Appendix A

United States Court of Appeals for the Fourth Circuit

FILED: April 6, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7531
(7:18-cv-00595-EKD-JCH)

WESLEY BRIAN EARNEST

Petitioner - Appellant

v.

KEITH W. DAVIS, Warden; HAROLD W. CLARKE, Director Virginia Department of Corrections

Respondents - Appellees

M A N D A T E

The judgment of this court, entered February 23, 2021, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

Appendix A

FILED: February 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7531
(7:18-cv-00595-EKD-JCH)

WESLEY BRIAN EARNEST

Petitioner - Appellant

v.

KEITH W. DAVIS, Warden; HAROLD W. CLARKE, Director Virginia Department of Corrections

Respondents - Appellees

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7531

WESLEY BRIAN EARNEST,

Petitioner - Appellant,

v.

KEITH W. DAVIS, Warden; HAROLD W. CLARKE, Director Virginia Department of Corrections,

Respondents - Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge. (7:18-cv-00595-EKD-JCH)

Submitted: February 18, 2021 Decided: February 23, 2021

Before NIEMEYER, KING, and FLOYD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Wesley Brian Earnest, Appellant Pro Se.

PER CURIAM:

Wesley Brian Earnest seeks to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2254 petition. *See Gonzalez v. Thaler*, 565 U.S. 134, 148 & n.9 (2012) (explaining that § 2254 petitions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2244(d)(1)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez*, 565 U.S. at 140-41 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Earnest has not made the requisite showing. Accordingly, although we grant Earnest's motion to exceed length limitations for the informal brief, we deny his motions for an evidentiary hearing and a certificate of appealability, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: February 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7531, Wesley Earnest v. Keith Davis
7:18-cv-00595-EKD-JCH

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: March 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7531
(7:18-cv-00595-EKD-JCH)

WESLEY BRIAN EARNEST

Petitioner - Appellant

v.

KEITH W. DAVIS, Warden; HAROLD W. CLARKE, Director Virginia Department of Corrections

Respondents - Appellees

TEMPORARY STAY OF MANDATE

Under Fed. R. App. P. 41(b), the filing of a timely petition for rehearing or rehearing en banc stays the mandate until the court has ruled on the petition. In accordance with Rule 41(b), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

Appendix A

FILED: March 29, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7531
(7:18-cv-00595-EKD-JCH)

WESLEY BRIAN EARNEST

Petitioner - Appellant

v.

KEITH W. DAVIS, Warden; HAROLD W. CLARKE, Director Virginia Department of Corrections

Respondents - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix B

United States District Court for the Western District of Virginia - Roanoke Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

WESLEY BRIAN EARNEST, Petitioner, v. KEITH W. DAVIS, Warden, and HAROLD W. CLARKE, Director, Respondents.	)	Civil Action No. 7:18-cv-00595 By: Elizabeth K. Dillon United States District Judge

FINAL ORDER

In accordance with the Memorandum Opinion entered this day, it is hereby ORDERED:

(1) The respondent's second motion to dismiss (Dkt. No. 19) is GRANTED, and Earnest's amended petition pursuant to 28 U.S.C. § 2254 is DISMISSED.

(2) This action is STRICKEN from the active docket of this court; and

(3) Concluding that Earnest has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c), a certificate of appealability is DENIED.

The Clerk is directed to send copies of this Order and the accompanying Memorandum Opinion to counsel for the respondent and to Mr. Earnest.

Entered: September 30, 2020.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

WESLEY BRIAN EARNEST, Petitioner, v. KEITH W. DAVIS, Warden, and HAROLD W. CLARKE, Director, Respondents.	)	Civil Action No. 7:18-cv-00595 By: Elizabeth K. Dillon United States District Judge

MEMORANDUM OPINION

Petitioner Wesley Brian Earnest, a Virginia inmate proceeding *pro se*, filed an original petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, and an amended petition, challenging his incarceration under an Amherst County Circuit Court criminal judgment entered February 10, 2011, for first-degree murder in violation of Virginia Code § 18.2-32 and use of a firearm in the commission of first-degree murder in violation of Virginia Code § 18.2-53.1 (Case Nos. CR 10013891-01 and CR 10013891-02). The court sentenced Earnest to life in prison plus three years. (Trial R. at 178-80.)[1]

Respondents filed a motion to dismiss the petition and amended petition as untimely, partially procedurally defaulted, and alternatively, without merit. Earnest has responded, making the matter ripe for disposition. After careful review of Earnest's claims and the entire record of all proceedings in the state court, the court concludes that Earnest's petition was filed past the statute of limitations. Further, Earnest has failed to demonstrate that he is entitled to equitable

[1] Citations herein to "Trial R." refer to the records of the Amherst County Circuit Court in Earnest's criminal trial, using the page numbers in the lower right corner of each page. Citations to "Habeas R." refer to the Amherst County Circuit Court habeas record, using the page numbers in the lower right corner of each page.

tolling or that he is "actually innocent." For these reasons, the court will grant the motion to dismiss and will deny Earnest a certificate of appealability.

I. BACKGROUND

On May 6, 2008, a Bedford County Circuit Court grand jury indicted Earnest for first-degree murder of his estranged wife, Jocelyn Earnest, on December 19, 2007, and for use of a firearm in the commission of that murder. Following a jury trial held March 24, 2010, through April 5, 2010, Earnest was convicted on both counts. Prior to the scheduled sentencing hearing, the court learned that several journals written by the victim and excluded from evidence had been inadvertently sent to the jury room with the trial exhibits. On July 26, 2010, the court entered a mistrial order, and the case was reset for November 8, 2010. On Earnest's motion for a transfer of venue due to heavy media coverage of the first trial, the court transferred venue to Amherst County Circuit Court for trial, with a venire panel to be selected from Nelson County. (Trial R. at 1–6.)

The trial took place from November 8, 2010, through November 19, 2010, during which the evidence, in the light most favorable to the government as the prevailing party, established that Ms. Earnest's body was found around noon on December 20, 2007, in her home in Forest, Virginia. She had died from a single gunshot wound to her head. A .357 handgun was lying near her right arm, and a typewritten note in the floor nearby appeared to be a suicide note. There were no signs of forced entry into the house, but the thermostat had been cranked up to 90 degrees, and the house was hot. Subsequent investigation of the crime scene and the autopsy were inconsistent with suicide.

Blood pattern analysis of the blood on the carpet indicated that Ms. Earnest's body was moved shortly after the shooting and had been drug through the first pool of blood. (Trial Tr. at

1222–47.) The angle of the bullet wound, from behind her right ear upward to the front of her head, just left of her left orbital, was an unusual angle for a self-inflicted wound. Further, Ms. Earnest had no blood spatter on her hands, and the stippling around the entrance wound had no soot, suggesting that the gun's barrel was at least two inches away from her head when fired, probably closer to two feet. (*Id.* at 1155–71.) Time of death could not be determined, other than to say that she had been dead more than 12 hours, because rigor mortis was dissipating by the time the medical examiner received the body for autopsy on the morning of December 21, 2007. The higher temperature in the house could also speed the process of rigor mortis, making an accurate time-of-death determination impossible. (*Id.* at 1195–99.)

Ms. Earnest's friend, Marcy Shepherd, with whom Ms. Earnest had been romantically involved, testified that she had been texting Ms. Earnest on December 19, discussing the possibility of getting together that evening after Ms. Earnest's counseling appointment. Her last text from Ms. Earnest was at 7:28 p.m. According to Wayne East, technician from the security company, Ms. Earnest's home security system was disarmed at 7:35 p.m., consistent with her normal practice; Ms. Earnest did not set the system at night, only when she was away from the house. (*Id.* at 942.) Shepherd thought that Ms. Earnest may have gone to dinner with a friend, but when she had not heard from Ms. Earnest after a couple of hours, she was worried and drove by Ms. Earnest's home around 9:45 p.m. Ms. Earnest's car was there, but no one answered the door, so Shepherd left. Upon learning that Ms. Earnest had not shown up at work by 10:00 a.m. the next morning, and still unable to reach her on the phone, Shepherd went back to Ms. Earnest's house on December 20, between 11:30 and noon. Ms. Earnest's car was in the same position as the previous evening. After calling Maysa Munsey, a mutual friend who had seen Ms. Earnest the previous day, Shepherd found the spare key to Ms. Earnest's home in the back

shed and entered the house. On finding the body, she told Munsey, and then both called the police. (*Id.* at 1027–34.) Based upon the text messages Ms. Earnest sent and when she turned off her security system, Ms. Earnest was clearly still alive at 7:35 p.m. By 9:45 or 9:50 p.m., when Shepherd came by and saw Ms. Earnest's car at home, but no one answering the door, Ms. Earnest may have been dead; that time frame, 7:35 to 9:50 p.m., is what the prosecutor called "the window" in which the murder occurred. (*Id.* at 2719.)

