggregate prejudice upon sentencing - the courts of the fourth circuit are deciding an important federal question in a way that conflicts with a plethora of relevant decisions of the United States Supreme Court.

Question no. 2

Summary

Virginia's Concert of Action jury instruction is unconstitutional whereby it relinquishes the prosecution's "production and persuasion" of the mens rea Intent, an essential element of each of petitioner's "principal in the 2nd. degree" criminal charges. Virginia's instruction requires of the jury an ignorance of a co-defendant's intent and Mandates a finding of guilty solely dependant upon the Principles criminal intent and actions. Indeed, Virginia's Concert of action instruction promulgates the abnegation of the principles announced in: Thompson v. Louisville, 362 US 199 (1960) and IN re Winship, 397 US 358 (1976). The Question presented is an important one under predecessor to Rule 10 as it effects EVERY Defendant in the Fourth Circuit.

The concert of action instruction, in the instant case, relied heavily upon the prosecution's misrepresentations of evidence and malevolent inferences of circumstances.⁷ In this regard, Cannon's charge as a Principle in the 2nd degree (under Va. Code § 18.2-18) REQUIRES the prosecution to prove "the defendant must also share in the principles 'criminal intent'." > citing McMorris v. Commonwealth, 666 SE 2d 348 (2008). However, the "one exception" is concert of action: "the resulting crime is a natural and probable consequence of the intended wrongful act." > quoting Spradlin v. Commonwealth, 195 Va. 523, 528. A review of the transcripts reveals a record devoid of Cannon's "consent of felonious purpose"; the prosecution's asked for inferences do not abide by IN re Winship, supra. { > citing Brown v. Commonwealth, 130 Va. 733, 737-38 (1921) }.

IN fact, the Court's jurisprudence reveals the tenacity of Petitioner's argument. Citing to: Jackson v. Virginia, 443 US 307, 323 (1979); Mullaney v. Wilbur, 421 US 684, 698, 706 (1975); Clark v. Arizona, 548 US 735 (2006); Estelle v. McGuire, 502 US 62 (1991). Contrary

⁷ While Cannon's averring such a statement might regard 'self-serving', all that needs to be done in the instant case is that a plain reading of the trial transcripts corroborates this statement. The Victim states Cannon was "not there".

to the Court's jurisprudence, the jury in Cannon's case was instructed that it could determine Defendant's state of mind through a legal presumption of wrongful intent from proof of an effect. > citing: Hickory v. United States, 160 US 408 (1896); US v. United States Gypsum Co., 438 US 422, 435 (1978).

Thus, in the instant case - and in ANY Virginia case - using the Concert of Action jury charge in combination with {instruction no. 8} "you may infer that every person intends the natural and probable consequences of their acts" relinquishes the prosecution from any production or persuasion of a defendant's state of mind and intent; it demands the jury convict from "proof of an effect" which violates, *inter alia*, IN re Winship, *supra*, and the Sixth and Fourteenth Amendments. Ergo, the Concert of Action jury charge, *notwithstanding* the Supreme Court of Virginia's opinion [§8.01-654 Final Order, p. 24-25] that it "mere stated a permissive inference", convicted Cannon upon a trial record wholly devoid of elements of the charges. As Cannon is legally innocent, his convictions must be vacated.

Argument Question no.1

Within petitioner's state habeas corpus petition, he asserted - Claim III (Part 6) - with 10 specific grounds that : "... the Cumulative Effect of counsel's deficiencies, and the Aggregate Prejudice caused by the errors and omissions, resulted in a fundamentally unfair trial not worthy of Public confidence, and thus a violation of Cannon's 6th and 14th US constitutional amendment guarantees. "

Authorities > Strickland v. Washington, *supra*; Fahy v. Connecticut, 375 US 85 (1963); Lindstadt v. Keane, 239 F. 3d. 191 (2001); Napue v. Illinois, 360 US 264 (1959). " [> See: Appendix T]

