No. 22-6504

IN THE

SUPREME COURT OF THE UNITED STATES

Donald A. Herrington — PETITIONER
(Your Name)

vs.

Harold Clarke Director D.O.C — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Fourth Circuit Court Of Appeals Richmond Virginia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Donald Arthur Herrington
(Your Name)

Deer Field Correctional Center
(Address)
21360 Deerfield Dr.
Capron, Va. 23829

(City, State, Zip Code)

(434)-658-4368
(Phone Number)

QUESTION(S) PRESENTED

Petitioner offers these questions in hopes that all, one, or part of a question will be heard.

QUESTION ONE:

Did the Commonwealth of Virginia adopt a trial framework that allows elected officials to brake their oath by presenting, publicizing and spreading disinformation to grand jury's, judges, attorneys, public and press, causing the loss of witnesses do to their inability to pierce the veil of the state deception; And was the U.S. Constitutional Amendments 1, 5, 6 & 14 adequate defense and public trial right violated?

QUESTION TWO:

Did the prosecutor to commit fraud on the grand jury by maintaining the case number given by the Circuit Court to a certified General District Court reduced Simple Possession charge, when the prosecutor wrote back into the certified reduced charge, the District Court struck charge Possession With Intent to Distribute, falsely presenting it to the grand jury as certified by the General District Court; And could the Circuit Court obtain jurisdiction where these actions are the derivation of the disinformation pervading the trial frame work; And did this violate U.S. Constitutional Amendments 1, 5,6 & 14?

QUESTION THREE:

Can attorneys be ineffective when they fail to object to a structural error that pervades the trail framework in a way that renders the proceedings fundamentally unfair, i.e. violate the adequate defense and public trial right; And did this violate U.S. Constitutional Amendments 1, 5, 6 & 14?

QUESTON FOUR:

Is a defendant constructively denied counsel when the court blocks presentation of mitigation of punishment for a Intent to Distribute drugs, i.e. as an accommodation, where under state law provides presentation only in the sentencing phase after guilt is established; And was counsel ineffective for failing to put a proffer on the record or object to the court's erroneous ruling, (it must be "argued and instructed on the case and chief") due to ignorance of the law; And is the current law that puts the burden on the defendant to prove accommodation and precludes one from presenting accommodation during the guilt phase a violation due process and U.S. Constitutional Amendments 5, 6, 14,?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Office of the Attoney General Jason Mayors, 202 Nth, 9th, St.
Richmond, Va. 23219

Representing Harold Clarke Director of the Department Of Corrections.

RELATED CASES

Supreme Court Of Virginai Ruling Herrington v. Commonwealth Of Va. 291 Va. 181 (2016)

Supreme Court Of Virginia Ruling, Case No. 170372 (2018)

District Court Alexandria Division Va. Case No. 1:19cv215(AJT/IDD) (2021)

Forth Circuit Court OF Appeal For Virginia Case No. 21-7384 (2022)

Suprem Court Of Virginia Ruling Case No. 200797(2021)

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix D to the petition and is

[x] reported at Herrington v. Clarke 2022 US App. LEXIS 34653; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[x] reported at Herrington 2021 Dist. LEXIS 62308; or, WL 1195931
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

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

The opinion of the Supreme Court of Va. court appears at Appendix A to the petition and is

[x] reported at Herrington v. Comm. 291 Va. 181 (2016); or, 781 S.E.2d 561
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was (12-15-2022). See Appendix D

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments to the United States Constitution.

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a…public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves this statute:

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

1. On (5-26-12) the Petitioner, **Donald A. Herrington** (DH hereafter) a non-felon, was arrested by warrant for **Possession with Intent to Distribute Oxycodone, a violation of Va. Code §18.2-248** (PWI hereafter) by the Stafford Sheriff's office. On (8-29-12) DH had a preliminary hearing to determine probable cause in **General District Court** (GDC hereafter). The GDC Judge made a factual ruling of no probable cause for PWI. The GDC did find probable cause for **Simple Possession of Oxycodone, a violation of Va. Code §18.2-250** (SP hereafter). The GDC reduced the warrant/swearing document and certified SP to the Stafford Circuit Court by way of two orders for the charge to be presented to a Grand Jury on (10-1-12), see [App. E-1 Pg.2, & App. E-2]. The Circuit Court clerk on (8-29-12) received and filed the SP charge/orders of the GDC in the **Circuit Case Management System** (CCMS hereafter) and created case number CR12000857-00 to go before the Grand Jury on (10-1-12), see [App. E-2,3,4]. The Prosecutor then decided to maintain the certified reduced warrant case number with the GDC's order of no probable cause for PWI attached. The prosecutor presented an indictment for PWI writing back into the indictment form of case number CR12000857-00, what the GDC just struck. On (10-1-12) the prosecutor presents to the grand jury an indictment form that erroneously represents a GDC certified PWI to distribute charge. DH is indicted on PWI, see [App. E-6]. Because the case number to the certified SP charge was maintained, the CCMS and **Online Case Information System** (OCIS) publicized at every source DH was indicted for a SP, see [App. E-4,5,8,12]. On 10-31-12 DH's defense attorney Ron Hurr filed a motion to quash or amend the indictment for it not being properly before the court, see [App. E-7]. On (11-1-12) the Circuit Court judge denied the motion to quash and did not rule on the motion to amend. After this denial DH waives the reading of the indictment and he is arraigned. Counsel withdraws due to a conflict. DH is set for trial on (1-8-13), newly appointed

counsel claims a conflict and withdrawals. The court continues the case over defense objection. Trial is reset for (2-20-13) and on that date the court again continues the case over defense objection. Trial occurs on (3-11-13). On (3-12-13) DH is convicted of PWI to distribute. On (3-12-13) Defense counsel asks to argue for accommodation which the judge denied stating it had to be "argued and instructed on the case and chief." The exact opposite of the law and guilt phase / sentence phase model jury instructions. DH is sentenced on (5-23-13) to 15 years and a $200.000 fine, 10 times the high and 20 times the low of guidelines. Note the clerk posted outside the courthouse doors, on all days, the docket stating DH was indicted, arraigned, tried and sentenced to SP [See posted dockets App. E-8]. Trial Counsel withdraws and DH is appointed new counsel for appeal that is noted on (5-23-13). The case is denied on (11-12-14) see **Herrington v. Commonwealth**, 2014 Va. App. LEXIS 371. DH appeals to the **Supreme Court of Virginia** (SCV hereafter) and a discretionary appeal is granted. This resulted in a published ruling **Herrington v. Commonwealth**, 291 Va. 181, (2016) [See App. A] denying the claims in the appeal, adopting a trial framework that violates several constitutional rights and allows for future constitutional violations. DH files a SCOTUS Writ of Certiorari, **Herrington v. Va.** 137 S. Ct. 509 (2016) denied on (11-28-16). DH then files a State Habeas corpus on (3-20-17).

2. During the time pending the State Habeas, the respondent gains the ear of the Stafford Circuit Court and convinced them to make an ex parte amended sentence order [App. E-9]. Respondent did this due to Petitioner in the habeas contesting the original sentence [App.E-10] order that had SP code [**§18.2-250]** violation listed in the controlling section. DH files a motion to vacate do to the ex parte actions mailed to the circuit court on (5-16-18). The circuit court denies the motion on (10-1-18), declaring "Scribner's error" by the Clerk, [App. E-14] referring to the contested sentence order [App. E-10]. DH then appeals the denial on (12-6-18) Record No. 181594. It was

denied on (9-24-19), [App. E-15]. DH filed a motion for rehearing, denied (11-21-19) [App. E-16]. DH files SCOTUS Writ of Certiorari denied (3-23-20) No 19-7551.

3. The state habeas is denied on (12-20-18) Record No. 170372 [App. B]. DH files a Federal **§2254** habeas on (2-26-19) case No. 1:19-cv-00215-AJT-IDD.

4. While that is pending DH files a second successive State habeas once an obstruction was discovered that allowed for one on (6-12-20), Record No. 200797. DH sends notice to the Federal District Court of the pending state habeas related to the Federal habeas before them. The State courts denied the second Habeas with an incomplete merits ruling and partial procedural bar that was not independent or adequate on (7-22-21) [App. E-18].

5. The Federal District court denied the Federal habeas without sending notice to the Petitioner on (3-30-21) [App. C]. DH learns of the denial 6 months later and files a motion to reconsider and provide a path to timely note his appeal. The District court denied the motion to reconsider but granted 14 days to note the appeal and request a **Certificate of Appealability** (COA) on (9-10-21). The Petitioner/Appellant timely noted the Appeal and requested a COA on (9-17-21). DH then filed a Fourth Circuit appeal by mailing it to the court on (10-7-21) Case No. 21-7384. The 4th Circuit Court of appeals denied the appeal on [12/15/22 App. D], Affirming the actions of the lower courts. Petition writ of certiorari comes before you now.