Earnest and his wife had been separated for more than two years, and Ms. Earnest had filed for divorce on grounds of desertion.[2] Earnest counter-sued for constructive desertion. According to Jennifer Stille, Ms. Earnest's divorce attorney, the divorce was contentious, particularly regarding financial matters and property. In addition to the marital residence, in which Ms. Earnest was living, the couple had built a home on Smith Mountain Lake, for which they had a $900,000 mortgage. Ms. Earnest, a manager at Genworth Financial, made more money than Earnest, who took a job as an assistant principal in Chesapeake, Virginia, after separating from his wife, because the Chesapeake school system paid better than what he had been making in Lynchburg. Earnest wanted to keep the lake house and allow Ms. Earnest to keep the home in Forest, which was paid for. Ms. Earnest had decided to move forward with finalizing the divorce, which would force a sale of the lake property, as, realistically speaking, Earnest could not buy her share. (*Id.* at 1394–1457.) Police also found writings by Mr. Earnest, detailing his financial difficulties and accusing Ms. Earnest of stealing their joint tax refund, hoarding her money while he paid the bills, and otherwise treating him unfairly.

The .357 handgun found with Ms. Earnest, from which the fatal shot was fired, was purchased by Mr. Earnest several years earlier; he told police that he bought the gun for his wife

[2] Uncontested evidence suggested that Earnest was having an affair with his girlfriend, Shameka, prior to the separation, which affair was apparently condoned by Ms. Earnest.

for her protection. However, the box for the gun was found in Mr. Earnest's girlfriend's home when police executed a search warrant there, and no ammunition for the gun was found in Ms. Earnest's home, save for the remaining bullets inside the gun. Her coworkers, friends, and family testified that they had never seen Ms. Earnest with a gun. No fingerprints were found on the gun. Two latent fingerprints were developed from the purported suicide note, however. Two different fingerprint analysts testified that the latent prints on the note belonged to Mr. Earnest, and no prints of Ms. Earnest were found on the note. A linguist who read over 150 items written by Ms. Earnest testified that the typed note did not have the writing style, punctuation, or tone of Ms. Earnest's writing. Further, the typewritten note was not on Ms. Earnest's computers and had not been printed from the printers in her home. (*Id.* at 2002–2172.)

Although Earnest told police that he had been in Chesapeake, Virginia, just over 200 miles from Ms. Earnest's home, investigation in Chesapeake raised more doubts for the police. Earnest's first landlord in Virginia Beach (for only a couple of months in 2005), Neil Phillips, said that Earnest made a statement one day following an argument with Phillips' wife, "Bitches like your wife and mine should be dead." (*Id.* at 1630.)

Earnest's workday ended at 4:00 p.m., and the drive from Chesapeake to Forest could be made easily in just over three and a half hours. One coworker interviewed by police, David Hall, indicated that Earnest borrowed his pickup truck the week of December 17, 2007, saying he was moving from his rental room to a campground. Hall's wife testified that Earnest brought the truck back on Thursday morning, December 20. Earnest apologized to Hall for a bleach stain on the driver's side floor mat, where Earnest had tried to clean up after using the truck. (*Id.* at 1874–91.) The campground manager testified that Earnest did not have a space rented at the campground until December 26, when Earnest's mother came in to make the arrangements. (*Id.*

at 1914–1920.) In January, Earnest borrowed the truck again for a single afternoon. When Earnest returned it, Hall thought the truck handled differently. Hall testified that he later found a window placard from Kramer Tire in his glove box. When he asked Earnest about the placard, Earnest said that he had gotten four new tires put on the truck because he had accidentally punctured two of the tires when he ran over some nails. Hoping to get the two good tires back, Hall called the Kramer Tire near the high school, but the facility had no record of a truck with his license plate being there. After calling around to other Kramer Tire locations, Hall found the truck's service ticket for new tires in January 2008 at the Virginia Beach store on Providence Road, much further away than the Chesapeake locations. Hall also learned that service ticket for his truck was in the name of "Tom Dunbar." (*Id.* at 1874–79.)

Rick Keuhne from Kramer Tire testified about the truck tires. He remembered the incident because the tires on the truck were in good shape, had nothing wrong with them, and did not need to be replaced. He told Mr. Dunbar that he did not need new tires, but the man insisted on getting new ones. Keuhne identified the work order, which had the license plate number of Hall's truck, with the name Tom Dunbar, an address in Roanoke that turned out to be fictitious, and a phone number with a West Virginia area code (where Earnest's parents lived). The tires were paid for with cash. (*Id.* at 1921–67.)

Three of Mr. Earnest's former coworkers in Chesapeake testified that Earnest told them he was not married and had never been married; Earnest also claimed that he was independently wealthy to these three persons and to two others who testified. (*Id.* at 1644–1688; 1899–1913.) Significantly, the high school principal where Earnest worked testified that Earnest called her around 5:00 p.m. on December 21, 2007, and advised her that he was at his lawyer's office about to be questioned because his estranged wife had apparently committed suicide because of a failed

relationship; this was the principal's first knowledge that Earnest was married. (*Id.* at 1795.) This was also *before* the police ever provided Earnest information about the circumstances of Ms. Earnest's death or the apparent suicide note, a detail that had not been publicly released by the police. Finally, Jesse McCoy testified that he had made arrangements to pick up Earnest's car for detailing during the week of December 17; McCoy suggested December 19, but Earnest said he would be "on the road" that day, so they agreed for McCoy to pick the car up from the high school on the morning of December 20. Later, Earnest called McCoy and pushed the pick-up time from 8:00 a.m. to 9:15 a.m., in case he ran late getting back to Chesapeake. (*Id.* at 1818–38.)

Earnest's counsel vigorously cross-examined all prosecution witnesses and called expert witnesses and alibi witnesses on behalf of Earnest. After hearing all the evidence, the jury deliberated, resolving evidentiary conflicts in the government's favor, and returned a verdict of guilty on both charges. (Trial R. at 152–53.) The jury recommended a sentence of life in prison for first-degree murder and three years (mandatory) for use of a firearm in the commission of the murder. (*Id.* at 156–57.) The trial court ordered a pre-sentence report and held a sentencing hearing on January 25, 2011, after which the court imposed the sentence recommended by the jury. The court entered the final judgment on February 10, 2011. (*Id.* at 178–80.)

Earnest appealed his conviction to the Court of Appeals of Virginia, raising numerous issues:

- The trial court's failure to move the trial to a venue in a different judicial circuit;
- The trial court's failure to grant a mistrial and dismiss the entire venire panel upon learning that members of the venire had talked about the case before voir dire and jury selection;

- The trial court's exclusion of the following from evidence:
    - Evidence of "third-party guilt";
    - Telephone records of the victim to show that she had not had contact with Earnest;
    - Telephone records of Marcy Shepherd and a videotape of her police statement as circumstantial proof that Shepherd destroyed phone records relevant to the victim's activities at the time of her death;
    - Evidence about Maysa Munsey's arrest for identity fraud;
    - Testimony about how the victim's Blackberry could have been remotely reset from her work computer system;
    - Testimony of Jennifer Mnookin as an expert in fingerprint methodology to contradict certain testimony of the Commonwealth's fingerprint experts; and
    - Sur-rebuttal evidence from the defense;
- The trial court's admission of the following evidence:
    - Testimony about the Earnests' separation and divorce;
    - Mr. Earnest's financial condition during time periods two years before and two years after the victim's death;
    - Testimony that Earnest borrowed Hall's truck and replaced the tires;
    - Testimony of Johnson and Riding that a partial latent fingerprint can be identified as a match to a known individual;
    - Sergeant Neal's testimony about how long it took him to drive from Chesapeake, Virginia, to Forest, Virginia; and

- A photograph of the cover of the victim's journal;

- The sufficiency of the evidence to support a conviction because the evidence failed to exclude "every theory of innocence"; and
- The trial court's failure to give a requested jury instruction about fingerprint evidence.

The Court of Appeals initially rejected the appeal on all issues in a per curiam opinion, but on petition for consideration by a three judge panel, agreed to consider the appeal only on whether the trial court erred in refusing to allow Dr. Mnookin[3] to testify as an expert witness in fingerprint methodology and refusing to allow her to contradict Johnson's testimony that no one had ever found two different people with the same fingerprint. After considering the issues, the Court of Appeals affirmed the trial court's judgment. *Earnest v. Commonwealth*, 734 S.E.2d 680 (Va. Ct. App. 2012).