The Virginia Supreme Court's denial of the claim, imputing the state habeas court's reasoning, was thus : [Appx. D, Final Order, p. 19-20] The Court finds that Virginia law does not recognize such a claim. " Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel. " Lenz v. Warden of the Sussex I State Prison, 593 SE 2d. 292, 305 (2004) [citation omitted] See also Fisher v. Angelone, 163 F. 3d. 835, 852 (4th Cir. 1998) " Having just determined that none of counsel's actions could be considered constitutional error... it would be odd, to say the least, to conclude that those same actions, when considered

collectively, deprived Fisher of a fair trial."); Mueller v. Angelone, 181 F. 3d 557, 586 n. 22 (4th. Cir. 1999) applying Fisher and concluding that the "cumulative effect" argument was "squarely foreclosed" by that decision. Therefore, because Claim III (f) does not set forth a cognizable basis for habeas corpus relief, it is DISMISSED. <end quote>

Contrary to the Fourth Circuit's Holding in Fisher is the juxtaposition of :

> Strickland v. Washington, 466 US 668, 694 (1984) "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (this is expressly cumulative review for aggregate prejudice)

> "The defendant must show... but for counsel's unprofessional errors, the result of the proceeding..." 466 US 694 (this is expressly a cumulative approach for judging if the TRIAL was constitutionally fair) { it does NOT state 'each individual error'; it states the plurality "errors" and "result" }

> "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 US 686

> "... the question is whether ... absent the errors, the fact-finder would have a reasonable doubt respecting guilt." 466 US at 695 (Expressly a cumulative review)

Additionally, the US Court of Appeals' opinion in Fisher is objectively unreasonable in considering "aggregate prejudice" whereby Strickland proffers the exposition:

"Accordingly, the appropriate test for prejudice finds its roots in the test for materiality... United States v. Agurs, 427 US 97, 104, 112-113 (1976) and in... United States v. Valenzuela-Bernal, 458 US 858, 872-874 (1982)... " 466 US at 694.

Thus, this Court averred, the "roots" of the test for prejudice derives from materiality of evidence in terms of its cumulative and aggregate effect. Ergo, it is implicit in the Court's Holding that the Strickland test for prejudice be NOT ONLY of a singular error but of the errors cumulative effect on the trial proceedings. > "of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 US at 108. > accord Kyles v. Whitley, 514 US 419, 433, 437 (1995).

The US Court of Appeals for the Fourth Circuit, by denying Cannon's Petition for a COA — wherein Cannon proffered the court of appeals needed to abrogate the specific holding in Fisher concerning "cumulative review" — affirmed the US District Court's denial of the issue at bar. [Appx. A; B]

ON federal habeas corpus, Cannon asserted:

"The Cumulative Effect and Aggregate Prejudice of Trial Counsel's errors and omissions violated Cannon's Sixth Amendment guarantee of a fair and adversarial trial."

> see: Appx. J and K ; pp. 95-102 of petitioner's §2254 petition.

Cannon asserted sixteen (16) grounds of ineffective assistance of counsel and averred that when reviewed and "considered cumulatively" the "aggregate prejudice resulted in a trial proceeding... whereby the verdicts are of questionable integrity." [Appx. J, p. 97]

The US Court of Appeals opined, imputing the district court's Opinion: "... federal law likewise recognizes that the cumulative effect of non-errors does not amount to error." [Appx. B, p. 30, 32; Fisher, 163 F. 2d. at 852.]

The federal question of substance under predecessor to Rule 10(a) appears in the juxtaposition of the Fourth Circuit's Opinion in Cannon's case with:

> US v. Hammonds, 425 F. 2d. 597 (D.C. Cir. 1970) (portentously holding prior to Strickland and never since overruled, that "we do not find that any one of the specified actions or omissions in the conduct of the trial would in itself constitute ineffective assistance of counsel. But the totality of the omissions and errors clearly reflect... a lack of adequate representation and establish the defendant was deprived of his constitutional right to effective assistance of counsel").

> Henry v. Scully, 78 F. 3d. 51, 53 (2nd. Cir. 1996) ("We express no view regarding whether one or two of these errors would have constituted ineffective assistance, for the aggregate effect of these three instances of inaction by defense counsel convinces us that [the defendant] received ineffective assistance of

counsel"). * Of particular significance to the present Question is that had the Defendant in Henry been in the Fourth Circuit, his victorious petition in the 2nd Circuit would have been summarily Denied. This is particularly why the Court should grant certiorari.