FACTS OF THE CASE IN RGARD TO QUESTION ONE, TWO AND THREE

6. The clerk of the court and prosecutor both took oaths of office broke them by their spread of disinformation that failed to uphold and faithfully defend the Virginia and U.S. Constitution. This rendered the trial framework fundamentally unfair violating the adequate defense, public trial right. Secrecy was profoundly inimical to this demonstrative purpose of the trial process. Their action kept unknown key witness from appearing by an arbitrary interference with access to

important information. An abridgment of freedoms for the public and press to assemble, free speech and their right to access information about the operation of the Judicial Branch protected by the 1st Amendment occurred. Attorneys were ineffective for failing to object to a trial frame work that allowed the spread disinformation pervading all proceedings. A structural error rendering the trial fundamentally unfair.

7. Petitioner's PWI to distribute warrant was reduced by the GDC to SP (8-29-12) and assigned the case number CR12000857-00 to go before the Grand Jury on (10-1-12), see [App. E-1 Pg.2, & App. E-2, 3]. The prosecutor committed fraud on the court by writing in the case CR12000857-00 indictment form [App. E-6] PWI to distribute, presenting it as if certified by the GDC when GDC reduced the certification to SP. The prosecution sought a "certified indictment" not a "direct indictment". That certification/warrant was filed in the Circuit Court record and given case number CR12000857-00. Prosecutor presented the front of the warrant to the grand jury [App. E-1] that stated PWI to distribute, not the back [App. E-1, Pg.2] that stated the charge was reduced to SP to bolster the indictment form. The prosecutor obtained an indictment for PWI to distribute via the certification and its case number. The prosecutor and clerk of the court also knew that by maintaining the certified SP charge case number, disinformation of an indictment for SP would be inserted into the algorithm of the CCMS, [See App. E-4]. This spread false information of the petitioner facing a charge of SP outside the courtroom on each date [App. E-8], to the judge, attorneys and on forms, [App. E-12]. The OCIS copies the[1] CCMS every 15 minutes, so the

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[1]**Daily Press v. Office of the Executive Sec. of the Supreme Court of Va.** 293 Va. 551 (2017): "[t]he Circuit Case Management System (CCMS), an electronic case management database. CCMS can be used to monitor the status of cases, prepare orders and forms, prepare civil and criminal reports...The Online Case Information System, or OCIS, is a database...designed to provide broader public access to case information through the internet...OCIS is an exact copy of the CCMS database. The copying process automatically occurs every 15 minutes."

prosecutor and clerk knew this would publicize disinformation to the public and press[App. E-5], i.e. DH was indicted on a minor SP charge on (10-1-12) when he was indicted on a serious PWI to distribute charge. Note: Va. Circuit courts[2] now solely rely on the OCIS to notify the public/press "without oral communication." Affiants [See affidavits App. E-11] would have come to trial and testified had they known the charge was a serious PWI to distribute and not a minor SP charge. Eight Affiants new DH had a valid prescription [See App. E-11, **Pg.3** Ln.10,11, **Pg.5** Ln.7,8, **Pg.7** Ln.5,6, **Pg.6** Ln.5,6, **Pg.7** Ln.5,6, **Pg.8** L. 11, **Pg.9** Ln.11,12 **Pg.10** Ln.4] for oxycodone, the charge publicized giving it no chance of a sustaining a conviction in their minds. Affiants called or came in person asking about the indictment or to see the charge. The clerk did not provide the indictment and instead stated the indictment was SP, referring affiants to the OCIS that was publicizing the same disinformation [See App. E-11, Pg. 3,5,6,7,8,9,10]. Affiants who talked to the clerk or went on the website, spread the false information to other unknown key witnesses. Affiant's testimony was of significant exculpatory value and proved the defendant's innocence. Affidavits show DH did not write the incriminating text nor did affiant Kim Burges give the defendant her medication [App. E-11 Pg.1,2,3,4,6,] directly contradicting the prosecution's theory of guilt. See [App. E-11 Pg.1] Affidavit from **Kim Burgess** (KB hereafter) where she admits to writing the text messages sent to the police on 5-26-12, when my girlfriend gave her a ride to her doctor's appointment. Also that she did not give DH her prescription which was the theory of guilt. This was corroborated by the testimony of Dr. Bajwa that he saw her that day and "upped" her prescription from 15 mg. to 30 mg. [See Tr. 412, (3-11-13) Prosecutor: "that

[2] **Howard v Comm.** 63 Va.App.580 (2014): "HOLDINGS: [1]-The trial court correctly held that the indictments against defendant were valid because the definitions of "present" and "announce" did not require an oral verbatim reading or...Va. Code Ann. 17.1-240...recorded in electronic format... 'Announce" means "to give public notice of; make known officially or publicly; deliver news of; proclaim...to give evidence of *especially without oral communication.*'

was the first day you gave her [Kim Burges] the thirty-milligram, before that you had given fifteen milligrams?" Dr. Bajwa: "yes"]. Also corroborated by affidavit from Steven Kasey and Julie Tremblay [App. E-11 Pg.2,3,4,] affirming the fact Mrs. Burges texted Steven Kasey seconds after texting the police the exact same incriminating text.

See printout of Commonwealths Exhibit one [App. E-13].

Sent text by Burges Pg. 282 **Ln. 3339:** Sent to Rob, on (5-26-12): "Got uped to 30s, u-know it."

See 44 seconds later: **Ln. 3340**: Sent to Kerry [Informant / Police]: "in did not go as planned"

Ln. 3341: "Ha got the 30s instead"

See 58 seconds later the exact same content **Ln. 3342**: Sent to Steven Kasey [the affiant] "It did not go as planned no 15s" 3343: "30s instead"

Fact: It was Mrs. Burges who saw the Doctor and "got upped" that day, not DH. See [App. E-11 Pg.1] were Mrs. Burges use the exact term in her affidavit as in the text "upped" again. This is also corroborated by Stephanie Blanchard [App. E-11 Pg.6]. Moreover, Judge Sharps (5-29-18) order [App. E-20] Pg.5 Par.7 and the prosecutor [Tr.7 Ln.20 (3-20-13)] both stated the text were "critical in the case". A situation where proof DH did not write the text is substantial. The publicizing of disinformation stating DH was in danger of a SP charge kept unknown key witness from coming to court. Moreover, the case was close, see where Judge Sharp states Tr. 205 Ln.12-15 (3-12-13) JS: "Mr. Brown I find that the Jury can support in evidence either view of the events..." In regards to guilt or innocence and if the case should be sent to the jury, i.e. "it was a close case"[3]. DH's

[3] **U.S. v. Pernell**, Dist. LEXIS 67171 (4th Cir. 2014): "evidence offered to support the case was circumstantial. Although the evidence was sufficient to send the case to the Jury, the verdict could have gone *either way*. In sum it was *a close case.*" [Emphasis added]

case was solely based off of circumstantial evidence. "Intent"[4] is a condition of the mind that can only be proven by circumstances. Other affiants would have provided mitigation of punishment testimony [App. E-11]. The prosecutor and Clerks actions caused an arbitrary interference with access to important information. This in turn raises the question of violating one's right to an adequate defense and public trial. Affiants knew the defendant had a valid prescription [App. E-11, **Pg.3** Ln.10,11, **Pg.5** Ln.7,8, **Pg.7** Ln.5,6, **Pg.6** Ln.5,6, **Pg.7** Ln.5,6, **Pg.8** L. 11, **Pg.9** Ln.11,12 **Pg.10** Ln.4] for Oxycodone, the SP drug publicized [See App.E-,4,5,8,12]. This minimized the danger and eliminated the need for witness to come to court. No one can or would, take off work to attend a trial for a serious PWI to distribute charge when the information and belief provided by all sources publicized a minor SP charge, where affiants knew the defendant possessed a valid prescription. This is like your house being on fire and the fire chief reporting smoke is coming out of your chimney. No one is going to show up for that and the fire chief would have violated his oath. To ameliorate, e.g. let's say you are running for Governor and it is publicized by the state board of elections that you are running for city council. Voters call the board of election or go on their website and they all publicized the same disinformation. Then you go to the local election site and it is posted outside the door, by that board, you are running for city council. The same as the clerk posted SP [App. E-8] outside the courthouse doors. This would violate the publics 1st amendment right to information, assemble and free speech, making you lose votes. The same as DH, who lost witnesses. When these action are performed by your adversary, in my case the prosecutor, to gain the advantage this can violate the constitution and one's oath of office.