Earnest then appealed to the Supreme Court of Virginia, raising several of the same errors, but the court denied his petition on July 13, 2013. (Addendum to Trial R. at 11.) The Supreme Court of Virginia denied Earnest's petition for rehearing on September 23, 2013. (*Id.* at 12.) Earnest filed a petition for certiorari in the United States Supreme Court, which the Court denied. *Earnest v. Virginia*, No. 13-799 (filed Feb. 24, 2014).

On September 4, 2014, Earnest filed his state petition for habeas corpus in the Amherst County Circuit Court. He raised three sets of claims: (1) due process violations, including several allegations of prosecutorial misconduct, plus denial of his right to put on a defense by excluding evidence of third-party guilt and denial of fair trial by changing venue to another

[3] Dr. Mnookin was a professor of law at UCLA, teaching evidence, and had written extensively about the lack of scientific foundation underlying fingerprint analysis testimony. However, she was not a fingerprint examiner and had never examined fingerprints herself.

location in the same judicial circuit; (2) ineffective assistance of counsel, including failure to investigate, failing to object to certain evidence, failing to offer a divorce document, and failing to argue that the victim committed suicide; and (3) evidentiary errors, consisting of most of the evidentiary issues raised in his direct appeal. (Habeas R. at 2–11.) The court issued a letter opinion denying the claim, without a hearing, on February 16, 2017. (*Id.* at 128–41.) The final order was entered on May 5, 2017. (*Id.* at 141–48.) On May 22, 2018, the Supreme Court of Virginia denied Earnest's appeal, finding no error. (*Id.* at 172.) The United States Supreme Court then denied his petition for certiorari. *Earnest v. Davis*, No. 18-5728 (filed Oct. 15, 2018).

Earnest certified the mailing of the current petition for relief under § 2254 on November 15, 2018, and the petition was received and docketed in the clerk's office on November 29, 2018. On August 7, 2019, Earnest mailed a motion for leave to file amended petition, along with his amended petition. The court granted leave to file the amended petition on August 19, 2019, without expressing any opinion on the merits of the additional allegations. (Dkt. No. 16.) In his amended petition, Earnest raises the following issues:

(1) The trial court erred in not allowing a complete defense using exonerating DNA evidence of blood and hair in the victim's home to create an alternative theory of third-party guilt;

(2) Ineffective assistance of counsel for failing to investigate witness reports of police misconduct;

(3) Commonwealth attorney withheld material, exculpatory evidence of prior statements of David and Vicky Hall, and ineffective assistance of appellate counsel for failing to raise the claim on appeal;

(4) The trial court erred in not allowing Dr. Jennifer Mnookin to testify as an expert in fingerprint methodology and to contradict the testimony of the Commonwealth's experts;

(5) The Commonwealth withheld (and destroyed) videotape evidence from Great Bridge High School, showing that Earnest worked until just after 4:00 p.m. on December 19, 2007, and Earnest became aware of this evidence being withheld by the Commonwealth in May 2019, rendering this new evidence of actual innocence; and

(6) Ineffective assistance of trial counsel in failing to investigate the existence and disappearance of the videotape.

II. DISCUSSION

Under 28 U.S.C. § 2244(d)(1), a petitioner has one year in which to file a federal habeas corpus petition. The statute of limitations runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. Section 2242(d)(2) tolls the statute of limitations during the time in which "a properly filed application for State post-conviction or other collateral review . . . is pending." In addition to

this statutory tolling, the court may equitably toll the statute under some circumstances, including upon the introduction of new evidence that persuades the court that a reasonable juror probably would not have convicted the defendant, but for the constitutional errors alleged. *McQuiggin v. Perkins*, 569 U.S. 383, 393–95 (2013); *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

A. Statutory Time Calculation

The United States Supreme Court denied Earnest's petition for appeal on February 24, 2014, and that is the date on which the one-year statute of limitations began to run. Absent tolling, the last date for filing his federal habeas petition in this court was February 24, 2015. However, the "time during which" a properly filed state habeas proceeding was pending tolled the statute, or stopped the clock from running, when the state petition was filed. Earnest filed his state petition on September 4, 2014. At that time, 192 days of the statute had passed, and then the clock stopped. When the state action was no longer pending, the clock resumed at the point where it was when it stopped; the one-year period did not start over again. *Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000).

Under § 2244(d)(1)(A), a judgment of conviction becomes final at "the conclusion of direct review or the expiration of the time for seeking such review." The Supreme Court has interpreted direct review of a conviction to include review by the Court. *Clay v. United States*, 537 U.S. 522, 527–28 (2003). However, the Court expressly declined to interpret § 2244(d)(2) the same way, because that section is worded differently and refers to a different type of litigation. State post-conviction review ends when the state courts have resolved the issue; "after the State's highest court has issued its mandate or denied review, no other state avenues for relief remain open." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007). After the State's highest court has dispensed with the matter, state post-conviction relief is no longer "pending." *Id.* Therefore,

Earnest's state post-conviction relief ended on May 22, 2018, when the Supreme Court of Virginia denied his state habeas appeal. The statute of limitations was not tolled during the pendency of Earnest's petition for certiorari in the state habeas case. Accordingly, the clock resumed on May 22, 2018, with 173 days remaining. Earnest's 173 days ended on November 11, 2018, which was a Sunday, and Monday, November 12, 2018, was a federal holiday, making Earnest's petition due on November 13, 2018. According to his certificate of service, Earnest mailed the petition on November 15, 2018, two days after it was due, rendering the petition untimely under the statute.

B. Equitable Tolling

The statute of limitations for habeas petitions is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 636 (2010). To receive the benefit of equitable tolling, however, a petitioner must show (1) that he has been pursuing his rights diligently and that (2) some extraordinary circumstances prevented his timely filing. *Id.* at 649. The length of the delay does not guide the determination; the court considers only the reasons for delay in determining whether equitable tolling is appropriate. *Rouse v. Lee*, 339 F.3d 238, 253 (4th Cir. 2003).

Earnest has failed to show that *extraordinary circumstances* prevented the timely filing of his petition. His stated reasons for untimely filing are (1) that he thought he had to wait until the Supreme Court considered his petition for certiorari before he could file, unless he received a waiver or permission to file sooner, and (2) lack of access to the law library during prison lockdowns lasting 15 days during the 31 days prior to the due date and another nine days in August and September. Neither reason qualifies as an extraordinary circumstance.

Mistaken calculation of the filing deadline, whether by counsel or by a *pro se* litigant, is not generally an extraordinary circumstance entitling a petitioner to equitable tolling. *Holland*,

560 U.S. at 651. Neither is ignorance of the law, "even in the case of an unrepresented prisoner." *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). Earnest's failure to realize that the time his petition for certiorari to the Supreme Court was pending did not toll the statute of limitations is simply ignorance of the law, law that has been firmly established by the Supreme Court since 2007. To the extent he thought he needed a waiver to file his petition while the matter was still pending before the Supreme Court, Earnest never filed a request for such waiver or permission to file his petition in this court and stay the proceedings pending the outcome of his certiorari petition.

Limited access to the law library has not generally been considered an extraordinary circumstance, either. *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) ("Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted."); *Atkins v. United States*, 204 F.3d 1086, 1089 (11th Cir. 2000) (rejecting a claim of equitable tolling when petitioner alleged that two prison lockdowns prevented him from using the library for a six month period); *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) (holding that normal restrictions on law library access, including during stays in administrative segregation, are not "extraordinary" for purposes of equitable tolling). Even if one were to consider such limited access extraordinary, Earnest cannot show that limited access prevented him from filing his petition in a timely manner. As noted by the Tenth Circuit Court of Appeals in *Marsh v. Soares*, the claims petitioner asserted were the same as those already presented in his state habeas case. *Marsh*, 223 F.3d 1217, 1221 (10th Cir. 2000). Likewise, Earnest has necessarily raised the same claims (for exhaustion purposes) either in his state appeal, in his state habeas, or both, making additional access to the law library less essential to

filing the same arguments before this court. *See also Hizbullahankhamon v. Walker,* 255 F.3d 65, 76 (2d Cir. 2001).

For these reasons, Earnest has failed to show circumstances entitling him to equitable tolling of the statute of limitations.

C. Actual Innocence

The Court has recognized a miscarriage-of-justice exception in an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324. A credible claim of actual innocence must be supported by new reliable evidence. *Id.*

> Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.