See: Dugas v. Coplan, 428 F.3d. 317 (1st Cir. 2005) ("Strickland clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced. We thus find that the three instances of deficient performance, taken together ... are sufficient to show prejudice.")

vs.

> Smith v. Johnson, Director, case no. 7:06 cv 00433; 2007 US Dist. Lexis 16860

"... Smith urges me to consider their aggregate effect upon his trial. The Fourth Circuit has specifically held that IAC claims must be considered individually and not collectively. Fisher v. Angelone, 163 F.3d. 835, 852 (4th Cir. 1998). Consequently, I cannot consider the aggregate prejudice that these supposed errors had upon the fairness of Smith's trial."

See also >

- Swaby v. State of New York, 2014 US Dist. Lexis 47101 case no. 06-cv-3845 (Courts "must also analyze the cumulative effect of counsel's failures" in assessing the issue of prejudice, > see: Bobles v. Lempke, No. 09-cv-2636, 2012 US Dist. Lexis 162770 (ED NY) citing > Lindstadt v. Keane, 239 F.3d. 191, 199 (2nd Cir. 2001).

> Rosario v. Ercole, 601 F.3d 118, 142 (2d Cir. 2010)

"IN addition to considering each alleged error by counsel in isolation, the court must also consider them in the 'aggregate' and 'look at the "totality of the evidence before the judge or jury."' Lindstadt v. Keane, 239 F.3d at 199 (quoting Strickland 466 US at 695-96).

> Duran v. Archuleta, Coffman US Ct. of Appeals 10th Cir. 746 Fed. Appx. 738 ; 2018 US App. Lexis 22748 No. 17-1321

"IN the context of federal habeas relief, claims should be included in the cumulative-error calculus even if they have been individually denied for insufficient prejudice. Where the state court did not assess the aggregate prejudice that could have resulted based on appellant's claims, a federal circuit court of appeals is not constrained by the deference limitations in 28 USC § 2254(d) and it reviews his claim of cumulative error de novo."

- also see: Cargle v. Mullin, 317 F.3d 1196, 1206-1207 (10th Cir. 2003) US App. Lexis 1298 (cumulative error analysis).

The Opinion of Fisher and thereafter the jurisprudence in accord with it's holding is also squarely at odds with, inter alia, the reasoned decisions of :

> Williams v. Taylor, 529 US 362, 146 L. Ed. 2d. 389 (2000)

(" The federal judge identified five categories of mitigating evidence that counsel had failed to introduce... As to prejudice, the judge determined, among other things, ...

but for counsel's unprofessional errors, the result of the proceeding would have been different, see Strickland, 466 US at 694. " 146 L.Ed. 2d 389, 399 > Also see, e.g.:

- 529 US 375 " errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ. " 8

" Section 2254(d) requires us to give state court's opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails. Lindh, 96 F.3d. at 869. "

* - 529 US 391 " Williams is therefore entitled to relief if the Virginia Supreme Court's decision rejecting his ineffective-assistance claim was either "contrary to, or involved an unreasonable application of " that established law. It was both. " The SAME can be stated for Cannon.

IN Fact, both the federal habeas court - which simply acquiesced to the state's opinion - and the US Court of Appeals have interpreted federal law, specifically Strickland, in a way both "contrary to [and] an unreasonable application of ". > see 146 L.Ed. 2d. 389, 409 ; 529 US at 378-379.

> Wiggins v. Smith, 539 US 510: Also demonstrates this Court's cumulative review for aggregate prejudice upon the trial proceedings.

- See: 539 US at 522 thru 523, 525 ; and Lockhart v. Fretwell, 506 US 364, 369 (1993) ; Miller v. Beard, 214 F. Supp. 3d. 304 (E.D. Pa. 2016) > All cumulative review.

The significance under predecessor to Rule 10(c). The courts of the Fourth Circuit are denying defendant/prisoner petitioner's due process in the adjudication of their writs of habeas corpus through an illegitimate and objectively unreasonable application of Strickland. The respective federal district courts subsequently adopt the illegitimate opinions.

IN the instant case, in the particulars of Cannon's adjudication, the state habeas court Denied petitioner's Motion for a plenary hearing but accepted counsel's affidavit - contrary to Virginia law - concerning Cannon's IAC grounds [Cannon had the same attorney for trial and direct appeal]. As previously discussed, petitioner's cumulative review claim was denied subscribing to the US Court of Appeals' decision in Fisher - without a merits review.