[4] **Sawyer v. Clarke**, 2014 U.S. Dist. LEXIS 31487, *22-23 (E.D. Va. March 7, 2014) "[a]bsent a direct admission by the defendant, intent to distribute must necessarily be proved by circumstantial evidence." *Holloway v. Commonwealth*, 57 Va. App. 658, 666, 705 S.E.2d 510, 514 (2011)

8. The SCV published ruling [**Herrington v. Commonwealth**, 291 Va. 181, 781 S.E.2d 561 (2016)] fails to recognize the fraud on the grand jury nor the incompatibility with the prosecutor/clerk's actions inserting disinformation in the algorithm of the CCMS/OCIS, adopting an erroneous trail framework. **Herrington v. Comm.** justifies the actions by the prosecutor and rules the prosecutor's action did not "precluded the Commonwealth from obtaining an indictment on a charge of possession with intent to sell or distribute." Allowing a trial framework for all prosecutors in Virginia that spreads disinformation and keeps unknown key witness and others from appearing. There is a proper procedure that would be compatible with the CCMS/OCIS in the Virginia code by a direct indictment, providing a new case number. This would allow an indictment for PWI after the finding of no probable cause in the GDC. However, the prosecutor and clerk of the courts did not use it. See where the Circuit Court **Judge Charles Sharp** (JS hereafter) admonishes the prosecutor and states the proper procedure. At Tr. 7 Ln. 8-10 (11-1-12) JS[5]. The Judge noted the disrespect "to the file number". This in turn disrespected the CCMS/OCIS inserting disinformation into the algorithm, violating the interested parties' fundamental Constitutional rights to access court information, assemble, free speech, adequate defense and public trial right, which JS did not recognize. JS rules prosecutor's actions did not "violate substantial rights" resulting in an absurdity cannon. Note: When DH challenged the ex parte amending of the sentence order [App. E-9] done by the court in (2017) to moot a habeas claim. The court then rules that it was a "scribers error" [App. E-14] on the part of the clerk. If there was

[5]"[b]ut why didn't you just bring a direct indictment and submit an order to nol-pros the certified charge." Tr. 11 Ln. 7-11 (11-1-12) JS:
"I would not of done it this way. I would of have done as I suggested earlier, submitted a nol-pros order with respect to the file number so-and-so, and submitted a direct indictment for the charge the Commonwealth seeks to proceed on." [Emphasis added]

a "scribers error", it was on the part of the prosecutor when she wrote back in the certified SP case number PWI to distribute. That was a deliberate action by the prosecutor though. The judge could not rule on the derivation of disinformation spread without appointing counsel and having a hearing. The Judge marginalizes the issue by novation, cutting out the prosecutor and falsely assigning derivation to the clerk. The sentence order was a contested matter. The judge should not of amended the sentence order ex parte[6] to moot a habeas claim. Even the Circuit Court Clerk's Criminal Manual states [App. E-17] **Pg. 1-29 (H):** "When a felony case is certified to the grand jury, the Commonwealth's attorney prepares a bill of indictment, or written accusation of the charge(s), and submits same to the grand jury." It would not state "submits the same" if not required to submit what is certified when maintaining the case number to that certification. In **Herrington** the court also relies on **Moore v. Comm.** 237 S.E.2d 187, 192 (1977): "(had the General Assembly intended to bar the bringing of an indictment after a finding of no probable cause by a district court, it could have easily so provided)" In **Moore** they sought a direct indictment and had a new case number compatible with the CCMS/OCIS with separation form the GDC's prior ruling. **Moore** did not seek an indictment with a certified reduced charge case number that infected the trial framework with disinformation, pervading all the proceedings. Rulings **see** **Davis** [7] describing **Moore** recognize the fact that a direct indictment must be obtained. The

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[6] **Lewis v. Flynt** 439 U.S. 438, 456 (1979): "[r]equirement that a judge's action in a contested matter be predicated on a permissible reason inevitably gives rise to a procedural requirement that the affected litigants have some opportunity to reason with the judge."

[7] **Davis v. Comm.** 63 Va. App. 45 (2014): "interpreting Code § 19.2-186, "a mere dismissal of a felony warrant at a preliminary hearing indicates only a finding of lack of probable cause" and "discharge cannot operate as an acquittal, or finding of not guilty," of that charge or charges. ***Moore***, 218 Va. at 393, 237 S.E.2d at 191. It does not matter if the general district court judge explains why sufficient cause is lacking (as here) or provides no explanation at all. The effect is the same. In either event, the Commonwealth still has the opportunity to demonstrate sufficient cause to a grand jury *by way of obtaining a direct indictment*" [Emphasis added]

problem is the prosecutor did not seek a direct indictment that would create a new case number and be compatible with the CCMS/OCIS. *Uno absurdo dato, infinita sequuntur.* The prosecutor in this case instead went before the Grand Jury by way of the certified reduced warrant and its case number. One could argue this is as good as the prosecutor stipulating to the finding of the GDC baring re-litigation by collateral estoppel / Res judicata. The prosecutor did not have the authority to maintain the warrant/certified charge and change the GDC's ruling of no probable cause for PWI sent to the circuit court. The prosecutor maintaining the case number [App. E-2,3,4,5] to that certified reduced warrant [App. E-1 Pg.2] and presenting the indictment form as if the GDC certified the PWI to distribute was fraud and nothing more than a want for an indictment. This type of fraud violates **Va. §18.2-168**[8], applying also to[9] "electronically recorded data" i.e. public records. Prosecutor willfully presented a certified return from the GDC, uttering it as a PWI to distribute charge certified by the GDC and obtained an indictment from that false uttering. Prosecutor maintaining the certified charge case number allowed her manipulate the detention of the defendant by keeping him incarcerated. The proper procedure compatible with CCMS/OCIS as the judge stated[5] but not enforced is in **Va. §19.2-265.3**: "Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown." See **§16.1-269.1**[10] instructions on how adults are treated and spell out the proper procedure. The prosecutor was able to avoid showing good cause for a Nolle prosequi buy overruling the GDC

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[8] **§18.2-168**: "If any person forges a public record, or certificate…or utter, or attempt to employ as true, such forged record, certificate, return, or attestation, knowing the same to be forged, he shall be guilty of a Class 4 felony."

[9] **Hall v. Comm.** 200 Va. App. LEXIS 287 (2000): (Public record means "written…documents…including electronically recorded data")

[10] **§16.1-269.1** "certified the charge and all ancillary charges…if the court finds no probable cause…seek a direct indictment".

judge. Moreover, had a Nolle prosequi been obtained the charge would be gone requiring the defendant be released. That is pending submission to the Grand jury for a direct indictment with a new case number that would have been compatible with the CCMS/OCIS. The prosecutor's actions also had the added benefit of inserting SP in the CCMS/OCIS algorithm keeping unknown key witness from coming forward and others out of the trial. Even if people did show for any date, the clerks posted outside the courtroom on all days DH being in danger of SP [App. E-8]. Finally, the circuit court clerk had to know of the false publicizing of SP before, during and after the trial. Once raised in Habeas, four years later, they willfully changed the CCMS/OCIS [see App. E-4,5] from a correct statement, of a "Original charge:" SP Case Number CR12000857-00 certified on (8-29-12). To the clerk uttering the same fraud by the prosecutor that CR12000857-00 was a certified return of PWI to distribute charge created on (8-29-12) by the GDC [see App. E-19]. A lie ongoing today[11]. The PWI did not arise till (10-1-12) [App. E-6]. The clerk of court is publicizing false information to this date. See the truth [App. E-1, 2,3,4,5,6]. Proving a deliberate action by the Clerk to try to cover up their false information with new false information in violation of **§18.2-168**[8]. The state court ruling in **Herrington** raises more questions than it answers and allows for future violations of U.S. Constitutional Rights. First, what the ruling states[12] was never the claim . We claimed the prosecutor amended the indictment form to be presented to the grand jury, not that a returned indictment had been amended. The State court only makes ruling on the construct of an indictment, not the substance or statutory road map to gain one. See **Herrington**

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[11] [See Case No. CR12000857-00 at Government website, (www.courts.state.va.us)]

[12] "At the outset, we note that Herrington's contentions are based on a flawed premise — that the indictment was amended by the Commonwealth. The Commonwealth obtained one indictment against Herrington on October 1, 2012. The Commonwealth did not thereafter amend the indictment or seek from the circuit court any amendment to the indictment."