Id. at 316. The video upon which Earnest bases his actual innocence claim is not new. He and his counsel were aware that Great Bridge High School had a security system that recorded random video images throughout the school. Indeed, as Earnest states in his amended petition, the government produced in discovery a transcript of conversation between the school principal, the prosecuting attorney and Investigator Mayhew, which occurred at the high school on January 22, 2008, in which the principal advised that the video system recorded over itself after 30 days, and thus video of December 19 and December 20, 2007, was no longer available. Evidence that is known, but only newly available, does not constitute newly discovered evidence and cannot toll the habeas statute of limitations. *Sistrunk v. Rozum*, 674 F.3d 181, 189 (3d Cir. 2012). *See also Johnson v. Medina*, 547 F. App'x. 880, 885 (10th Cir. 2013).

Earnest does not have a video recording to offer even now, so one cannot say that the video is available, either. He alleges that the police received a copy of the video recording from

school officials and then destroyed it. He bases this allegation on statements purportedly made to a representative of the Hamilton Firm, PLC, in May 2019 by Bob Berry, counsel for the Chesapeake City School Board. Earnest asserts that Berry told the Hamilton Firm that the school superintendent preserved the video and made it available to the Bedford County law enforcement officers in December 2007. (Mot. to Am./Am. Pet. at 7, Dkt. No. 15.) Earnest has provided neither an affidavit nor anything in writing from the Hamilton Firm or from Bob Berry to support his claim, but he immediately jumps to the conclusion that the government received the video and then destroyed it.

The prosecutor on the case, Wesley Nance, and the lead investigator during December 2007, Gary Babb, each filed an affidavit indicating that he had neither requested nor received any video surveillance footage of Great Bridge High School from anyone. (Aff. of Nance, Ex. N to Br. in Supp. of Second Mot. to Dismiss, Dkt. No. 20-1; Aff. of Babb, Ex. O to Br. in Supp. of Second Mot. to Dismiss, Dkt. No. 20-2.) Whether agents of the Commonwealth ever possessed this evidence in the form now alleged by Earnest is clearly disputed.

Having never seen the video, Earnest can only speculate on its contents, including whether the random images collected included images of him around 4:00 p.m. on December 19, 2007. Assuming that the video existed and showed Earnest leaving the high school shortly after 4:00 p.m., as he initially told investigators and as he testified at trial (Trial Tr. at 2540), the video merely corroborates uncontradicted testimony given at trial by Earnest and by defense witness Al Ragas. (*Id.* at 2296–2397.) The prosecutor never disputed that Earnest left the high school around 4:00 p.m. Rather, the state's theory of the case was that Earnest had time to drive to Forest, Virginia, and commit the murder after he left the school. (*Id.* at 2782–84.) For this reason, even if the video were found and were considered new evidence, Earnest could not

establish the second part of the actual innocence/miscarriage of justice exception: Earnest has not established that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327. In determining whether, in light of the new evidence, no reasonable juror would find the defendant guilty, the federal habeas court must consider all evidence, old and new, admissible and excluded, "to make a probabilistic determination about what reasonable. . . jurors would do." *Id.* at 328–29. The jury already knew that Earnest did not get off work until 4:00 p.m. There is no reason to conclude that the video, if it exists, would show anything else. The evidence is ample to support reasonable jurors in concluding that Earnest had time to travel to Forest and commit the murder after he left work. Earnest has failed to establish "actual innocence" as grounds for considering his untimely claims.

III. CONCLUSION

For the reasons stated, the court will grant the respondent's motion to dismiss. Further, concluding that Graham has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(1), a certificate of appealability will be denied.

An appropriate order will be entered.

Entered: September 30, 2020.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

Appendix C

Virginia Supreme Court
(Habeas Corpus)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 22nd day of May, 2018.

Wesley Brian Earnest, Appellant,

against Record No. 171028
Circuit Court No. CL14009211

Keith W. Davis, Warden, etc., et al., Appellees.

From the Circuit Court of Amherst County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

Deputy Clerk

Appendix C

Appendix D

Circuit Court of Amherst County, Virginia
(Habeas Corpus)
[Same Judge as trial Judge]

V I R G I N I A:

IN THE CIRCUIT COURT OF AMHERST COUNTY

WESLEY BRIAN EARNEST,

Petitioner,

v. **Case No. CL14009211**

KEITH W. DAVIS, WARDEN,
Sussex I State Prison, and
HAROLD W. CLARKE, Director
of Virginia Department of Corrections,

Respondents.

ORDER

Upon mature consideration of the petition of Wesley Brian Earnest for a writ of habeas corpus, the motion to dismiss of the respondents, the petitioner's response to motion to dismiss and the authorities cited therein, and a review of the record in the criminal case of Commonwealth v. Wesley Brian Earnest, which is hereby made a part of the record in this matter, the Court finds for the following reasons that the petitioner is not entitled to the relief sought.

The petitioner raised the following claims in his petition:

A. His due process rights were violated because:

i. The prosecutor intimidated witnesses;

ii. The prosecutor withheld exculpatory evidence;

iii. The police attempted to elicit a confession from the petitioner in the absence of his attorney;

Appendix [redacted] D

iv. The court erred in excluding third-party evidence;

v. The court erred by changing venue to this Court;

vi. The prosecutor made inflammatory arguments in his closing;

vii. The Commonwealth failed to preserve evidence.

B. Petitioner's attorneys were ineffective for:

i. Failing to investigate exculpatory evidence and police misconduct;

ii. Failing to investigate authenticity and chain of custody of evidence;

iii. Failing to investigate whether charging documents were unconstitutionally obtained;

iv. Allowing improper evidence to go to the jury in an earlier trial;

v. Not objecting to evidence of the petitioner's illegal entry into the home;

vi. Not preparing a defense of suicide;

vii. Failing to have a divorce document admitted into evidence;

C. The trial Court erred in:

i. Not allowing an expert witness to testify;

ii. Allowing certain testimony by Commonwealth's witnesses;

iii. Moving the trial to this Court;

iv. Allowing evidence of time to travel to the scene of the crime;

v. Allowing evidence about David Hall's truck.

The Court finds that claims A and C could have been raised at trial and on appeal. The Court further finds that C(i) and C(ii) were presented on direct appeal.

With respect to claim B(i) which alleges the attorney failed to investigate exculpatory evidence, the Court finds that petitioner has failed to name any witness who could provide evidence of police misconduct and has not even identified the officer alleged to be guilty of misconduct. The Court further finds that the petitioner has not identified any other witnesses who could have testified for him or provided any alibi evidence and has not proffered any testimony or explained how any such evidence would have assisted his case. The Court further finds that the petitioner has not identified the witness allegedly threatened by agents of the Commonwealth. On the other hand, the Court finds that the attorney presented at least three alibi witnesses. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(ii) alleging the attorney failed to investigate the authenticity and chain of custody of certain evidence, the Court finds that the Commonwealth provided a reasonable foundation for admission of David Hall's sign-in sheet. The Court further finds that the sign-in sheet was not used to change Hall's testimony. The Court further finds that the petitioner has failed to

show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(iii) which alleges the attorney failed to investigate whether the charging documents were constitutionally obtained, the Court finds that there is absolutely nothing in the record to suggest any defect or deficiency in any of the charging documents. Consequently, the Court finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(iv) alleging the attorney failed to prevent inadmissible evidence being given to the jury during deliberations, the Court finds that the inadmissible journals were provided to the jury in the first trial without the knowledge of defense counsel and without his involvement so that any error was inadvertent. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(v) where the petitioner claims the attorney failed to object to questions about the petitioner's prior unauthorized entry into the victim's home, the Court finds that the evidence of such entry was probative of the petitioner's having knowledge of how to gain entry into the home without the use of force. The Court further finds that the evidence was probative of his having the means to commit the offenses as they were committed and in a manner that was consistent with the appearance of suicide. The Court further

that the probative value of this evidence outweighed any incidental prejudice. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient because he failed to object to admissible evidence. The Court further finds that the petitioner has not shown that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(vi) which alleges the attorney failed to present a defense that the victim killed herself, the Court finds that the attorney adopted a reasonable strategy of arguing that the Commonwealth had not proven his client's guilt beyond a reasonable doubt. The Court further finds that the attorney was aware of the strength of the Commonwealth's evidence offered to negate suicide. The further finds that relying on a suicide defense would have justified the admission of the victim's journals which would have been very damaging to the petitioner's case. The Court further finds that the attorney was able to present alibi witnesses, placing the petitioner in Chesapeake on the day of the murder. The Court further finds that the attorney offered expert testimony supporting his defense and emphasized the suspicious behavior of acquaintances of the victim. The Court finds that the attorney's strategy was reasonable. Consequently, the Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

With respect to claim B(vii) alleging the attorney failed to present a divorce document showing that the murder weapon was in the possession of the victim,

the Court finds that the petitioner has failed to identify the document or to state its contents. The Court further finds that because the divorce was in an early stage, the petitioner has not shown that there was any document that would have proven what he wanted and still be admissible against a hearsay objection. The Court further finds that box containing the gun when it was purchased was at the home of the petitioner's girlfriend and that no ammunition for the gun was found in the victim's home. The Court further finds that the petitioner has failed to show that the attorney's performance was deficient or that he was prejudiced by any of the alleged acts or omissions of his attorney.