Now the bigger picture and the larger problem. Cannon's subsequent federal petition, under § 2254, included and asserted: (a) that the essential elements of the criminal charges of armed statutory burglary, abduction, and rape were ~~void~~ Devoid of the record and thus counsel was ineffective for not raising and arguing the claim on her

8 Petitioner has asserted, and does so here, that the Supreme Court of Virginia HAD A DUTY, a jurist responsibility, to independently review the constitutionality of his cumulative review claim and NOT summarily acquiesce to the (erroneous) federal interpretation of federal law. Rule 10(b).

"Motion To Set Aside" post conviction. [see: Appx. P, pp. 63-94, 16-19, and Addendum n.1, n.4, n.5 and n.7: Martinez Motion for "each of the grounds in Claim IV..."]; (b) that in accord with Martinez, the claims were "factually supported" and in-fact proved Cannon's legal innocence; ineffective assistance "often requires factual development in a collateral proceeding" ... Martinez, 132 S.Ct. at 1317; (c) and included a Motion For Evidentiary Hearing pursuant to Townsend v. Sain, 372 US 293 (1963). > appx. P

* the federal claims, as proffered, were NOT adjudicated in their 'as proffered' form * [Opinion; Dkt. 18, p.9 "Cannon has augmented his present versions..."] > Appx. B, p.9 The basis of the legal innocence claim - and thus corroboration of prejudice per Strickland on Cannon's federal §2254 petition - is found in the INSUFFICIENCY of Evidence arguments within both the Motion To Set Aside AND Cannon's Direct Appeal.

The District Court denied Cannon's plenary hearing Motion, which in essence denied the legitimacy of Cannon's Martinez rule claims, and corroborated the Respondent's illegitimate interpretation of Martinez rule claims and §2254(e)(2).

Wherefore, by the court additionally not recognizing the cumulative review grounds, Cannon's writ of habeas corpus was decided contrary to federal law as determined by this Court. > see: Jones v. Shinn, 943 F.3d. 1211 (9th. Cir.

2019)(cumulative review and Martinez hearings to develop evidenciary basis for granting writ)

Question no. 2 : Argument

The significance under predecessor to Rule 10(c).

> See: Appx. I ; T. 4/9/2014, pp. 273-287 - Jury Instructions

Instruction no. 9 : "... A principal in the second degree is a person who is present and assists by helping in the commission of the crime. It MUST BE SHOWN that he Intended by words, gestures, signals, or actions to encourage, advise, urge, or help the person who actually committed the crime. Presence and consent alone are not sufficient to make a person a principal in the second degree. ..." {emphasis added}

Instruction no. 10 : "If there is concert of action with the resulting crime one it's incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way to bring it about are equally answerable and bound by the acts of every other person connected with the consummation of some resulting crime -- such resulting crime." {emphasis added} [id. p. 275-76]

> For the relevance of this Argument, note that each of Cannon's subsequent jury instructions for his criminal charges include that the jury find "with the intent to commit" or "as a principle in the second degree" - which, by Va. statute § 18.2-18 REQUIRES proof of Intent.

> Also highly relevant and material : the jury acquitted Cannon of the "crime of conspiracy to commit armed burglary" [id. p. 276-77]. Whereby it announces the FACT the jury found NO Intent from Cannon to commit armed statutory

burglary - no finding of a common plan. And yet the jury convicted Cannon, as a principle in the second degree, of armed statutory burglary DUE TO the concert of action jury-charge. THIS result defies the principle announced in In re: Winship, 397 US 358, 364 (1970) (evidence necessary... beyond a reasonable doubt of the existence of every element of the offense).