at 185 "The indictment satisfied the requirements of Code **§§ 19.2-220** and **-221, 3** and Herrington does not contend otherwise" Whether an indictment has the eye's doted or tee's crossed and is signed is not the problem, the substance was. This is the extent to the discussion of law providing no definitive answer and omitting several other statutes that show Jurisdiction could not be obtained this way. Ruling fails to address the prosecutor's fraud, incompatibility with the trial frame work and CCMS/OCIS. The Circuit Court Judge read the CCMS to the gallery on a trial date that was continued, informing all who were in the gallery the charge was only SP. Newly appointed counsel remained silent do to confusion brought on by the CCMS that he relies. See the Judge at Tr. 5 Ln. 20, 21 Tr.6 Ln. 1-4 (2-20-13) JS: "Mr. Herrington you are before the court charged with the felony possession of a schedule one or two controlled substance, you are aware of the charge?" DH states: "Yes your honor." Affiants had mailed copies of the OCIS to the defendant while he was in jail [App. E-11 Pg.5]. This caused DH to have vacillation regarding his charge and he agrees with the judge. It is unclear when counsel figured out DH was in danger of PWI. We do know that on (2-20-13) counsel thought it was SP as he remained silent, trial was continued again to 19 days later where the judge again read the CCMS and stated the charge was SP. See Tr. 6 Ln.2-6 (3-11-12) JS: "You're set for trial today on a charge of possession of a schedule on or two". Counsel on the day trail is held, corrects the judge "It's Possession With Intent". SCV ruling in **Herrington v. Comm.** is misplaced and provides no definitive answer on the laws or as to how the prosecutor and clerk of the court could do this without mass deception. Courts failed to reverse adoption of such an erred trial framework despite multiple proper filings for them to do so. The errors seriously affect the fairness, integrity or public reputation of judicial proceedings in a pejorative way. This is shown by the affiants who would have come to trial, had they known about the serious PWI to distribute charge that was concealed by state deception.

FACTS OF THE CASE IN REGRAD TO QUESTION FOUR

9. Judge Sharp constructively denied DH counsel when he denied the opportunity to argue or instruct the jury on accommodation as mandated under Va. Law. It is undisputed that the trial court interfered with defense counsel's presentation of mitigation of punishment as the defendant had a right to mandated under law, **§18.2-248 (D)**, i.e. PWI to distribute as an accommodation. See Tr. 316 Tr. 317 (3-12-13)[13]. This was the extent of the court's ruling/discussion regarding accommodation and is the exact opposite of the law, see **Porter** [14], see also **Brown**[15] .

10. Defense Attorney Joe Brown was unaware of the relevant Law for which his client is on trial for. Counsel should have objected and informed the Judge of the law and how it is applied. If the court was unconvinced by the law, then counsel should have asked to put a proffer on the record. Instead he states "Okay. Thank you." Rendering him constitutionally ineffective.

11. The way the law is applied **Porter**[14], demanding one wait till sentencing to present mitigating factors, raise a question of interfering with the write to present a full, fair and adequate defense. No state should create laws that restricts presentation of mitigating factors during the guilt phase.

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[13] **Counsel:**" I just wanted to know if the court would--If there would be an objection if I argued for accommodation, at this phase.'
Judge Sharp: "How can you argue for accommodation?"
Counsel: "Well, I think it could still be found to be accommodation at this level, couldn't it?"
Judge Sharp: "I don't think it could be found to be accommodation unless."
Joe Brown: "Okay. Thank you."

[14] **Porter v. Commonwealth** 66 Va. App 302 (2016): "An accommodation defense is a defense that pertains only to the penalty imposed on one found guilty of drug distribution. Whether a defendant acted only to accommodate another is a determination to be made after guilt has been decided and in contemplation of the penalty... The law...*falls outside the scope* of permissible argument in the guilt phase." [Emphasis added]

[15] **Brown v. U.S.** Dist. LEXIS 1198 (4th Cir. 2018):"**Va. Code 18.2-248** (emphasis added). Critically, '[a]ccording to Virginia case law, **18.2-248(D)** is *relevant only to sentencing* and...provides a reduced penalty range when the defendant proves that he acted without any intent to profit thereby.'" [Emphasis added]

REASONS FOR GRANTING THE PETITION

REASONS FOR GRANTING THE WRITT QUESTION ONE:

12. This case gives the court the opportunity to rule on an important subject and avoid the appearance of looking political or partisan. Whether or not the constitution is violated when an elected official takes an oath and then spreads disinformation is a mainstream question important to answer. This question will come before the court again with regard to former President Donald J. Trump. Specifically, the several law suits from people who got hurt and convictions for the January 6th 2021 riot. People where inspired/motivated by the president's claim of a stolen election. Citizens were hurt or faced charges due to the crowd's belief in the disinformation. Also attempt to delay or influence state electors certifying the election may come before this court. Whether an elected official can break their oath by spreading disinformation and if it can violate U.S. Constitutional rights was a matter of heated debate in the impeachment trial of the former president. Answering QUESTION ONE now, avoids later rulings from being engulfed in political stench. Answering this question also provides useful rulings for litigation in the lower courts that will come with a political magnifying glass later. Whether the spread of disinformation by government officials brakes their governmental oath of office and if constitutional violations can occur is important to answer for the Country.

13. No prosecutor or clerk should be able to take disinformation and insert it into a government software based system's algorithm to gain an unconstitutional advantage. Moreover, the use of software based systems to spread disinformation is of primary concerns to the country. This in regard to Face Book, Twitter, U-tube etc. These platforms were used to interfere in our elections. Inserting disinformation by elected officials in government websites can violate constitutional rights. There should be more of a concern for this court when a state court adopts a trial framework

that allows clerks and prosecutors to brake their oath's by spreading disinformation to the public/press by manipulating a Government website to gain an unconstitutional advantage. Many Courts now have total reliance on software based systems to inform on the operations of their judicial branch. SCOTUS has an opportunity to have rulings keep up with technology. Va. has turned their system into a powerful weapon to gain an unconstitutional advantage that should be brought to light and stopped. The errors seriously affect the fairness, integrity or public reputation of judicial proceedings. Affiants have revealed that fact by the consternation in their affidavits.

14. It is a fact that unknown key witness did not come to the trial [App. E-11] due to the spread of disinformation, i.e. the defendant being in danger of a minor SP charge when he faced a more serious PWI charge. "An arbitrary interference with access to important information or facts" was decided to be a violation of 1st & 6th Amendment Constitutional rights, among other important rulings in **Richmond** [16]. **Richmond Newspapers, INC v. Va.** also note: "Public trials come to the attention of key witnesses unknown to the parties..." An important question to answer is: Did the trial framework that spread disinformation through the CCMS, OCIS, forms, Judge and clerks

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[16] **Richmond Newspapers, INC v. Va.** 488 U.S. 555 (1980):"Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account... **[448 US 570]**...[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony... **[448 US 571]**...[t]he Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment... **[448 US 584]**...[t]hat the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch... **[448 US 585]**...Secrecy is profoundly inimical to this demonstrative purpose of the trial process... **[448 US 596]**...The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," In re *Oliver*, 333 US, at 270, 92 L Ed 682, 68 S Ct 499-an abuse that, in many cases, would have ramifications beyond the impact upon the parties before the court. Indeed, '[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'...A miscarriage of justice that imprisons an innocent accused [can result] ... Facilitation of the trial fact finding process, **<*pg. 1003>** therefore, is of concern to the public as well as to the parties.**21** Publicizing trial proceedings aids accurate fact finding. 'Public trials come to the attention of key witnesses unknown **[448 US 597]** to the parties...As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced

violate the adequate defense and public trial right, due to the loss of witness that would have come to the trial but for that disinformation? **Richmond Newspapers, INC v. Va.** deal with the public trial right and whether or not the doors were open. There is no ruling by the SCOTUS on when the press does not report on a charge or the public fail to attend the trial for a charge that has been falsely stated or minimized. The Fourth Circuit affirmed the District Court stating "that [constitutional] right does not encompass plaintiffs' asserted right to "correct court information." **Herrington v. McClanahan**, 2020 U.S. Dist. LEXIS 173697, (2020); Cf. [17] **Herrington v. Clarke**. The Fourth Circuit has ignored the deliberate use of the disinformation that pervaded the trial. Moreover, the deliberate providing of false information is a form of withholding information. This can interfere with the access to information, ability to assemble and free speech, that the public and press have a right to. The Fourth Circuit ruling that incorrect information cannot violate any 1st amendment constitutional right, because disinformation was provided is strained. Such rulings could encourage the deliberate use of disinformation to get around constitutional rights and laws to access information, assemble and free speech. See[16] **Richmond Newspapers, INC v. Va.**:

> "[t]hat the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch... **[448 US 585]** ...Secrecy is profoundly inimical to this demonstrative purpose of the trial process... **[448 US 596]"**

The District court also ruled[17] "state took no affirmative action to interfere with the ability of any party to attend the trail". Publicizing DH was on trial for SP and obstructing the PWI to distribute