Consequently, the Court rules that since claims A and C are non-jurisdictional issues that could have been raised at trial and on direct appeal, they are not cognizable in a habeas corpus proceeding under *Lawlor v. Warden,* 288 Va. 223, 764 S.E.2d 264 (2014) and *Slayton v. Parrigan,* 215 Va. 27, 205 S.E.2d 680 (1974). The Court further rules that claims C(i) and C(ii), having been presented on direct appeal, are also barred by *Henry v. Warden, Riverside Regional Jail,* 265 Va. 246, 248, 576 S.E.2d 495, 496 (2003).

The Court further rules that under the criteria set forth in *Strickland v. Washington,* 466 U.S. 668 (1984), the petitioner has not shown that his attorney was ineffective and that, therefore, claim B should be dismissed.

For the foregoing reasons and for the reasons set forth in this Court's opinion letter of February 16, 2017, the Court believes that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to the petitioner, Jack T. Randall, Esquire, counsel for the petitioner and Eugene Murphy, Senior Assistant Attorney General, counsel for the respondents.

Enter this 5-12 day of May, 2017

Judge

I ask for this:

Counsel for Respondents

Seen and objected to: on the grounds that the evidence provided & arguments stated in the petition were sufficient to warrant a hearing in this matter, to proceed with witnesses, and have a ruling on the merits. Additionally, this matter should have been ruled on by a judge other than the judge who presided at the trial.

Counsel for Petitioner

A Copy, Teste:
Deborah Coffey Mozingo, Clerk
By: Courtney C. Maddox
Deputy Clerk
Circuit Court Amherst County, VA

Appendix E

Virginia Supreme Court

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 29th *day of* July, 2013.

Wesley Brian Earnest, Appellant,

against Record No. 130018
Court of Appeals No. 0366-11-3

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.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: Deputy Clerk

Appendix E

In The

Supreme Court of Virginia

RECORD NO. 130018

COURT OF APPEALS RECORD NO. 0366-11-3

WESLEY BRIAN EARNEST,

Petitioner – Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Respondent – Appellee.

CORRECTED PETITION FOR APPEAL

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

All references herein are to the record filed in this Court. References to the trial transcript are designated as (*T. page number*), and references to the sentencing transcript are designated as (*S. page number*). References to the record are designated as (*R. page number*). References to exhibits are designated as (*E. number*). References to proffered testimony will be designated as (*name of witness, page number*).

On May 6, 2008, Wesley Earnest was indicted for first degree murder of his estranged wife Jocelyn Earnest and use of a firearm in Bedford County. (R. 1-3). He was tried and found guilty of both offenses in Bedford Circuit Court on April 5, 2010. The verdict was set aside on July 14, 2010, and a mistrial order was entered on July 26, 2010. A change of venue was granted on motion of the defendant and the second trial took place over defendant's written objection in the town of Amherst, with a Nelson County venire, beginning November 8, 2010.

On November 19, 2010, the jury returned a guilty verdict against Earnest for first degree murder and use of a firearm. (T. 2864). The jury recommended life imprisonment plus three years. (T. 2888), which the Court imposed on February 10, 2011. (R. 175).

Earnest duly noted his exceptions and filed his Notice of Appeal with the Virginia Court of Appeals on February 18, 2011. A writ was granted and the Virginia Court of Appeals issued its published opinion on December 4, 2012. The defendant has timely noted his appeal to the Virginia Court of Appeals and through this petition for appeal, appeals the decision of the Virginia Court of Appeals and the decision of the Trial Court.

ASSIGNMENTS OF ERROR

1.) Error regarding Fingerprint Expert.

The Trial Court erred in not allowing Jennifer Mnookin to testify as an expert in fingerprint methodology, or contradict the testimony of the Commonwealth's expert witnesses. The Virginia Court of Appeals erred by affirming the decisions and rulings of the Trial Court and by holding that the Trial Court did not abuse its discretion in failing to allow Jennifer Mnookin to testify as an expert witness in fingerprint methodology or contradict the testimony of the

Commonwealth's expert witnesses, since record proved that she was clearly qualified. (Error preserved by R. 14, T. 1999 L6-25, T. 2204, L12-19, T. 2204, L2-25, T. 2214 L1, T. 2214 L2 – T. 2229 L1, R. 158, S14 L14- S19 L1, T. 2139 L10, T. 10 L12 – T. 11 L9, R. 158.)

2.) Error regarding basis for Expert testimony, confrontation clause and jury instruction.

The Trial Court erred in allowing Andrew Johnson and Kenneth Riding to testify that a partial latent print can be identified as being an unqualified match to a known print of an individual and in refusing a jury instruction on this point. The Court of Appeals erred in affirming the Trial Court's decisions and rulings and in holding that the trial court did not abuse its discretion. (Error preserved by R. 14, T. 2016 L15-17, T. 2026 L22-24, T. 2034 L6-7, T. 2115 L19 – T. 2125 L13, T. 2134 L8-10, T. 2139 L 10-12, T. 2736 L4-5, T. 2737 L24, T. 2738 L2-23, R. 134-137).

3.) Error Regarding Change of Venue and Objection to the Venire.

The trial court erred when it granted a change of venue but then only moved the trial to another town within the judicial circuit, thereby subjecting the second jury to the same taint from "out-of-court" information influencing the jury pool as a jury from Bedford County, and by not granting defendant's objection to the *venire* once it was learned that the jury pool was tainted. The Virginia Court of Appeals erred by affirming the Trial Court decisions and ruling and by holding that the objection to the venire should not have been granted because the record did not show that the potential jurors performance of duty as jurors was prevented or substantially impaired, and by otherwise failing to consider the defendant's objection to the venire. (Error preserved by written objections filed September 10, 2010, T. 345 L14 – T. 349 L3, T. 397 L9 – T. 398 L11).

4.) Error regarding Driving Experiment.

The Trial Court erred in admitting an impermissible speculative experiment regarding the time it takes to travel from Chesapeake to Jocelyn's Pine Bluff residence in Forest. The Court of Appeals erred in affirming the decisions and ruling of the Trial Court and in holding that Officer Neal's personal observations of his driving time covering several hundred miles on a route that could not be shown to be a route that the defendant took was relevant admissible, and not speculative. (Error preserved by T. 1741 L16 – T. 1745 L4).

5.) Error regarding excluding relevant evidence improperly termed "third party guilt".

The trial court erred in excluding relevant evidence of what the court termed "third-party guilt" and improperly grouped various defense theories into the category of "third-party guilt." The Virginia Court of Appeals erred by affirming the trial courts decisions and ruling regarding these matters and in holding that the proffered relevant evidence that is characterized by the Appeals Court and the Trial Court as "third party guilt evidence" merely suggested someone else may have committed the offense and was not otherwise admissible and that the exclusion of such relevant evidence was a proper exercise of discretion by the Trial Court. (Error preserved by T 399 L6 – T. 417 L10, T. 2461 L1 – T. 2473 L19, S13 L2 – S14 L13, T. 2381 L9 – T. 2389 Le, T. 2403 L4 – T. 2412 L17, T. 2384 L 15-25, T. 2390 L8 – T. 2399 L8, T. 2461 L1 – T. 2466 L1, T. 2382 L22 – T. 2384 L6, T. 2399 L9 – T. 2412 L4).

6.) Error regarding tire evidence.

The Trial Court erred in admitting speculative evidence concerning David Hall's truck and replacement of tires. The alleged occurrence of any such events was too remote in time and there is no evidence of tire marks or the vehicle at the scene. The prejudice of this evidence outweighs its probative value. The Court of Appeals erred by affirming the decisions and ruling of the Trial Court and by holding that the speculative evidence was admissible, and by erroneously relying on an assertion that the defendant changed the tires after being confronted by the police, and other errors of fact, and by holding that the probative value of this evidence was not outweighed by its prejudicial effect. (Error preserved by R. 46, T. 1929 L16 – T. 1930 L13).