- > Petitioner proffered on his State habeas: Claim IV, ground 4: " ...given the factual predicates of the record, there is no factual evidenciary foundation to include a concert of action jury instruction." [Appx. S; Va. S. Ct. Pet. for Appeal, p. 12-13, 35]
- > Petitioner proffered on his federal §2254 habeas: Claim IV(f): " Trial counsel did not object that the concert of action jury instruction was unconstitutional." [Appx. P., p. 102-109] and Claim V: " Petitioner's 5th, 6th, and 14th Amendment guarantees were violated whereby two of the jury instructions stated mandatory presumptions which shifted the burden of proof of the elements of the charges onto the defendant to negate them. " [id. pp. 109-113]
- > Cannon again proffered the issues to the US Court of Appeals, Fourth Circuit, pursuant to 28 USC §2253 [see: Appx. B; p. iii, 46-50 and 56-61]
- > The District Court dismissed Claim V as "unexhausted" and thus defaulted. [Appx. B, p. 11] The court's finding is in error.
- > The District Court dismissed Claim IV(f) [id. p. 32-34] partly due to an erroneous summation Cannon held the instruction

created a Sandstrom violation; Sandstrom only being a part of Cannon's argument. [id. p. 34].

> The State's dismissal, presumptively the Virginia Supreme Court's denial of the claim, relied on the fact (a) the Va. S. Ct. has defined and stated what "concert of action" is [id. p. 20] and (b) "Indeed, Cannon in this claim 'essentially asks this court to reverse the Supreme Court of Virginia on the question of whether it was objectively unreasonable for an attorney in Va. to fail to make an appellate argument based purely on Va. law...'" [id. p. 21]

> Additionally, the Court finds that the Virginia Supreme Court has previously examined that instruction [concert of action] and found that it "did not establish an improper presumption but merely stated a permissive inference," quoting Schmitt v. Comm., 547 SE 2d 186, 198-99 (2001). [id. p. 20-21]

> Cannon Asserts there is NOTHING about the jury instruction, nor the Va. Supreme Court's definition of concert of action [id. p. 20 (annotated in red)], that is a "permissive inference".

- It STATES, inter alia: ① All those assemble themselves together... are responsible...; ② it is not necessary [] the crime should be a part of the original [plan]... it is enough if... one of the participants...

> Just because a jury instruction is supported by "precedent" at the state level does NOT make it constitutionally viable. If that were the case, we would not have, inter alia: Mullaney v. Wilbur, 421 US 684 (1975) or Sandstrom v. Montana, 442 US 510 (1979)

IN Cannon's case:

1. The victim testified only "Goodman" put the gun to her head, made her open and enter her apartment, and forced her to the living room. [Va. Code §18.2-89 ; §18.2-47 : burglary & abduction]
2. The victim testified Goodman forced her into a bedroom.
3. The victim testified, and the court "finds", that "after Cannon told Goodman to hurry-up, Goodman stopped raping her." [Order, p.4]

IN Cannon's case the essential elements of rape, abduction, and armed statutory burglary were commenced and brought to fruition without Cannon's physical presence or intent. Which is to state : by statute and Virginia caselaw, Cannon is legally innocent of those charges as a principle in the second degree.

Virginia's Concert of action jury instruction imposed an arbitrary and mandated relinquishment of Cannon's *Mens rea*; and forced an ignorance of each of the crimes necessitating "intent" be proved. Va. Code §18.1-86, 18.1-215. IN the instant case, SANS the concert of action, could ANY rational trier of fact have found the essential elements of the charges beyond a reasonable doubt ? > Jackson v. Virginia, 443 US 307, 99 S.Ct. 2781, 2783 (1979); Thompson v. Louisville, 362 US 199 (1960); Boyd v. United States, 271 US 104, 107 (1926).

" We have always held that federal courts, even on habeas, have an independant obligation to say what the law is." Wright v. West, 505 US 277, 305 (1992), quoted in Williams v. Taylor, 529 US 362, 384 (2000).

This jury instruction is unconstitutional.

Conclusion

Petitioner contends the national importance of this Court's jurisprudence in granting certiorari on Question no. 1 as well as, in particular, the need for the Court to resolve the discrepancies of the fourth circuit. Question no. 2 avails upon this Court to address those defendants who are factually and legally innocent yet imprisoned derivative of a wholly unconstitutional jury instruction.

Petitioner prays the Court to grant certiorari of either or both questions and remand to the state court if prudent, or vacate the charges in question.

I Ask For This.

Respectfully Submitted,
> William Cannon

William David Cannon, prose
November 5, 2020

I Attest, under penalty of perjury, that the information and statements made in the foregoing Document are true and accurate to the best of my beliefs and knowledge.

> William Cannon 11/5/20