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[17] **Herrington v. Clarke**, 2021 U.S. Dist. LEXIS 62308, (2021) however, to locate any precedent to sustain petitioner's argument that individuals possess a constitutional right to access "correct court information."...Petitioner, though, has not alleged any facts that show the state took affirmative action to interfere with the ability of any party to attend his trial and has thus failed to state any freedom of assembly claim... as a criminal defendant, petitioner was entitled to call witnesses on his own behalf at the guilt and sentencing stages of his prosecution. He therefore could have called the individuals he claims were denied access, and his decision not to do so cannot be blamed on incorrect information displayed on the state's website.

information from the public and press are affirmative action that interfere. One cannot make plans to attend trail for PWI when that is concealed from them. This was from the start of the indictment till four years after the conviction. Fraud resulted in the derivation of disinformation that pervaded the entire trial process. If the venue was changed and it was reported to be at the wrong place by all sources, i.e. clerks, Judges on forms and through the OCIS, one could not say the public trial right was honored by claiming the doors were open[18]. There was no reasonable notice for the trial to be held "in accordance with the statute" for PWI to distribute. The mere fact of having the doors open after all sources falsely informed the public DH was in danger of a minor SP indictment cannot serve as a constitutionally sound trial framework. In this day and age, the courts, public and press have total reliance on these software based systems. Thus making the need for rulings that keep up with technology where various constitutional rights may be impacted. With the ruling **Herrington v. Comm.** (Supra) e.g. a prosecutor can seek an assault charge in the GDC and have it certified to the Circuit court. Then maintain that certified case number and gain an indictment for attempted murder inserting the wrong charge in the CCMS/OCIS. Cf. If one can do this with a factual ruing of no probable cause for PWI to distribute attached to that certified charge/case number. Then it stands to reason that a prosecutor can maintain any certified charge case number and present a higher charge, inserting disinformation into the algorithm of the software. Publicizing the lessor charge, keeping the public and the press unaware of the what crime one is in danger of being prosecuted or their need to be present. Also loss of days preparing for the wrong charge by attorneys can occur. Removing all demarcation on what a prosecutor can do does not meet constitutional standards guaranteed to U.S. citizens. District Court also ruled[17] "petitioner was

[18] **Vescuso v. Commonwealth**, 5 Va. App. 59 (1987): "Provision should be made for reasonable notice to the parties and general population who have a right to expect the trial to be held at the courthouse in accordance with the statute."

entitled to call witnesses on his own behalf at the guilt and sentencing stages of his prosecution. He therefore could have called the individuals he claims were denied access, and his decision not to do so cannot be blamed on incorrect information displayed on the state's website." The judge has omitted from his ruling forms, clerks and even judge at times stating to the gallery the charge was SP. The ruling is contrary to SCOTUS president. See[16] **Richmond Newspapers, INC v. Va.**: "Publicizing trial proceedings aids accurate fact finding. 'Public trials come to the attention of key witnesses unknown to the parties'..." The defendant was entitled to "key witnesses unknown to the parties" to come forward. The District court ruling and Fourth Circuit Affirming does not recognize that right, nor the affiants who stated they would have come to trial and testified but for their inability to break the veil of the state's deception. This cannot serve as a sound trial frame work that recognizes and protects constitutional right.

REASONS FOR GRANTING THE WRITT QUESTION TWO:

15. The court should not gain **Subject Matter Jurisdiction** (SMJ hereafter)[19] when fraud was used to gain an indictment and that fraud results in the derivation disinformation inserted into the CCMS/OCIS algorithm violating the adequate defense, public trail right. Moreover, the procedure violated Virginia's laws. In Virginia "[w]hen determining jurisdiction first requires analysis of the merits on an issue." **Rutter v. Oakwood** 710 S.E. 460 (2011); That determination was made in the GDC and certified to the Circuit court were they gave the certification case number CR12000857-00 set to go before the Grand Jury on (10-1-12) see [App. E-2,3]. The day of (10-1-12) was slated to have tens of people all be indicted by certified GDC charges. No "Direct

[19] **U.S v. Cotton** 535 U.S. 625 (2002): "Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived, Thus defects require correction, regardless of whether the error was raised in district court... [535 U.S. 634] ...the Fifth Amendment grand jury rights serve a vital function in providing as body for citizens that acts as a check on prosecutorial power"

Indictment" charges as that is a different procedure. The prosecutor committed fraud on the grand jury by presenting a PWI to distribute charge indictment form as if certified by the GDC when they had lowered the certified charge to SP. This fact alone could have influenced the grand jury decision making by considering the lower court judge certified a finding of probable cause for PWI when the inverse happened. In Virginia direct indictments state "DIRECT INDICTMENT" at the top. When that is not present and by the type of hearing being held, the grand jury knows if charge was certified by the low courts. Also the filing and presenting of the warrant tells you it was certified by the GDC. See CR12000857-00 indictment form listing PWI to distribute [App. E-6] where the "DIRECT" is absent denoting certification of the charge from the GDC. See also the record for CR12000857-00 where the certified reduced warrant was filed and is part of the record. While the GDC ruling does not constitute acquittal for the purpose of double jeopardy. The GDC decision of lowering the charge to SP and the prosecutor maintaining the case number/filings provided to that charge is as good as stipulating to the SP. This does bar relegation for CR12000857-00 by collateral estoppel / Res judicata. The Prosecutor did not have the SMJ to write back in what the GDC Judge just struck. The prosecutor and grand Jury did not have the authority or SMJ to overrule the GDC judge. If the jury was aware the GDC lowered the charge, which I doubt, then the Grand Jury did not have SMJ to review the GDC order reducing the warrant or the power to overturn it, see **Wright v. Comm.**[20]. The GDC Judge made a decision on the evidence and witnesses that was before him. The GDC Judge ended prosecution for PWI to

[20] **Wright v. Comm.** 667 S.E.2d 787 (2008): "We hold that the circuit court is without *subject matter jurisdiction* to conduct...review to the district court's order...and therefore cannot reverse that court's order... However, in criminal cases, General Assembly has not provided any authorization that would permit a circuit court to review a district court's discretionary decision ending prosecution." [Emphasis added]

distribute in the warrant lowering it to SP, certifying it to the Circuit Court where they gave it Case No. CR12000857-00 [App. E-1 Pg.2, E-2,3,4,5]. If the jury was aware of that then they reviewed the GDC findings and overturned them. No Grand Jury has the authority to do this and SMJ cannot be achieved this way. In **Herrington v. Comm.** (Supra) they rely on **Moore v. Comm.** 218 Va. 388 (1977) to state why the prosecutor could bring back up the PWI after the GDC reduced the warrant. That case is not analogous to this case. In **Moore** the charge was obtained by a direct indictment and had a new case number with no attachment of the GDC ruling and was in regards to double jeopardy. Also contrary to this case, no fraud was alleged and the trial frame work was compatible with the CCMS/OCIS. In **Wright v. Comm.** (Supra)[20] they state why the court would be without subject matter jurisdiction. **Wright**[21] also states why a dissent's reliance on **Moore** "is also misplaced". In petitioner's case obtaining jurisdiction by way of the case number to a reduced warrant, restricted the prosecutor and grand jury to the GDC findings. Keeping the case number to the certified reduced warrant and submitting it to Circuit Court's Grand jury to review that warrant, "required the circuit court to consider the basis for the dismissal in the [General] district court." Reviewing the GDC ruling of no probable cause and overturning the order in CR12000857-00 is