STATEMENT OF FACTS

In December 2007 Jocelyn Earnest was employed at Genworth Financial as a supervisor at the financial institution. She had been separated from her husband since 2004. Jocelyn lived on Pine Bluff Drive in the Bedford County suburbs of Lynchburg, and her estranged husband Wesley lived in Chesapeake, Virginia.

In June 2006, Jocelyn filed for divorce, alleging desertion. Wesley counter-claimed alleging constructive abandonment. (T. 1348-1351, 1372). In December, 2006, a *pendente* lite hearing was held in Bedford Circuit Court

during which the Court ordered that Wesley Earnest would have exclusive use and possession of the Smith Mountain Lake house and Jocelyn Earnest would have exclusive use and possession of the Pine Bluff marital residence. (T. 860, 1373, 2640). With their attorneys, Jocelyn and Wesley discussed property settlement proposals in Jocelyn's attorney's office on February 19, 2007. (T. 2517) (T. 1411, 1384-1385). The couple agreed to pay their only remaining mortgage debt on the lake house through escrowed money they had received on the sale of the rental house which they had previously owned. (T. 2652). The escrow account was managed exclusively by their attorneys and was more than adequate to handle the debt. There were no ongoing disputes regarding support or other property, and the couple did not have children.

At the time of the *pendente* lite Hearing and through the time of Jocelyn Earnest's death, Jocelyn earned slightly over $100,000 per year, and Wesley earned around

$70,000. Wesley and Jocelyn never met face-to-face after the February 19, 2007 meeting. (T. 1409).

In 2006, Jocelyn changed the locks to her home and installed a security system which only Jocelyn and her friends Maysa Munsey and Jennifer Kerns could operate. (T. 806, 831).

In 2005, Jocelyn entered into an intimate relationship with Marcy Shepherd who stated at trial that she was the "new love" in Jocelyn's life. (T. 1052-1055, 1096).

In December, 2006, Jennifer Kerns and Jocelyn went and removed virtually all items, including furniture, electronics, and office supplies including paper, from the lake house (T. 2372-2375, 2524), which was confirmed by a neighbor, David Wilson. (T. 2417-2419).

On the morning of December 19, 2007, Jocelyn armed her home security system at 7:34 a.m. and met Maysa Munsey and went with her to the Amherst Sheriff's office where Maysa Munsey was arrested for identity theft. (T. 2434-2440). Throughout that afternoon, Jocelyn was

exchanging text messages with Marcy Shepherd about getting together sometime that evening. (T. 1011-1014). Jocelyn attended her counseling session with Roehrich from 5:00-6:00 p.m. (T. 962). At 7:35 p.m. her home security system was disarmed. (T. 940-942).

Jocelyn Earnest died some time on the evening of December 19, 2007. She was dressed as though she had just entered her home. The last anyone heard from her was an e-mail at 7:28 p.m., most likely from her Blackberry, approving an employee's time card. (T. 816, 894-896, 2487). Jocelyn was also texting with Marcy Shepherd at the same approximate time. Jocelyn's friend, Marcy Shepherd stated she had planned to meet Jocelyn on the evening of December 19 and had driven to Jocelyn's house but claimed that she did not go in. Shepherd went to Jocelyn's home at 11:30 a.m., claimed to get a spare key in the shed, and entered the house where she found Jocelyn's body. (T. 1030-1044). The police were called and arrived after 12:00 p.m. (T. 530). Neither Shepherd or Munsey were processed

for gunshot residue, nor were their vehicles searched. (T. 562, 759-760, 818). Shepherd told the police about her texts and phone calls with Jocelyn on December 19, 2007, and though two of the messages interested Investigator Mayhew, the police did not examine or seize her phone until weeks later because she was reluctant to give it to them. (T. 789-790, 1082). When Shepherd did relinquish her phone, selective text messages beginning December 19, 2007 had been deleted and could not be retrieved. (T. 795-797, 1088).

Officer Mayhew stated that there were no points of forced entry to the residence. (T. 818-819).

The autopsy revealed that Jocelyn had died from a single gunshot wound to the head. (T. 1162-1171). There was unexplained gunshot residue on Jocelyn's right hand. (T. 1208-1209).

Other items of forensic significance were gathered from Jocelyn's home. A sheet on the bedspread was collected but not processed. A condom paper was found beside the bed

with no condom inside. A trashcan in the bedroom was overflowing, but the trash can in the bathroom was empty. (T. 809-813). An unopened condom was on the floor of the master bedroom and an unopened box of condoms was found in the guest bedroom. (T. 653-656, 671). A bloodstain which DNA tests proved to be from a male and not the defendant was found in the sink a few feet from the body. (T. 640-646, 812, 2193-2194, 2236-2237). Hair was found in the bathroom which did not belong to Jocelyn or Wesley Earnest.

The police also found a folded note near Jocelyn's body (T. 553-555), though Marcy Shepherd denied seeing the note at the scene. (T. 1056). The note was computer-generated and contained the following message: *"Mom, I just can't take it anymore. I have tried so hard to be so strong, but it's too hard to continue. The ups and downs are too much to deal with. I am trying to appear as though I'm doing fine, but the bad days are so overwhelming and lonely. My new love will never leave the family. Wes has*

buried us in debt. And starting over is too much. I am so sorry, Mom. I am so sorry, everyone. Jocelyn." (T. 556-558).

The note was examined for latent prints by two fingerprint examiners using the ACEV method (T. 2008). Two incomplete latent prints were found – one on each side of the paper containing the note. Kenneth Riding opined that there were a sufficient number of points of similarity to conclude that the incomplete or partial prints on the front and back of the note were made by the **same** thumb of Wesley Earnest. (T. 2023-2031). Riding stated that he found 16 points of similarity out of a potential 75 points. (T. 2074). Riding stated, however, that he had no way of telling when the prints were made on the paper or, how old the prints were, acknowledging that prints can last for decades. (T. 2053).

Andrew Johnson performed an independent analysis of the latent prints on the note and while his findings regarding

points of similarity did not precisely agree with Mr. Riding he agreed with Riding's opinion. (T. 2146-2147, 2162).

The note was also examined by James Fitzgerald, forensic linguist, who determined that the composition style was inconsistent with that of Jocelyn, and it did not match Wesley's writing style either. (T. 1314-1319, 1327).

Earnest testified that he was in Chesapeake the entire night of December 19, 2007. He was seen as he left the school on December 19 at 4:00 p.m. (T. 2539-2540). He went to Taco Bell between 6-7:00 p.m., where he was seen by a Taco Bell employee. (T. 2540-2545). On December 20, he arrived at school between 7:30 and 7:45 a.m., had coffee, chatted with Al Ragas, and did a teacher observation. (T. 2305, 2546-2547).

No witness saw Earnest outside the Chesapeake, VA area on the evening of December 19-20, 2007. Chesapeake, VA and Forest, VA are more than 200 miles from each other.

ARGUMENT

1.) Error regarding Fingerprint Expert.

Standard of Review: It is within the sound discretion of the trial court to determine whether a witness should be permitted to express an expert opinion, and the decision to exclude proffered expert opinion will not be reversed unless it appears clearly that the witness was qualified in the field. Landis v. Commonwealth, 218 Va. 797, 241 S.E.2d 749 (1978). Constitutional issues present a question of law as to the admissibility evidence, to which a de novo standard of review applies Walker v. Commonwealth, 280 Va. 227, 704 S.E.2d 124 (2011)

Argument and Authorities: Dr. Mnookin was the most qualified witness to appear at this trial. While the Trial Court and the Court of Appeals focused mainly on the fact that she is an evidence professor at U.C.L.A. with a law degree, she also has a degree from M.I.T. and has served in many scholarly capacities relating to fingerprint methodology. She has written and published articles on fingerprint

methodology and she was given a grant by the National Institute of Justice to compile a clinical and statistical model to develop, for the first time, a clinical and statistical basis for affecting a match between a partial print and a known print. Each of her many qualifications bear directly on her expert qualification in fingerprint methodology. Dr. Mnookin's testimony regarding fingerprint methodology is common to all fingerprint disciplines.

Dr. Mnookin's entire testimony involved her opinion and analysis of the methodology employed by Riding and Johnson. Dr. Mnookin would have testified that until she completes her study no statistics or other clinical study support the levels of certainty expressed by Riding and Johnson regarding their fingerprint identification of the partial latent print in this case.

Matters elicited on direct examination are material for the purpose of impeachment by contradiction. Kirk v. Commonwealth, 21 Va. App. 291, 464 S.E.2d 162 (1995).