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[21] **Wright v. Comm.**: "The dissent contends that deciding this case on jurisdictional grounds runs contrary to our Supreme Court's decisions in *Williams*, 208 Va. 724, 160 S.E.2d 781; *Foster v. Commonwealth*, 209 Va. 297, 163 S.E.2d 565 (1968); and *Moore*, 218 Va. at 388, 237 S.E.2d at 187. According to the dissent, if subject matter jurisdiction were a proper basis for our decision in this case, our Supreme Court would have decided those cases on subject matter jurisdiction, rather than reaching the [***18] merits of the cases. See infra at 23-30. We disagree...As we noted supra, this case involves two separate criminal prosecutions. By bringing a motion to dismiss pursuant to **Rule 3A:9(b)**, Wright was asking the circuit court to reach back into a concluded legal proceeding and review the district court's discretionary decision in that previous case. *The dissent's reliance on Moore*, 218 Va. at 388, 237 S.E.2d at 187, *is also misplaced. Moore* involved two issues: first, whether the Double Jeopardy Clause precluded further prosecution after dismissal at a preliminary hearing; and second, whether the statute required a preliminary hearing once the defendant [***19] was indicted for the same offense. Id. at 390, 393, 237 S.E.2d at 189, 191. Neither of these issues required the circuit court to consider the basis for the dismissal in the district court." [Emphasis added]

contrary to Virginia law. There are several laws and case law that state the trial framework could not proceed this way. Yet the lower courts either omitted them or used a strained and curious account. In **Herrington v. Clarke**, U.S. Dist. LEXIS 62308 (2021) they admit: "Court is unable, however, to locate any precedent to sustain petitioner's argument that individuals possess a constitutional right to access "correct court information." Demonstrating SCV and Fourth Circuit rulings "limited available precedent makes obvious that a 'definitive[ ] answer' is nowhere to be found" **Bah v. Barr** citing **Mathis**;[22]. There are several laws that the lower courts have ignored that would have provided a "definitive answer" under law. See **§19.2-217**[23], requires "a writing verified under oath" to gain SMJ. The prosecution used the reduced warrant for the "writing verified under oath" constraining SMJ to that writing/warrant of SP. See **§19.2-218**[24], states the defendant is entitled to the hearing on probable cause and "no indictment shall be returned" unless waived. The judge found no probable cause for the PWI to distribute charge. The law could not have meant that you would have this hearing and write into the indictment form what the judge just struck while maintaining the case number to the GDC findings. See **§19.2-190.1**[25] the law

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[22] **Bah v. Barr** 950 F.3d 203, 215-216 (4th Cir. 2020): "We look first to Virginia's state court decisions. *Mathis*, 136 S. Ct. at 2256..."definitively answers the question . . . [we] need only follow what it says" (citation omitted) ...The limited available precedent makes obvious that a "definitive[ ] answer" is nowhere to be found. *Mathis*, 136 S. Ct. at 2256..."

[23]**§19.2-217** "An information may be filed by the attorney for the Commonwealth based upon a complaint in *writing verified by the oath of a competent witness*; but no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found..."

[24]**§19.2-218** "No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and *no indictment shall be returned* in a court of record against any such person prior to such hearing unless such hearing is waived in writing by the accused." [Emphasis added]

[25] **§19.2-190.1 Certification of ancillary misdemeanor offenses:** "Upon certification of any felony offense pursuant to this chapter, the court shall also certify any ancillary misdemeanor offense to the clerk of the circuit court *provided that the attorney for the Commonwealth and the accused consent* to such certification." [Emphasis added]

allows for certification of a lesser charge than probable cause was found. This is only allowed if the defendant consents. If consent is required to allow an ancillary charge to go forward by way of certified a felony. Then to go forward with a felony charge by way of a certified ancillary charge, consent would be need even more so. However, the prosecutor cannot seek a charge the district court dismissed/reduced by way of the certified lessor charge, which is exactly what she did. The certification case number that was maintained has the finding of no probable cause for PWI to distribute attached. See **§16.1-269.1.** [26] This law gives Instructions on how adults are treated, spelling out the proper procedure. If the prosecutor desires to bring back the charge for which no probable cause was found. The statute makes it clear, a direct indictment is required. This gives the charge a new case number that would be compatible with the CCMS/OCIS. See **§19.2-189** [27]

See App. E-1 Pg.2 and App. E-24 Pg. 1 & 2 where No capias was issued for the PWI on (10-1-12). If SP disappeared with an indictment for PWI, what was accused being held by. All ten continued custody orders say the accused was being held on SP, [App. E-12]. See **§8.01.4**[28]. The trial framework or "docket control procedures", adopted in **Herrington** "abridge substantive rights". This cannot serve as a constitutionally sound method for the circuit court to gain SMJ for a PWI to distribute charge. The arbitrary construction of Virginias own Laws is unsupportable, **Mullaney v. Wilbur** [29] violating due process.

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[26] **§16.1-269.1. Trial in circuit court; preliminary hearing; direct indictment**; remand (D): "certified the charge and all ancillary charges…if the court finds no probable cause…seek a direct indictment"

[27] **§19.2-189** "If the accused be committed, it shall be by an order of the judge"

[28] **§8.01.4** "docket control procedures…shall not abridge substantive rights"

[29] **Mullaney v. Wilbur** 421 U.S. 684 (1975) "Within broad limits a state court must be the one to interpret its own laws. Never the less, a totally unsupportable construction which leads to an invasion of constitutional due process is a federal matter".

REASONS FOR GRANTING THE WRITT QUESTION THREE:

16. It was ruled in **Weaver v. Massachusetts**[30], without deciding, that "an error...deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error" Contrary to **Weaver**[29] the errors here did "pervade the whole trial and lead to basic unfairness." The question in regards to counsel's being ineffective for the failure to object to a structural error is important to answer. The trial framework was in peril at the indictment stage. Mr. Reyes who was representing DH at the grand jury hearing should have objected to the fraud i.e. the charge being presented as a PWI to distribute charge certified from the GDC. Also an objection to the submission of the front of warrant to bolster that claim. The fact was the back stated the GDC reduced the charge to SP [App. E-1 Pg.2]. Any attorney acting within professional norms would have read that, objected to the disinformation, argue the problems this would cause with the CCMS, OCIS, adequate defense and public trial right. Objection would have stopped the *Uno absurdo dato, infinita sequuntur*. No judge would have allowed case CR12000857-00 to go forward as a PWI to distribute charge. Moreover, defense counsel Mr. Hurr who filed the motion to quash or amend failed to argue the fraud, spread of disinformation in the CCMS, OCIS, on continued custody orders and how the public trial /

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[30] **Weaver v. Massachusetts** 137 S.Ct 1899 (2017): "The question is whether invalidation of the conviction is required here as well, or if the prejudice inquiry is altered when the structural error is raised in the context of an ineffective-assistance-of-counsel claim...This case requires a discussion, and the proper application, of two doctrines: structural error and ineffective assistance of counsel. The two doctrines are intertwined; for the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error...The public-trial right also protects some interests that do not belong to the defendant. After all, the right to an open courtroom protects the rights of the public at large, and the press, <*pg. 434> as well as the rights of the accused. See, e.g., *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 508...(1984); **Richmond Newspapers, Inc. v. Virginia**, 448 U.S. 555, 572-573...(1980). So one other factor leading to the classification of structural error is that the public-trial right furthers interests other than protecting the defendant against unjust conviction...prejudice can be shown by a demonstration of fundamental unfairness,"

adequate defense right could be effected. Effective counsels also would have argued the prosecutor and clerk committing fraud as laid out by the statute **§18.2-168**[8]. Joe Brown who took over the case also failed to make these arguments. An obstruction occurred that hindered Counsel's ability to prepare an adequate defenses do to the loss of key unknown witnesses. Counsel was also confused by the CCMS that he relied, causing him to prepare for the wrong charge. This can also be construed as constructive denial of counsel rendering him ineffective. Moreover, the trial frame work infected the plea process. Counsel tried to seek a deal for a misdemeanor SP [App. E-23] after he said the charge was SP. There also was a PWI no time plea on the table [App. E-22]. This was turned down due to the court stating to the gallery the charge was SP, counsel stating the indictment was unlawful and speedy trial was violated. Counsel stated speedy trial clock was from the preliminary hearing, citing **§19.2-243** and the case number. SCV ruled in **Herrington**, Id at 186, the clock started at the indictment. All added to DH's vacillation about the charge. Any attorney acting within professional norms would have objected to the trail frame work that caused structural error pervading the proceedings rendering them fundamentally unfair.

REASONS FOR GRANTING THE WRITT QUESTION FOUR:

17. The claim was fully supported by law and the facts in the record. The testimony to go along with those facts were un-contradicted. Lower court's rulings ruling on the facts were so far outside the law, distorted and unreasonable to call for action by this court.