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) states at page 321 that "there is little reason to believe that confrontation will be useless in testing an analyst's honesty, proficiency, and methodology," with regard to cross examination. The right to a fair trial demands that a defendant must be allowed to present testimony, Webb v. Texas, 409 U.S. 95 (1972), as well as conduct cross examination. The right to a fair trial is guaranteed by the Sixth and Fourteenth Amendments, including the right to a meaningful opportunity to present a complete defense. U.S. v. Mickens, 837 F. Supp. 745 (S.D. W. VA. 1993), aff'd, 53 F.3d 329 (4th Cir. 1995), Keane v. Kentucky, 476 U.S. 683 (1986). All scientific conclusions are subject to being qualified by the presentation of evidence which explains, limits, or contradicts those conclusions.

Dowdy v. Commonwealth, 278 Va. 577, 686 S.E.2d 710 (2009) established that the basis for a fingerprint expert's testimony was a matter of weight and not admissibility, and such testimony is admissible when it

"concerns matters not within the ordinary knowledge of the jury." State v. Dietz, 182 W. Va. 544, 390 S.E.2d 15 (1990). Payne v. Commonwealth, 277 Va. 531, 674 S.E.2d 835 (2009); Compton v. Commonwealth, 219 Va. 716, 250 S.E.2d 749 (1979).

The factual and scientific basis for the existence of the defendant's position can be found in the National Academy of Sciences Report published by the Department of Justice, Strengthening Forensic Science in the United States A Path Forward, and The National Academy of Sciences Report on forensic Sciences: What it Means for the Bench and Bar, The Honorable Harry T. Edwards' presentation at the Conference on The Role of the court in an Age in Developing Science & Technology, Washington, D.C., May 6, 2010.

Expert testimony must be based upon a proper foundation. Va. Fin. Assocs. v. ITT Hartford Group, Inc, 266 Va. 177, 585 S.E.2d 789 (2003). Wesley Earnest offered a witness to say that the Commonwealth's methodology exaggerates its efficiency since there is no clinical or

statistical foundation for the claim that the experts made regarding a partial fingerprint.

Dr. Mnookin's testimony and her statements regarding the lack of a clinical or statistical basis for Mr. Riding or Mr. Johnson's opinion is a matter for the jury. Street v. Street, 25 Va. App. 380, 488 S.E.2d 665 (1997). The jury is entitled to weigh the education and experience of the experts and accept or reject their opinions. Bolling v. Bowen, 682 F. Supp. 864 (W.D. Va. 1988). Differences in methodology have been held to be appropriate for resolution by a jury. Watson v. INCO Alloys Int'l, Inc., 209 W. Va. 234, 545 S.E.2d 294 (2001). Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609 (1990) rejected the Frye test but stated that a finding of reliability is required for the admissibility of evidence.

The Virginia Court of Appeals has allowed experts to differ regarding the methodology used for DNA evaluations. In Hodges v. Commonwealth, 26 Va. App. 43, 492 S.E.2d 846 (1997) both the defense and the Commonwealth

presented differing views of the method used to compute statistical probabilities. The Hodges case was not discussed in any way by the Court of Appeals even though it controls the result in this case and has never been overruled.

The Commonwealth experts in support of the partial latent fingerprint comparison offered a reference to a one in sixty six billion to one error rate and stated that "nobody has ever found two different people with the same fingerprint." Collectively and individually these statement represent the exaggerated claims of infallibility that surround fingerprint testimony. These claims require clarification.

All fingerprints are not the same. There are inked prints which are complete, and there are partial latent prints which must first be revealed by a chemical or other scientific process, and which are only portions of a fingerprint. Frequently, with partial fingerprints, a substantial portion of the whole fingerprint is simply missing. The fingerprints in this case are partial latent fingerprints and much of the fingerprint is missing.

Dr. Mnookin would testify from her personal experience, that she knows of a case where a fingerprint was identified to two people and that this problem has been the subject of study in her working groups and has led to the National Institute of Justice project to develop a database which for the first time will attempt to develop a system which can match a partial fingerprint to a known fingerprint. She is conducting this project and her nationally recognized work is not hearsay.

Dr. Mnookin would not have testified that she knew of no documentation supporting Johnson's assertions, she would have testified that based on her personal experience, and the original work she was performing compiling a database for the National Institute of Justice, that there was no substantiation or documentation supporting Johnson's claim. Dr. Mnookin statement is a statement of a presently existing fact, and a present scientific reality.

Johnson and Riding completely lacked personal knowledge regarding scientific support for their claims of

accuracy regarding partial latent fingerprints. Only Dr. Mnookin possessed this personal knowledge and this testimony is required for a complete defense which includes a meaningful right to present testimony. Webb v. Texas, 409 U.S. 95 (1972), Crane v. Kentucky, 476 U.S. 683 (1986).

2.) Error regarding basis for Expert testimony, confrontation clause and jury instruction.

Standard of Review: "[W]here the issue of scientific reliability is disputed, if the court determines there is a sufficient foundation to warrant admission of the evidence, the court may in its discretion admit the evidence with appropriate instructions to the jury to consider the disputed reliability of the evidence in determining its credibility and weight." Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609 (1990). Constitutional issues present a question of law as to the admissibility evidence, to which a de novo standard of review applies Walker v. Commonwealth, 280 Va. 227, 704 S.E.2d 124 (2011).

When the trial court refuses to grant an instruction proffered by the defendant, the appellate court views the facts in the light most favorable to the defendant. It is error to refuse an instruction when there is evidence to support it. Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001).

Argument and Authorities: Two independent witnesses saw Wesley Earnest in Chesapeake Virginia at a time when it would have been difficult, if not impossible for Wesley Earnest to travel to Forest Virginia in time to meet Jocelyn at 7:30 p.m. when her last known earthly acts occurred. The fingerprint identification is in direct conflict with the testimony of all persons who testified about the defendant's whereabouts on the night of Jocelyn's death, and with the biological evidence found at the scene.

In Hodges v. Commonwealth, 26 Va. App. 43, 492 S.E.2d 846 (1997) the Commonwealth was allowed to present rebuttal evidence by an expert witness regarding the methodology employed by the defense expert, and the basis

for that expert's opinion. Neither Riding nor Johnson did any work which contributed to the scientific contention that a partial latent fingerprint could be matched to a known print based upon finding a certain number of matching points discerned through a completely visual comparison of the two fingerprints. They simply reciting a routinely used premise for establishing a fingerprint match in these situations. It was apparent on cross examination that neither witness could explain the basis for this premise or their conclusion by offering a clinical or statistical context which proved their claim that the fingerprint could only belong to Wesley Earnest.

In recent years whole categories of convictions relating to comparative bullet-lead analysis, and hair and fiber analysis, have been set aside, dismissed, or retried, based on the same sort of extraordinarily inflated and exaggerated statements of accuracy that were used by the Commonwealth witnesses in this case.

In the wake of a growing expression of concern in the forensic scientific community, the United States Supreme Court in the case of Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527 (2009) discussed the same study from of the National Academy of Sciences, which the defense was prevented from using in this case. While the Melendez court stated that the accuracy of the methodology used and, incompetence of the examiner may be weeded out by cross-examination, it also acknowledged that there is a problem with "subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis..."

More recently the Scottish Government has released a report entitled "The Fingerprint Inquiry," conducted by Sir Anthony Campbell, which was released in December 2011, and which again questions the overstated claims of certainty in fingerprint analysis in a case of national prominence. In the Scottish case and the Mayfield case a proper result was ultimately obtained, but the result was contrary to the initial fingerprint identification, and only occurred, when unlike the

present case, additional expert and factual evidence was considered.

In Bullcoming v. New Mexico, 564 U.S. ___ 0910876 (2011), the Court cited Crawford v. Washington, 541 U.S. 36 (2004) by saying "the text of the Sixth Amendment does not suggest any open ended exceptions from the confrontation requirement to be developed by the courts. Giles v. California, 554 U.S. 353, 375 (2008). Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross examination." Id. at Slip Op. 13.

If the Confrontation Clause requires such clear opportunities to confront adverse testimony, an application of this Sixth Amendment right and the Fourteenth Amendment guarantees to a fair trial would require a court to allow a defendant to present a witness to confront

adverse testimony regarding overstated claims of reliability. Crane v. Kentucky, 476 U.S. 683 (1986).

In State of Maryland v. Bryan Rose, (Circuit Court of Baltimore County, Case No. K06-545, October 19, 2007), The trial judge granted Rose's motion to exclude and ACE-V fingerprint examiner's testimony finding that there is no error rate in the ACE-V method as incredible; that the ACE-V method relies on subjective judgments; that the State failed to establish its reliability; that there is no agreed upon standard for the minimum number of points required for a match; and that verification is not independent of the initial identification.

By allowing the Commonwealth to elicit testimony from it experts that the latent print is Earnest's print as an adjudicative fact, i.e. that the latent prints conclusively matched Earnest's known prints would have required the jury to wholly reject their conclusive opinions in order to find Earnest "not guilty."

The Defendant offered the following instruction (R. 134), refused by the trial court:

> The Court instructs the Jury the latent fingerprint expert's testimony is his or her professional opinion. It should not be considered by you as a conclusive fact, but should be weighed along with all the evidence that you have heard in this case. You should consider the basis for this expert's opinion and the manner by which he arrived at his conclusions. You may consider the education and experience of the expert witnesses who testified considering fingerprints when evaluating their opinions. Testimony from a latent fingerprint expert is not conclusive, in itself, on the issue of guilt; instead, guilt must be proven in light of all the evidence. As jurors, you are the ultimate fact finder and may give the fingerprint evidence whatever weight you determine is appropriate.

It is error to refuse an instruction when there is evidence to support it. Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001). The testimony amounts to a comment on the ultimate issue which is not permitted. Ramsey v. Commonwealth, 200 Va. 245, 105 S.E.2d 105 (1958).

3.) Error Regarding Change of Venue and Objection to the Venire.

Standard of Review: A change of venue is a matter within the sound discretion of the trial court. Poindexter v. Commonwealth, 218 Va. 314, 237 S.E.2d 139 (1977).

Argument and Authorities: Finding Earnest could not receive a fair re-trial in Bedford County, the trial judge granted Earnest's motion for a change of venue from Bedford Circuit Court and over defendant's written objection moved the case to Amherst Circuit Court with a venire from Nelson County. Both Amherst and Nelson County are within the same judicial district as Bedford County and all three counties are suburbs of, or otherwise closely associated with, the City of Lynchburg. The same television stations broadcast in all three counties (T. 360, L8-10) and there is a common daily newspaper. (T. 362, L13-18). The first Earnest trial, the circumstances of Jocelyn Earnest's death, and the subsequent investigation, were all widely reported in all of these media outlets.

The Court could fairly be said to have already ruled that jurors from Bedford County could not stand indifferent to the cause, Green v. Commonwealth, 262 Va. 105, 546 S.E.2d 446 (2001) and the same finding must apply to the Nelson County jurors.

Brittle v. Commonwealth, 222 Va. 518, 281 S.E.2d 889 (1981). Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984).

Over a seven hour period while jury selection was taking place, the *venire* were speculating about the case and discussing the fact that it had been tried before, and that the first jury had seen evidence that was excluded from both trials (T. 333 L1, - T. 339 L2, T. 341, L3-24). One juror recounted the extensive discussion in the jury room and said that she was surprised that everyone had not admitted talking about the case in the jury room. (T. 341-342).

4.) Error regarding Driving Experiment.

Standard of review: A Circuit Court's decision to admit or exclude evidence is reviewed under an abuse of discretion

or legal error standard and, on appeal, will not be disturbed absent a finding of abuse of that discretion or legal error. Herndon v. Commonwealth, 280 Va. 138, 694 S.E.2d 618 (2010).

Argument and Authorities: Testimony based on results of experiments is not admissible if it is based on an inadequate foundation, is speculative, or is founded on assumptions lacking a sufficient factual basis. John v. Im, 263 Va. 315, 319-20, 559 S.E.2d 694, 696 (2002).

The Court admitted evidence about the length of time it takes to travel from Chesapeake to Forest, Virginia. The evidence, concerning an automobile trip which lasted several hours, and began at the Atlantic Ocean and ended at the Blue Ridge Mountains, was generic and lacked a proper foundation. No effort was made to account for weather conditions, road conditions, traffic conditions, or even to account for the various routes which may have been used or the time of day and time of year when the trip was being made. The jury was invited to speculate about routes and

make assumptions about speed, lack of radar enforcement, and route in the case where time was of the essence. Lacking a proper foundation, testimony regarding travel time was pure speculation and should not have been admitted. Keesee v. Donigan, 259 Va. 157, 524 S.E.2d 645 (2000).

5.) Error regarding excluding relevant evidence improperly termed "third party guilt".

Standard of Review: A Circuit Court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. Herndon v. Commonwealth, 280 Va. 138, 694 S.E.2d 618 (2010).

Argument and Authorities: It is well established that in order for there to be sufficient evidence to convict in a circumstantial case there must be an unbroken chain of circumstances which are consistent with guilt and inconsistent with innocence. There is direct evidence from witnesses who saw the defendant hundreds of miles away at a time when he could not have driven to Bedford County to confront or kill Jocelyn Earnest at 7:30 on the night of the murder. There is even DNA evidence of an identifiable, yet

unknown, person's blood within a few feet of the body. The excluded evidence in this case is admissible for an independent reason as it tends to disprove circumstantial evidence which was introduced by the Commonwealth and used to support the Commonwealth's wholly circumstantial theory of guilt. Augustine v. Commonwealth, 226 Va. 120, 306 S.E.2d 886 (1983).

In any circumstantially presented murder case the events of the decedent's last few hours are relevant to time, place, motive and means. Thomas v. Commonwealth, 187 Va. 265, 46 S.E.2d 388 (1948). A defendant should not be required to present his case in a vacuum simply because the circumstances of the last hours of a decedent's life are unsavory. Every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant and should be admitted upon being offered into evidence by a proper witness. Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51, 419 S.E.2d 627 (1992). This is especially true when one considers that circumstantial

evidence should be viewed with great caution, especially in first degree murder prosecutions Chrisman v. Commonwealth, 3 Va. App. 371, 349 S.E.2d 899 (1986), State v. Frasher, 164 W. Va. 572, 265 S.E.2d 43 (1980). Abdell v. Commonwealth, 173 Va. 458, 2 S.E.2d 293 (1939).

The excluded evidence previously cited, including the evidence of Jocelyn's involvement with Maysa throughout her arrest for identity theft on the day Jocelyn died, circumstantially show Wesley Earnest's absolute absence from Jocelyn's life. He simply doesn't appear anywhere during that fateful last day. The excluded evidence tends to prove or disprove time, place, motive, means, or conduct, or rebuts and clarifies a circumstance previously introduced by the Commonwealth.

The spots of blood with an unknown DNA profile a few feet from the body and the hair from unknown persons establish the existence of other central characters in this case, and other relevant evidence should not be excluded

simply because it highlights questions reaised by this unexplained evidence.

6.) Error regarding tire evidence.

Standard of Review: A Circuit Court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. Herndon v. Commonwealth, 280 Va. 138, 694 S.E.2d 618 (2010).

Argument and Authorities: In order to be relevant, evidence must tend to prove a point at issue in a case. There is absolutely no evidence of David Hall's truck or its tire marks in or near Forest, Virginia on any date, nor is there any evidence that Wesley drove a truck at all on that day. Speculation on this point is not permitted. Courtney v. Commonwealth, 281 Va. 363, 706 S.E.2d 344 (2011)

David Hall and his wife persisted in saying, for more than a year, that they could not say that Wesley had David's truck on December 19. This was because they knew that Victoria Hall had seen Wesley when he returned the truck, and that she had left prior to school that morning in

December, 2007 around 8:00 a.m. due to rush hour traffic for a photo appointment in Virginia Beach. David always maintained that he was late for school on the day Wesley returned the truck, yet he was not late for school on December 19, 2007.

In fact, David was due at work at 8:15 a.m. and was not late for work on any day that week. There was no evidence regarding unusual odometer readings on Hall's truck. Though Earnest borrowed Hall's truck in December, 2007, the testimony is ambiguous as to when the truck was borrowed and returned. Evidence that Earnest bought new tires for the borrowed truck has no relevance to Jocelyn's death and is speculative.

Evidence is not admissible if it is not relevant and should be excluded if its prejudicial effect outweighs its probative value. Evans-Smith v. Commonwealth, 65 Va. App. 188, 361 S.E.2d 436 (1987).

CONCLUSION

For the reasons stated herein, Wesley Brian Earnest respectfully submits that the trial court erred holding that the Commonwealth met its burden of proof, and for the reasons stated herein, the defendant respectfully submits that the Virginia Court of Appeals erred in affirming the decisions and ruling of the trial court and in making further rulings in this matter thereby finding him guilty of first degree murder and use of a firearm in the commission of a felony.

Wherefore, Wesley Brian Earnest prays that the Court grant his petition for appeal. Counsel for Appellant wishes to appear and state orally the reasons for granting his petition.

Respectfully submitted,

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