18. First: Constructive denial of representation[31] happened when Joe Brown asked to argue for accommodation during the sentencing phase, the only time it's allowed. Court erroneously ruled[13]

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[31] **Strickland v. Washington**, 466 U.S. 668, 692, (1984): "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic*, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658"

(he had to "argue[] and instructed on the case and chief"). This was the inverse to how the law is applied in Virginia. See[14] **Porter v. Comm.** "The law...falls outside the scope of permissible argument in the guilt phase." Cf. [15] **Brown v. U.S.**. See also model jury instructions [App. E-21 Pg.1] "Guilt phase" has no mention of accommodation. See [App. E-21 Pg.2] "Sentence phase" instruction where accommodation is found. The SCV agreed the court erroneously ruled that we had to argue and instructed in the case in chief. See SCV order[32] [App. B] Pg. 20, Par. 2. The preceding sentence was unreasonable, SCV Order (12-20-18) Pg. 20, Par.2: **"**Although counsel timely *argued at the penalty phase that the evidence showed the petitioner intended to distribute the drugs as an accommodation***"**. This never happened. Judge Sharp did not allow counsel to "argue" one word about "accommodation". Footnote[13] is the total extent to the discussion. Counsel asked the questions, could he argue, he did no arguing. No reasonable or fair minded jurist would ever say what the SCV did, i.e. counsel "argued at the penalty phase that the evidence showed the petitioner intended to distribute the drugs as an accommodation" because it never happened. A complete fabrication of what counsel Joe Brown was able to "argue" defies reason, and is indeed unreasonable. Thus rebutting any presumption by "*clear and convincing evidence*, and a *decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding*." **28 U.S.C. 2254(B)(2) & (e)(1)**; State "interference" prevented JB from presenting/proving mitigation evidence, arguments, and a crucial jury instruction central in DH's defense for a lower sentence. See **Mathews v. U.S.** 485 U.S. 58 (1998): "[d]efendant held entitled to jury instruction...even if defendant denies one or more elements of crime." This purloined JB's chance to "subject[] the prosecution's case to meaningful adversarial testing, thus

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[32]**SCV** order Pg. 20, Par. 2: **"**[t]he court *erroneously ruled* that it could not find accommodation unless the issue was 'argued and instructed in the case [in] chief'**"** [Emphasis added]

making the adversary process itself presumptively unreliable" **Saoud v. U.S.** Dist. LEXIS 62541 (4th Cir 2018); Meeting the standard for constructive denial of representation from state inference **Strickland v. Washington** citing **Cronic**[31] rendering counsel ineffective.

18. Second: IAC for failing to investigate and present mitigation of punishment for the charge his client is on trial for. This claim centers on ineffectiveness deprived the defendant of a substantive or procedural right to which the law entitles him. Counsel did not know the law regarding PWI and accommodation for which his client is entitled to present evidence under the law, **§18.2-248 (D).** Effective counsel would have objected and informed the judge of the relevant law when he said we had to argue and instruct accommodation during the "case in chief" as court ruling was the exact opposite of the law. If Judge Sharp was unconvinced by the law, then effective counsel would have asked to put a proffer on the record. DH had a constitutionally protected right to mitigation evidence. See a straight forward application of **Strickland** with regards to mitigation evidence. **Williams v. Taylor** 529 U.S. 362 (2000)

> "(b) an unreasonable application of such federal law, insofar as (i) the state court's analysis concerning a "mere" difference in outcome relied on an inapplicable exception to *Strickland v Washington*, (ii) the state court failed to evaluate the *totality of the available mitigation evidence...a straightforward application of Strickland* when counsel's ineffectiveness deprives the defendant of *a substantive or procedural right to which the law entitles him.* Here, Williams had a *constitutionally protected right to provide mitigating evidence*" [Emphasis added]

19. DC ruling advanced a new theory and argument that was never made. Is contrary to the facts in the claim and record, regarding IAC failing to investigate and present mitigation of punishment. Such a distorted look at the facts by the lower court's rulings are unreasonable and the affirming of these actions by the Fourth Circuit. The district court in **Herrington v. Clarke**, U.S. Dist. LEXIS 62308 (Va. 2021) comes up with a new argument the petitioner never said or implied. Such a perfunctory ruling so opposite the claim is curious and not a de novo review.

See[33] where I underline the court's false statements resting on an incorrect factual predicate, an erroneous ruling not in line with the actual claim.

20. Here is the real claim, supported by the record. It was testified that Andrea Flood would receive the Dilaudid directly from the "informant" and was in the car for that reason. DH was getting nothing, there was no intent to profit or a consideration for DH. The SCV ruled DH was paying Andrea Flood's debt to him [the informant] so he would give back her Dilaudids. The pills Andrea gave the informant early that month before he was arrested. SCV state in there [App. B] (12-20-18) ruling Pg. 20, Par. 2: "Petitioner testified he planned to meet the informant to pay Flood's debt to him [the informant] and receive Flood's Dilaudid pills in exchange." SCV leave out the un-contradicted testimony that Flood was there at the meet to get her medication back directly. See Tr. 43 Ln. 1-13, (3-12-13) DH: "I would have to pay some of that debt down and they would return some of that medicine back to *her*." Tr. 91 Ln. 6-8, (3-12-13) DH: "She definitely let me know…she didn't have anything please help *her* get some back." Tr.103 Ln. 18-21, Tr.104 Ln. 1 (3-12-13) DH:

> "I was going to pay down the debt, and he was going to return some of her medicine." TM: Okay. So what you expected to happen hand to hand was giving him some cash and him giving you Dilaudid?" DH: *Giving her, her Dilaudid.*" [Emphasis added]

The testimony was completely un-contradicted and fit with all the facts and circumstances. So even though the jury did not believe DH was going give money to the informant, and they believed

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[33] **Herrington v. Clarke**, U.S. Dist. LEXIS 62308 (Va. 2021): "jury found petitioner guilty of possessing oxycodone with intent to distribute it despite petitioner's testimony that this was not the case. Petitioner appears to misunderstand this ruling and believes he was entitled to an accommodation instruction defense based on his version of event that he sought to meet the informant with respect to his girlfriend's debt and Dilaudid medication, which he claimed to be taking possession of for her. But because the petitioner was not convicted of possessing Dilaudid with intent to distribute it he, was not entitled to an accommodation mitigation instruction theory at sentencing under that theory, a theory that the jury had rejected as false."

DH was handing over oxycodone to reduce her debt, they still could have found that DH was a middle man with no consideration for him, getting nothing. Andrea Flood was there to get her lawfully prescribed medication back directly as testified to. DC ruling that the jury rejected a theory regarding DH being convicted Dilaudids as accommodation was never the claim. The claim was DH could not present[34] "mitigation of punishment to be fully and freely developed" from state interference and IAC. DH had no chance to present accommodation arguments surrounding the case. The District Court did not comprehend the claim even though the SCV understood the claim to be regarding distribution of oxycodone as an accommodation. See SCV's state Pg. 20, Par. 3 (12-20-18): "The record, including trial transcript, fails to demonstrate any evidence petitioner agreed to meet the informant to distribute the oxycodone to him as an accommodation." This ruling though and Federal Courts affirming, is so unreasonable it shocks the conscious. DH detailed why the SCV ruling was unreasonable. Fact: Arguing accommodation in the guilt phase is impermissible **Porter**[14]. If one is not allowed to present mitigating factors, argue or instruct in the guilt phase any downward departure in a sentence for accommodation according to law. Where the defendant waited till sentencing phase, the only time it is allowed and the court shutdown that opportunity. There is no reason you would find "any evidence". DH tried to argue/present "evidence," witnesses and instruct at the appropriate time in the penalty phase. The SCV ruled the court denied the request "erroneously" as a matter of law, so there is absolutely no reason why you would find "any evidence" in the "record" and "transcript" of accommodation. DH was not allowed to present "any evidence", argument, witnesses and instruct on accommodation in the sentencing phase. For the SCV to say "The record, including trial transcript, fails to demonstrate

[34] **Glover v. U.S**, 531 U.S. 198, 203, (2001) "[S]entencing is a critical stage of trial at which a defendant is entitled to effective assistance of counsel a sentence imposed without effective assistance must be vacated and re-imposed to permit facts in mitigation of punishment to be fully and freely developed."

any evidence petitioner agreed to meet the informant to distribute the oxycodone to him as an accommodation." when that opportunity was shutdown is unreasonable.

21. The SCV uses the wrong analysis according to federal law regarding when "ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him" see **Williams**[35]. The lower courts did not conduct an evidentiary hearing, where facts can be fully and freely developed with the assistance of counsel. This shows a [**§2254 (B)**]: "circumstance exist that render such process ineffective to protect the rights of the applicant." The court is required to view the[36] "totality of the mitigating evidence" from an evidentiary hearing. The mitigating evidence must be considered with counsel present and the ability to subpoena evidence and witnesses intact. Moreover, DH provided 1 to 7 reason [Federal Habeas Pg. 44,45] why an accommodation instruction was warranted and the ignoring of that evidence made the court ruling defective. See **(1)** At sentencing during prosecution questioning, DH admitted to providing drugs an accommodation to other people [Tr.347,346 (3-12-13)] so it was reasonable for the jury to think DH was doing that again. **(2).** Fact, nowhere does any text, testimony or evidence state DH was to get anything in return for pills. The fact of no evidence of "intent to profit thereby" **Brown**[15] or consideration from a distribution for DH anywhere, is evidence the jury could have found for

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[35] **Williams v. Taylor** 529 U.S. 362 (2000): "(ii) the state court failed to evaluate the totality of the available mitigation evidence...a straightforward application of Strickland when counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him...Williams had a constitutionally protected right to provide mitigating evidence"

[36] **Elmore v. Ozmint** 661 F.3d 783 (4th Cir. 2011): "assessing the prejudicial effect of a failure to investigate mitigation evidence for sentencing, *a court acts unreasonably if it does not "evaluate the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - in reweighing it against the evidence in aggravation."*... ("The [state habeas court's] decision that Porter was not prejudiced by his counsel's *failure to conduct a thorough - or even cursory - investigation is unreasonable* [under *Strickland*]. The [court] either did not consider or unreasonably discounted the mitigation evidence adduced in the post-conviction hearing."); *Rompilla*, 545 U.S. at 390-93 (finding prejudice under same totality-of-evidence standard on de novo review);" [Emphasis added]

accommodation. **(3).** Fact, there is substantial testimony fitting with all the facts and circumstances that DH was there to pay Flood's debt so she could get her medication back directly. See Tr. 43 Ln. 1-13, (3-12-18) DH: "I would have to pay some of that debt down and they would return some of that medicine back to *her*. At Tr. 91 Ln. 6-8, (3-12-12) DH: "She definitely let me know...she didn't have anything please help *her* get some back. At Tr. 103 Ln. 18-21, Tr. 104 (3-12-18) DH:

> "I was going to pay down the debt, and he was going to return some of her medicine." TM: Okay. So what you expected to happen hand to hand was giving him some cash and him giving you Dilaudid?" DH: *Giving her, her Dilaudid.*" [Emphasis added]

The testimony was completely un-contradicted and fit with all the facts and circumstances. So even though the jury did not believe DH was going give money to the informant, and believed DH was handing over oxycodone to reduce the debt, they still could have found that DH was not getting anything and Flood was there to get her lawfully prescribed medication back directly as testified to. **(4).** Fact, Dr. Bajwa testified that Flood was being prescribed Hydromorphone, the generic for Dilaudid. Corroborating the testimony see Tr. 429-430 (3-11-13). **(5).** Fact Flood was in the car and drove there. Corroborating the testimony. Why was she there? To get her medication. **(6).** Fact It was proven by several drug test, from 3 different agencies' that DH was not taking Dilaudid. The drug testified being sought from the informant for Mrs. Flood. See Tr. 462 Ln. 1-6 (3-11-13) **Karen Powell** director of the ASAP program testified DH tested positive for "Oxycodone" and had a prescription. See Tr. 447 Ln.17-21 (3-11-13) **Kevin Hudson** Captain from the Jail that DH tested positive for "Oxycodone" and had a prescription. See Tr. 432-443 (3-11-13 **Lynn Greenstein** with Alliance Therapy Center testified to DH testing positive for opiates and DH had a prescription. Not one of these recent drug test did DH test positive for Dilaudid. Thus corroborating the testimony that DH was paying Flood's debt so she could get her medication back directly, and stop her from complaining she had none. **(7)** See also testimony by Deputy McBride

Tr. 200 Ln. 2-5 (3-11-13) JB: "And there's no price specifically, there's no money mentioned in here is there?" DM: "No. sir". Corroborating DH's testimony. When the facts are reviewed in their totality, and in the light most favorable to the one seeking the instruction, they show substantial evidence and testimony DH was getting nothing. There was not intent to profit or a consideration for DH, i.e. an accommodation. When the SCV has evidence before it, and they are required to review the[34] "totality of the mitigating evidence", but ignores it, is unreasonable. SCV ruling "The record, including trial transcript, fails to demonstrate any evidence petitioner agreed to meet the informant to distribute the oxycodone to him as an accommodation" is "defective"[37]. This is from not granting a hearing, ignoring evidence before them and the fact that opportunity to present evidence was shutdown. Any attorney acting within professional norms would have studied the law that his client is on trial for, objected to the judge's erroneous ruling and asked to put a proffer on the record if the court was unconvinced by the law. A reasonable probability exists that DH would have been allowed an accommodation instruction had counsel not been ineffective and would have received a sentence less than 10 times the high and 20 times the low of guide lines, i.e. 15 years and a $200.000 fine. The results of the proceedings are not worthy of confidence.

22. Third: Virginia represents the only state that will not let you present mitigating factors of accommodation in the guilt phase. These arguments are need in the guilt phase. In this case the prosecution repeatedly stated the defendant was a drug dealer and was able to argue against accommodation. See Tr. 300 Lan.16 (3-12-13) "both of these individuals are in drug trafficking" Tr. 303 Ln. 11 "He's engaged in selling drugs" Ln. 18 "I will

[37]**Moore v. Hardee** 723 F.3d 488 (CA4 2013) "[W]here the state court has before it, yet apparently ignores, evidence that supports [the] petitioner's claim," the state court fact-finding process is defective. *Taylor*, 366 F.3d at 1001 (finding an unreasonable factual determination under 2254(d) (2) where the state court "overlooked or ignored" "highly probative" evidence)."

tell you right now ladies and gentleman, this man is a drug dealer" Defense objected Tr. 303 Ln. 18. The court overruled the objection and would not let counsel state the objection till the jury was out. Tr. 304 Court: "You can make your statement to the record later but it is overruled" The prosecutor is allowed to continue calling the defendant a drug dealer. See Tr. 307 Ln.10 "This man went to McDonald's that day to sell drugs" Tr. 308 Ln. 12 "She is the girlfriend of a drug dealer" At Tr. 311 (3-12-13) Counsel states his objection.

> "I object to the Commonwealth's characterization of my client as a drug dealer and implying that he had been paying for his home and that it was ongoing enterprise because the only evidence that's been put forward is about this on possible distribution. And my argument is and my objection is that the statements are inflammatory, they're not supported by the evidence and they're unfairly prejudicial to my client...that kind of statement not supported by evidence and as prejudicial as it is supports a mistrial." Tr. 312 Court: "The court already ruled on it during the course of the argument."

23. The defendant was not able to argue in the guilt phase, even if one believed the defendant was going to give oxycodone instead of money to reduce his girlfriend's debt, this would only be an accommodation. The defendant was merely trying to pay his girlfriend debt so she could get her medication back. There was no intent to profit or a consideration for the defendant whatsoever. This would be a useful defense against the repeated and unsupported claims the defendant was a drug dealer. In Virginia there are numerous case laws that do not allow for one to mention the mitigating factor of accommodation in the guilt phase despite the need for it. The burden is erroneously on the defendant to prove accommodation. Had we been able to call witnesses and present evidence in the guilt phase, this would have provided for a full, fair, adequate defense and provided arguments of accommodation the prosecution should have to disprove.

Reason to Grant: Unequal and inconsistent application of federal law contrary to SCOTUS

24. In Virginia the defendant has the burden to prove accommodation see **Spear v. Comm.**, 221 Va. 450 (1980): "We held that **§18.2-248** placed upon the defendant the burden of proving

the existence of an accommodation distribution (and the right to the lesser penalty)." **United States v. Hill** 237 Fed. Appx. 878, (4th Cir. 2007): "if such person proves that he gave, distributed or possessed marijuana only as an accommodation" The Fourth Circuit looks at this law as not a sperate offense. See **Cucalon v. Barr**, 958 F.3d 245 (4th Cir. 2020):

> "[t]he sole effect of the accommodation language in Va. Code Ann. **§18.2-248(D)** is to establish a partial affirmative defense to mitigate the punishment for the crime of distribution of a controlled substance. Accordingly, distribution as an accommodation is not a separate offense requiring that the Commonwealth prove different elements."

The issue is **§18.2-248 (D)** is a sperate law where the burden should be on the prosecution to disprove accommodation. See **Logan v. Auger** 428 F. Supp. 396 (Dist. 6th Cir. 1977):

> "The Iowa Supreme Court found this deletion and its own change in stance constitutionally "unescapable" under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). *Monroe*, 236 N.W.2d at 34. In *Wilbur*, the United States Supreme Court had upheld a defendant's argument that Fourteenth Amendment due process required the State of Maine, contrary to its statutes, to carry the burden of proof as to each and every element of a homicide charge.
> However, in concluding its *Monroe* decision, the Iowa Supreme Court enunciated a limited retroactivity, thereby qualifying the shift in burden of proof at the accommodation hearings."

Given the rulings in **Mullaney v. Wilbur** cited in **Logan v. Auger**, if the defendant goes to trial he should be able to make arguments of accommodation in the guilt phase and the burden of disproving those arguments should rest on the prosecution. This demonstrates two federal courts applying the law in an unequal and inconsistent manner. The disagreeing on the application of SCOTUS law is a good for this court to resolve.

CONCLUSION

25. The lower court rulings need to be abrogated as they will allow for future violations of constitutional rights. **WHEREFORE** the petition for writ of certiorari should be **GRANTED.**

Respectfully submitted, Date: 12-30-22